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Normativity in Law after Positivism

DISSERTATION

submitted in partial satisfaction of the requirements  
for the degree of

DOCTOR OF PHILOSOPHY

in Political Science

by

Ryan Thomas Sauchelli

Dissertation Committee:  
Professor Kevin Olson, Chair  
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2016



# **DEDICATION**

To Stacey

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# **ABSTRACT OF THE DISSERTATION**

Normativity in Law after Positivism

By

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Doctor of Philosophy in Political Science

University of California, Irvine, 2016

Professor Kevin Olson, Chair

No legal tradition in history has developed an account of law and legal validity that compares in significance to that of legal positivism. Its most celebrated theorist in the 20<sup>th</sup> century, Hans Kelsen, conceptualizes legal validity as produced and reproduced within a self-referential system of law. Yet, by focusing on law's self-referentiality, i.e., norms legitimating other norms, his theory fails to account for the complex interplay between positive and non-positive norms, and how this interplay is related to legal validity. More specifically, the positivist conception of law cannot account for how non-positive practices of legal adjudication produce and reproduce legal validity. To address this problem, I develop a "post-positivist" approach to legal validity grounded in non-positive norms of legal adjudication. I discuss three normative theories of legal adjudication that provide non-positive, practice-based accounts of legal validity. The three theories of adjudication I discuss are those of Ronald Dworkin, Jürgen Habermas, and Rainer Forst. In conclusion, a post-positivist approach to law means keeping positivism's notion of self-referential legal validity, but introducing other normative inputs that compete with it without negating it in an on-going fashion.

## Introduction

“Another division of laws is into *natural* and *positive*. *Natural* are those which have been laws from all eternity, and are called not only *natural* but also *moral* laws, consisting in the moral virtues, as justice, equity, and all habits of the mind that conduce to peace and charity...*Positive* are those which have not been from eternity, but have been made laws by the will of those that have had the sovereign power over others...” -Thomas Hobbes<sup>1</sup>

Spanning over two millennia of existence, the term “positive law” is perhaps one of the oldest political concepts that is still relevant today. From our modern perspective, the history of positive law is a story of evolution beginning in the city-state of Athens in 6<sup>th</sup> century B.C.E., continuing through time with the ultimate rise of the modern constitutional state in the 18<sup>th</sup> and 19<sup>th</sup> centuries. Despite the “victory” of positive law over “natural” or “divine” law given that it occupies a central place in what we now call a “rational” legal system, a central problem of positive law remains. How does one apply it? This problem is most poignant in a liberal-democratic society where there exists no Leviathan to provide definitive answers to the ever-changing questions of justice. As such, positive law’s application is not only a perennial problem that has existed for over two millennia; it is especially pronounced in our modern historical condition.

Indeed, other problems of positive law existed, too, prompting a tradition called “legal positivism” to reconcile the artificial character of law with the modern liberal-democratic state. In the 20<sup>th</sup> century, no legal tradition provided a more sophisticated and comprehensive account of “legal validity” than legal positivism, especially that of its most prominent theorist, Hans Kelsen. But as the 21<sup>st</sup> century presents us with new problems and challenges, one finds that legal positivism never adequately addressed the problems associated with law’s application. Although it provides an account of legal validity that is perhaps its proudest achievement, legal

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<sup>1</sup> Thomas Hobbes, *Leviathan* (Indianapolis: Hackett, 1994), 185.

positivism's silence on adjudication makes one reconsider its usefulness in understanding modern legal affairs. When one tries to think about adjudication from a positivist perspective, one runs into many problems inherent within the positivist project itself; namely, one cannot escape from non-positive norms in providing an account of law. Therefore we need a post-positivist approach to legal validity. Returning to what I see as the original problem of positive law, I seek to provide a normative account of legal adjudication that provides a practice-based account of legal validity. Moreover, this dissertation seeks to think beyond positivist assumptions of law by grounding adjudication in non-positive norms.

In this dissertation I approach legal validity from the perspective of law's practice and application. It addresses some important and basic questions: What is the valid application of law? What problems must we acknowledge that interfere with such application? What assumptions must we accept about the indeterminacy of law? And what are possibilities to overcome those problems? Although the project must analyze and include discussions about the concept of law itself, it is meant to be tailored more specifically to the *normative application of law*.

The general premise that motivates my post-positivist approach is as follows: a theory of legal validity requires a theory of adjudicative validity because to speak of "valid" laws implies speaking of laws that are also *applied* in valid ways.

Given the above premise, my dissertation discusses three distinct normative theories of "valid" adjudication. Chapter 1 sets up the theoretical framework of my dissertation by analyzing some of the key problems I view in Hans Kelsen's legal positivism. I particularly criticize his focus on law's "conceptual form and structure" rather than its "normative

substance.”<sup>2</sup> By focusing almost exclusively on the former rather than the latter, Kelsen’s concept of a legal system excludes all political, sociological, and moral concepts. This is problematic because adjudication relies precisely on those non-positive concepts that his legal system rejects. As a result, Kelsen leaves us with an account of legal validity that lacks any relation to law’s application. This chapter also provides a broad overview of the major contemporary themes within adjudication, including legal indeterminacy, its relation to language, interpretation, rhetoric, legal correctness, and power.

Chapter 2 presents Ronald Dworkin’s constructivist account of adjudication, which I juxtapose against Carl Schmitt’s concept of legal decisionism. Although they have different political and cultural backgrounds – one being a liberal and the other expressly not – their thoughts on the non-positive foundations of law have significant similarities. This chapter brings the two into conversation for the first time. Here I argue that Dworkin’s heroic judge “Hercules” confuses interpretation with decision-making, undermining Dworkin’s own liberal premises. I find that the specter of Schmitt’s decisionism haunts Dworkin’s Hercules in ways Dworkin and his proponents never foresaw.

Chapter 3 attempts to solve Hercules’ problem of decisionism by turning to Jürgen Habermas for help. Habermas’ notion of adjudication is intersubjective and procedurally-oriented. The advantage of Habermas’ approach is that by rationalizing the procedures of adjudication, decision-making is a pluralized yet regulated activity. Indeed, this chapter attempts to situate Habermas’ adjudicative theory within his broader discourse theory of law and democracy. Though Habermas’ procedural-discursive theory of adjudication solves the

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<sup>2</sup> See Kaarlo Touri, *Critical Legal Positivism*, (Burlington: Ashgate, 2002), p. 18.

problems Dworkin's Hercules faces, Habermas' reconstruction is ultimately quite conservative as it recommends no normative resources for a court to behave in "activist" ways. By eliminating decisionism from his adjudicative framework, the unfortunate byproduct is that it causes a court to be unable to address pressing legal and political problems. Given that a court ought to retain its decisive power in times of need, how can the court solve problems of systematic injustice?

Chapter 4 answers this question by sketching the adjudicative consequences of Rainer Forst's theory of justification. Here I argue that Forst can navigate around the problems of Dworkin's decisionism and Habermas' conservatism. By grounding Supreme Court duties in a moral theory of justification, which in turn can only be fulfilled by discursively engaging with civil society, it recommends a critical theory of adjudication that is best able to address problems associated with racial narratives of justification, and the problems they pose for applying law in valid ways.

In sum, what I aim to advance with the above three theories of adjudication is a "post-positive" approach to legal validity that anchors Kelsen's legal system in various non-positive norms of adjudication.

## Chapter 1: From Positive to Post-Positive Validity

There are many components to "legal validity." Given law's multiple and various functions, purposes, types, and institutions that interact with it, constructing an umbrella theory that reconciles all of law's complexities is a tall order. Indeed, no single umbrella theory has yet to succeed in reconciling the various parts of "law" in a holistic way. In terms of government institutions, one can divide legal validity into three branches that correspond to three distinct divisions of law: legislative as legal generation, executive as legal implementation, and judicial as legal adjudication. If one assumes that each branch's relationship to law is governed by a different notion of validity -- that making law, executing law, and adjudicating law are different enough to be governed by their own unique rules, norms, standards, methods and ideals -- then the notion of legal validity is complicated even further. One may reject this picture outright, claiming that "legal validity" *has not to do with the institutions that interact with it, but with only the law itself*. I reject this criticism; what is the worth of a "valid" law that has been created, applied, or interpreted in non-equitable, inconsistent, or mistaken ways? One must think of legal validity as always extending beyond the law itself, for without such an extension, one is caught in the awkward position of privileging law's form over its content, its source over its application. My main point, however, is that any attempt to understand "legal validity" involves a complicated discussion about the relationship between law and the institutions that interact with it.

In the face of such complexity, there is one tradition of legal thinking that is almost exclusively devoted, in one way or another, to understanding legal validity. That tradition is "legal positivism." Legal positivism is not a theory, but a tradition that is "comprised of



numerous contributions that often diverge, sometimes even conflict, on key issues."<sup>3</sup> The tradition has such a long and complicated history that it often provokes confusion when interlocutors speak past one another -- when one speaker is using one notion of the term, the other speaker, another -- making it not unreasonable to doubt the term's usefulness.<sup>4</sup> And since there are so many representations, interpretations, and varieties of positivism, criticisms of it sometimes choose the most extreme parts of it as their targets, parts which contemporary positivists claims are either obsolete, antiquated, or plain wrong.<sup>5</sup>

Despite the various intra- and inter-disciplinary quarrels that surround it, the term legal positivism has meaning and is still theoretically useful. Below I develop a brief clarification of its chief subsidiary concept "positive law," a major theme that unites various legal positivist theories, the separability thesis, and a specific appropriation of the term of its most regarded proponent, Hans Kelsen.

This chapter thematizes the outdated aspects of legal positivism that stem from its over emphasis on analytic validity. Due to its robust yet narrow conception of legal validity, legal positivism is silent on a number of topics, unable to address contemporary questions and problems outside its analytic framework. As a short list I will thematize further below, legal positivism cannot satisfactory address topics such as: adjudication; legal indeterminacy; legal practices that are anterior and adjacent to law; normative questions of justice, fairness, or morality in general; law's relation to democracy or legitimacy; law's relation to justification and the rights and duties derived thereof, etc.

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<sup>3</sup>Andrei Marmor, "Legal Positivism: Still Descriptive and Morally Neutral," *Oxford Journal of Legal Studies* 26, no. 4 (2006): 683-704, 685.

<sup>4</sup> See Uta Bindreiter, "On Positivism and Other Isms," *Archives for Philosophy of Law and Social Philosophy* 93, no. 3 (2007): 321-344.

<sup>5</sup> Giorgio Pino, "The Place of Legal Positivism in Contemporary Constitutional States," *Law and Philosophy* 18, no. 5 (1999): 513-536, 514.

These topics will be breached in this chapter, only to be more fully developed in the subsequent chapters. In the latter part of this chapter, I survey mostly legal scholars from law schools, who still continue to debate the merits and demerits of legal positivism. This chapter seeks to not only uncover some vulnerabilities in legal positivism, but to also provide the reader with a snapshot of some of the historic and contemporary law school debates central to it. In order to develop the more political theory-relevant themes in the subsequent chapters, it is first necessary to consult legal scholar literature to provide a more robust and interdisciplinary foundation.

In sum, this chapter highlights the need to think past positivism, and rethink “legal validity” in post-analytic ways. As such, I use the term “post-positivist” to account for the broadening and expansion of positivism’s key ideas, rather than the term “anti-positivist,” which connotes its base rejection.

## **What is Positive Law?**

Before speaking about “legal positivism,” one must first at least lay some groundwork for the concept of “positive law.” What is positive law? Historically, Solon's reforms of Athenian law ca. 6th century BC are one of the earliest recorded examples of positive law.<sup>6</sup> Shortly thereafter ca. 5th century BC, Rome's Twelve Tables were established as the primary code of Roman jurisprudence.<sup>7</sup> Etymologically, positive law (*ius positum*) connotes posited, laid down,

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<sup>6</sup> Plutarch, *Greek Lives*, trans. Robin Waterfield, Intro. Philip A. Stadter, (New York: Oxford University Press, 1998).

<sup>7</sup> Whether or not the Romans derived the Twelve Tables from Solonian law is debated among historians. See Michael Steinberg, "The Twelve Tables and Their Origins: An Eighteen-Century Debate," *Journal of the History of Ideas* 43, no. 3 (1982): 379-396.

or publicly written law.<sup>8</sup> In its contemporary conceptual usage, it is a bit more complicated. Below are a few non-exhaustive but fundamental theses of positive law.<sup>9</sup>

At the risk of making a tautological claim, positive law is not natural law. This is an elementary claim, but a necessary starting point. To help illustrate a definition of positive law, it is helpful to know its relationship to natural law and how it differs from it. Even though the relationship between the two concepts is contested, the definitional separation is still quite useful.

By extension, positive law has many relations to natural law, and is not wholly autonomous from it.<sup>10</sup> Positive law and natural law have such an integrated genealogy, to speak as if they are antithetical species brackets the many subtle relations between them. For instance, positive law can have natural law components, and natural law can be "posited." Any moral or universal language found within a constitution or individual law has some relation to natural law. Likewise, if one were to "posit" Kant's categorical imperative as the 28th amendment of the Constitution, it would be odd to disregard its "natural" roots in reason because of its newly adopted positivity; its relation to natural law, where it originated, would persist. So if they are inherently related, how are they different?

Positive law is sourced from *social convention*. Silving puts its conventional status succinctly, writing that positive law is "...a system which prescribes the rules of its own

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<sup>8</sup> Plutarch's biography of Solon cites this as one of Solon's important reforms in response to the decline of ancient Athens. Solon decreed that his laws were to be "...inscribed on revolving wooden tables enclosed in frames...*displaying* the legislation..." (my emphasis), Plutarch, *Greek Lives*, 69.

<sup>9</sup> See Marmor, "Legal Positivism: Still Descriptive and Morally Neutral," 685*f*.

<sup>10</sup> Helen Silving, "The Twilight Zone of Positive and Natural Law," *California Law Review* 43, no. 3 (1955): 477-513. Helen Silving was the first female law professor in the U.S. and the only female scholar to study under Hans Kelsen. See Reut Yael Paz, "A Forgotten Kelsenian? The Story of Helen Silving-Ryu (1906-1993)." *The European Journal of International Law* 25, no. 4 (2014): 1123-1146.

development."<sup>11</sup> The sources of those rules and acts of human will vary, including but not limited to sovereign political will, extant law, legal procedures, or legal norms (e.g., *stare decisis*). Despite the variety of its possible sources, what unites these diverse sources is that they are all social conventions. By contrast, natural law is sourced from something external to human convention, such as reason or divinity. What joins the various sources of natural law together is a quality that is external to human will. In this sense, unlike positive law, natural law cannot be created, but only discovered in one way or another; positive must be created. Natural law's non-conventional quality leads to a problem of enforceability to which positive law provides a solution.

Positive law is backed up by a *governing authority*. It is thus coercible, making those who transgress it or fail to obey it liable to sanction. As such, the motivation to follow positive law comes from an external source (fear of sanction, feelings of loyalty, belief in common good, etc.), rather than its intrinsic qualities or "ends."<sup>12</sup> In this sense, positive law has "specific machinery of enforcement."<sup>13</sup> It is therefore obligatory, though there exist variegated motivations why a subject might choose to follow positive law. By contrast, natural law is not obligatory, and therefore somewhat voluntary, because it has no coercive institutional support. Natural law is thus fragile; it is contingent upon individuals being sufficiently motivated by it without fear of [earthly] sanction or hope of reward.<sup>14</sup>

The last thesis about positive law is, by far, the most controversial: the "separability thesis." This thesis claims that the validity of positive law does not depend on its being just or moral. The separability thesis claims that there is no necessary conceptual link between positive

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<sup>11</sup> Silving, "The Twilight Zone of Positive and Natural Law," 489.

<sup>12</sup> See Sergio Cotta, "Positive and Natural Law," *The Review of Metaphysics* 37, no. 2 (1983): 265-285, 280.

<sup>13</sup> Silving, "The Twilight Zone of Positive and Natural Law," 489.

<sup>14</sup> I say earthly because in the case of divine law, sanction and reward exist, but only in the afterlife.

law and justice. Positive law is an autonomous system whose validity is independent of moral evaluation. As such, judges that interpret positive law are expected to find the *correct* meaning of the law, not necessarily the right or just meaning of it. Unlike positive law, it is unintelligible to say that a natural law is correct, but immoral. Concerning positive law, the separation is not only possible, but essential to its definition. Without being able to provide an entire history of the debate regarding the separability thesis, it is still necessary to provide a critical interpretation of some of its details.

Before developing a specific reading of legal positivism from a Kelsenian perspective, it is first necessary to bring into clearer focus the separability thesis and provide a critical analysis in its contemporary form.

## **The Separability Thesis**

As part of its formal properties, there must be a "core" meaning to legal positivism in order for the term to be useful. That presupposed "core" of the term is what many refer to as the "separability thesis." Robert Alexy, one of the most incisive critics of legal positivism, writes: "The separability thesis, surely, does not exhaust legal positivism. But it is found at its core."<sup>15</sup>

As they are commonly described, "hard" positivists take the separability thesis to be essential to positivism while "soft" positivists take it to be merely "compatible."<sup>16</sup> In other words, must morality be separable from law, such that a norm's validity – or the validity of a legal system as a whole – is always independent of its adherence to moral principles (i.e., justice

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<sup>15</sup> Robert Alexy, "The Nature of Arguments about the Nature of Law," in *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz*, eds. Lukas H. Meyer, Stanley L. Paulson, and Thomas Winfried Menko Pogge, (New York: Oxford University Press, 2003), 10.

<sup>16</sup> Jules L. Coleman, "The Architecture of Jurisprudence," *The Yale Law Journal* 121, no. 1 (2011): 2-80, 6.

or fairness)? Or, is it merely compatible with the separability thesis, which the validity of positive norms need not, but sometimes can and do overlap with norms of reasonableness? In my view, the qualifier "soft" isn't theoretically illuminating. Rather than claiming that positive law "sometimes" overlaps with natural law, or is merely "compatible" with natural law, I argue that positive law always has overlap with natural law; it's not just compatible, it's an omnipresent relationship that, like any relationship, has a dynamism of occasional repulsion and attraction. In sum, soft positivism is not only incorrect, but makes the very weak theoretical claim about law's compatibility. "Hard" positivism at least takes a definite position and is theoretically coherent, yet its use of the hard dualism between morality and law is conceptually and empirically inaccurate. I will return to these points later, but for now, what would morality as a condition of positive validity look like?<sup>17</sup>

Thesis 1.) All positive norms contain moral ends.

*Implication:* all laws have either explicit or implicit moral language to signify their moral ends.

Thesis 2.) The state itself is setup to pursue or be a moral end even if its individual laws do not pursue moral ends.

*Implication:* individual positive norms do not require moral ends because the legal system as a whole is itself a moral end; one can isolate the moral validity of the legal system from the moral validity of its individual norms.

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<sup>17</sup> The three these were inspired generally from Ibid., 10.

Thesis 3.) All laws, even those without moral language contain a moral kernel because the procedures of legitimation and adjudication are morally sound.

*Implication:* individual positive norms are guided by basic procedural norms, or series of more basic norms that are morally valid, and hence all laws deriving from such procedures of validation are themselves morally validated.

Regardless of the tenability of each thesis, one can connect morality to positive law in three ways: at the level of individual norms, at the level of the legal system as a whole, or at procedural level that is independent on an individual norm's content.

“Hard” positivism does not sufficiently explore these domains; the relationship between morality and law is quite complex (with many more implications possible than I've listed above). On the other hand, “soft” positivism seems more like a truism than an interesting and useful concept. Since there are many possible intersections between morality and positive law, claiming an overlap is redundant and imprecise. Although terms like “hard” and “soft” positivism are potentially helpful to navigate the different arguments within legal positivism, in this case they confuse the matter more than clarify it.

So, if the validity of a norm does not depend on moral validity, then on what grounds does legal positivism assign validity to law? As Gardner puts it, a law's validity must come from a valid source, such that "at some relevant time and place some relevant agent or agents announced it, practiced it, invoked it, enforced it, endorsed it, or otherwise engaged with it."<sup>18</sup> If validity of a law depends solely on its source, then an immoral norm retains its validity so long

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<sup>18</sup> John Gardner, "Legal Positivism: 5 1/2 Myths," *American Journal of Jurisprudence* 46, no. 1 (2001): 199-227, 200.

as the law is authored or sourced by a relevant authority. Scholars often refer to this as the “source thesis.”

We have two bases of validity for natural law and legal positivism: the former assigns validity to a law if it reaches a minimal level of reasonableness, while the latter assigns validity to a law so long as it was enacted, posited, etc. by an authoritative source. Like the distinction between “hard” and “soft” positivism, the source-thesis is supposed to provide clarity to a concept of legal positivism, but instead creates more confusion. If we assume that legal positivism distinguishes itself from natural law by sourcing the validity of law to its authoritative source – and not its reasonableness – then this raises the question about the merits/reasonableness of the source itself. As Gardner writes, if “King Rex,” popularly thought of as a “noble king,” announced a new law, isn’t the validity of that law at least partially a product of King Rex’s merits, trust, or desirable character? Gardner argues yes, that King Rex is noble “...bears on the moral significance of his (its) pronouncements and practices...”<sup>19</sup> Assuming Gardner is right, then the validity of the new law indirectly depends not only on the fact that King Rex is a king, but a *noble* king. Although the example is somewhat incomplete (what does it mean to be a noble king? Who declared him as such? etc.), Gardner’s example highlights a confusion: merit-based and source-based validity many times cannot be separated. If this is true, then even an authority like Hobbes’ Leviathan is at least partially based on citizens’ trust of his good-will towards their own corporeal well-being. Thus, for Gardner, the separation thesis fails even in the “law as source-based” argument. He writes, the thesis that there is no necessary connection between law and morality is “...absurd and no legal philosopher of note has

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<sup>19</sup> Ibid., 201. The original allegory of King Rex the reformer can be found in Lon Fuller, *The Morality of Law*, (New Haven: Yale University Press, 1969), 33.



ever endorsed it as it stands," despite its description as the "quintessence of legal positivism" found in many student textbooks.<sup>20</sup>

## Hans Kelsen's Legal Positivism

Though legal positivism has evolved and shifted in specific and important ways since the original publication of Hans Kelsen's *The Pure Theory of Law* (1934), current debates of legal positivism still conform to many of the theses made explicit in Kelsen's work.<sup>21</sup>

For Kelsen, legal norms are only one kind of norm among various types. There are "logical" norms which are "norms of thinking" and there are "action" norms, which include moral and legal norms.<sup>22</sup> Put simply, a norm prescribes, permits, or authorizes a way of thinking or type of behavior.<sup>23</sup> Yet, one's "will" can also do the same; a command by a king has meaning by virtue of his majesty. It is important to note that Kelsen distinguishes facts from norms, favoring the latter over the former as the primary concept and object of analysis within his "pure" theory. Yet, in Kelsen's view, the relationship between facts and norms is not a simple one.

Kelsen writes, "Using a figure of speech, we say: the norm is created or posited by an act of will; then it is a positive norm."<sup>24</sup> Whereas the fact is an act of will, the norm "is the meaning of this fact."<sup>25</sup> Kelsen suggests that though a norm is posited by an act of will, that act of will is not the reason for the validity of the norm; the validity of the norm "can be only a norm, another

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<sup>20</sup> Gardner, "Legal Positivism: 5 1/2 Myths." 223, and n. 45, cited from Howard Davies and David Holdcroft, *Jurisprudence: Texts and Commentary* (London: Butterworths, 1991), 3.

<sup>21</sup> There are indeed many legal positivisms; I chose Hans Kelsen's version for a few reasons. No other legal positivist of the 20th century has developed a positive notion of validity that is as sophisticated or robust as Kelsen's. In addition, Carl Schmitt, Ronald Dworkin, Jürgen Habermas, and Rainer Forst -- who represent the remaining chapters of this dissertation -- all have either directly or indirectly engaged with Kelsen's Neo-Kantianism in some way, making his version of legal positivism more germane to my project than any other.

<sup>22</sup>Hans Kelsen, "On the Basic Norm," *California Law Review* 47, no. 1 (1959): 107-110, 107.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

higher norm."<sup>26</sup> For Kelsen, the validity of all norms is made possible only by other norms, not by a will, act, decree, determination of force, or individual or collective power. The validity of norms is thus a product of a legal system's self-referentiality, which is a formal concept of legal validity since it is agnostic about legal content; validity derives from legal form, not content. It is important to note that Kelsen is not naive about the impact or importance of political or sociological will; emergency laws, for example, are accounted for within his analytic fact-norm distinction. In other words, it's not as if facts are irrelevant or nonexistent. Kelsen's point is only that "facts" do not have any formal validity because those facts -- say, political will -- have no formal constraints. Indeed, laws cannot write themselves; like their interpretation, they require acts of political will. As suggested, Kelsen's normative legal scheme is built upon a skepticism of power. In order for law to succeed in its liberal objective of channeling and constraining political power, the concept of legal validity must be elevated above the hungry reach of political will. The integrity of the legal system, as a form of sovereignty in and of itself, is thus the primary and lone formal category of Kelsen's jurisprudence.

Though not made explicit by Kelsen, the dualism between norms and facts is also made possible by a concept of authorship. Facts, as acts of will, are tied to an author, for every act must be done by an agent. Norms, by contrast, are more anonymous and free from the fetters of subjective authorship.<sup>27</sup> The lack of authorship tied to a norm grants it a different kind of validity than that of a will because its relatively anonymous character helps a norm retain a type

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<sup>26</sup> Ibid., 108. To illustrate this claim by analogy, Kelsen uses his now famous example of a father issuing a command to his son. When the father issues a command, it is "not the fact that the father issued the norm," but the norm itself: "a child ought to obey the commands of his father." Yet, Kelsen's argument by analogy is somewhat fragile. What if the father is intimidating, has a history of violence, or has credibility to impose sanctions on the child? A child in this situation obeys his father for external reasons, not because of the internal validity of a general norm.

<sup>27</sup> There are, of course, some laws branded or championed by certain political actors. But norms, like any literary text, book, poem, or piece of art, transcend their authors and become relatively independent of their creators, compared to an act, whose meaning is more contingent upon the agent.

of openness, whereby succeeding generations can appropriate the norm as their own. A command in the form of a "will," on the other hand, is marked by the specific deed of a specific author at a specific time and place; the subjectivity of the author and the validity of the norm that follows cannot be easily disjointed.

So, if only norms regulate and validate other norms, then there must be a presupposed basic norm (*Grundnorm*) that legitimates all others. Here is where Kelsen distinguishes the validity of a norm from the contents of that norm. He writes:

For the basic norm which is the reason of the validity of this legal order refers to the creation of the norms of this order; it does not determine the contents of its norms. The contents of the norms of a positive legal order are determined exclusively by acts of will of human beings...<sup>28</sup>

Here Kelsen separates the validity of a norm from its author, yet connects the content quality of the norm to the will. So, the content of laws are something totally different from their validity. This puts Kelsen in the awkward position of theorizing the conditions of normative validity not only independent of their morality, but independent of their content all together. As such, he calls his theory a "pure" theory partly for this reason. The form of law is the condition of its validity, that it is part of a larger coherent legal system. The content of law, by contrast, apparently sullies such a pure theory. The basic norm does not dictate the content of laws; it only confers validity to the legal system as a whole.

Kelsen's basic norm serves as the legitimating foundation of his legal system. Though one might understandably assume the basic norm is a positive norm, since it validates all subordinate positive norms, Kelsen's basic norm is not a positive norm because it cannot be "posited." Instead, it is a presupposed, *a priori* legal concept. As such, the basic norm is a

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<sup>28</sup> Kelsen, "On the Basic Norm," 109.

property of reason, a necessary presupposition of legal ordering within jurisprudence, and not an empirical object.<sup>29</sup> The basic norm cannot be posited because there exists no norm higher than it to validate its legality. The ancestry and ordering of all norms within a legal system, therefore, derives from a transcendental starting point -- a type of transcendental genealogy -- which provides the familial validity of all norms within a legal system. The basic norm is borrowed from Kant's idea of a pure concept. But Kelsen isn't so interested in Kant's legal philosophy as he is in his epistemology found in the *Critique of Pure Reason*.<sup>30</sup> It reveals Kelsen's primary interest in law's "conceptual form and structure" rather than its "normative substance."<sup>31</sup>

Separate from its analytic form is law's coercive potential. Legal norms are a subset of "action norms" that not only prescribe action but also punish and place sanctions on those who transgress them. For Kelsen, coercion is thus what distinguishes legal norms from other non-positive norms. He writes: "The law is, to be sure, an ordering for the promotion of peace, in that it forbids the use of force in relations among the members of community."<sup>32</sup> To achieve this "ordering" of peace, the essential element of law is its coercive function.

Moral norms are what Kelsen refers to as relatively "sanction-less" norms because, at most, "...the sanctions consist in the automatic reaction of the community not expressly provided

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<sup>29</sup> Kelsen developed the concept of *Grundnorm* at least as early as the first publication of *Pure Theory of Law* in 1934. Yet, as Duxbury illustrates, there is evidence that Kelsen began to move away from the concept by 1964. Duxbury suggests that Kelsen began to "radically shift" away from the basic norm by questioning the extent to which a *Grundnorm* required authorship or an "imaginary act of will." Neil Duxbury, "Kelsen's Endgame," *The Cambridge Law Journal* 67, no. 1 (2008): 51-61, 56.

<sup>30</sup> Touri, *Critical Legal Positivism*, 19. It is important to note that H.L.A. Hart rejected Kelsen's neo-Kantian transcendentalism and instead insisted that the authority of law is a sociological fact that rested on custom, not a presupposition of reason. Hart's equivalent of the "basic norm," is what he calls the "rule of recognition," which is a rule we know through existing practices, not through faculties of reason.

<sup>31</sup> See Touri, *Critical Legal Positivism*, 18.

<sup>32</sup> Hans Kelsen, "The Law as a Specific Social Technique," *The University of Chicago Law Review* 9, no. 1 (1941): 75-97, 81.

by the order."<sup>33</sup> Public shaming and personal guilt, though perhaps effective in the household, are too weak in their ability to direct action for a community at large. As such, moral norms are soft norms that are as non-explicit as they are open to disagreement, and therefore lack the motivational quality to consistently direct action at the societal level.

Religious norms are a bit different. Kelsen depicts religious norms as relying on both positive reward and negative condemnation for obedience (e.g., within the Catholic doctrine, ascending to heaven, repenting in purgatory, or condemnation to eternal hell). Religious norms, unlike moral norms, are much more coercive because they can, for example, "...threaten the murderer with punishment by a superhuman authority."<sup>34</sup> Because of its coerciveness, though non-earthly, Kelsen views legal norms as much closer to religious norms than to moral norms.

But we might object to this notion of the law as something archaic and quite limited. Rather than depicting law as a predominantly sanctioning institution, Leslie Green claims that legal sanctions are far different from legal facilitations. In other words, Green writes that law's primary purpose is to guide conduct in an informational sense; law's "sanctions and civil remedies" are only law's "Plan B."<sup>35</sup> The purpose of law is to coordinate activity and, as such, is more of an "informational device" than a "motivational" one. Therefore, Green concludes:

Even a society of angels would have a need for law: do-gooders would still need to coordinate their activity, and there are circumstances in which they could not do so without the help of authoritative rules.<sup>36</sup>

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<sup>33</sup> Ibid., 76.

<sup>34</sup> Ibid., 80.

<sup>35</sup> Leslie Green, "General Jurisprudence: A 25th Anniversary Essay," *Oxford Journal of Legal Studies* 25, no. 4 (2005): 565-580, 573.

<sup>36</sup> Ibid., cited from cited from Joseph Raz, *Practical Reasons and Norms*, (Oxford: Clarendon Press, 1991): 154-162; John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 266-70.

Green isn't so much denying law's ability to coerce as one of its essential functions, but he is emphasizing the complexity of law's purpose. In addition to Green's thesis, there are other conceivable purposes of law: law as a "coercion licensor" (Ronald Dworkin); law as the enabler for individuals to "act in the face of disagreement" (Jeremy Waldron); law as a "common-good achiever" (John Finnis).<sup>37</sup> The point is that to equate law with coercion, as Kelsen seems to do, is to restrict oneself from understanding other equally important functions of law.

Notwithstanding the sociological consequences of law as a coercive action system, Kelsen endeavors, perhaps most controversially, to create what he calls a "pure theory of law." His pure theory is an effort in scientific thinking, which "...endeavours to free the science of law from all foreign elements."<sup>38</sup> The "purity" in this theory derives from its lack of non-legal elements (political, sociological, or cultural). A pure theory of law thus requires disentangling key legal concepts from other areas of social science such as "psychology and biology," "ethics and theology."<sup>39</sup> Kelsen's perhaps biggest motivation is to "liberate" the science of law from matters of morality and social custom; he claims such separation is "chiefly important" to his approach.<sup>40</sup> But before uncovering what is at stake in separating morality from his pure theory of law, it is important to note one thing: despite his "pure" theory, Kelsen suggests that there is a necessary relationship between morality and the content of law. He claims law must have a "moral minimum."<sup>41</sup> However, as noted above, the content is something quite different from a

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<sup>37</sup> Green, "General Jurisprudence: A 25th Anniversary Essay," 574.

<sup>38</sup> Hans Kelsen, "The Pure Theory of Law: Its Method and Fundamental Concepts," *Law Quarterly Review* 50 (1934): 474-498, 477.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*, 481.

<sup>41</sup> "If we are really to have 'law,' we are told, then the positive political order must participate in some measure in the idea of justice, must realize an ethical minimum and approximate to right 'law,' that is, to justice. Since, however, the legal character of the prevailing political order is presumed to be self-evident, its legitimization at the hands of this theory of the moral minimum (which is only a minimized theory of natural law) is an easy matter. And this minimum guarantee suffices alike for the comparatively peaceful periods of middleclass domination and for the

law's validity, and it is here that Kelsen definitively separates law's validity from any moral considerations. In other words, though supposing that law ought to be moral is plainly clear, the validity of law does not and cannot rest on those moral grounds. His pure theory of law argues for a scientific and amoral grounding of legal validity depends on its positivity, not justifiability.

Given these claims, the validity and justification of law belongs to two different registers of thought. The extra-legal norms that govern the process of justification are absent from positive law; there are no inherent qualities or norms of justice relevant to the criteria of validation. In this sense, Kelsen disconnects law's validity from extra-legal "ideology" such as political or ethical values that would otherwise stand over and above positive law.<sup>42</sup> In sum, the ability of law to fulfill its compulsory function derives solely from its positive validity, and not from its extra-legal justification: "[The Pure Theory] is the result of no inherent quality, of no relation to some extra-legal norm or moral value transcending positive law...the positive legal order reacts to the behaviour with an act of compulsion."<sup>43</sup>

With the justificatory base gone, so to speak, what Kelsen leaves us with is a theory about the structural relationships between norms which are suspended in a unified and cohesive system. It is a self-referential system of norms whose validity is thus disconnected from 1.) non-positive norms of justification, and 2.) sociological and political "facts" such as the will of a group or an extraordinary individual.

The problem is that since the basic norm is taken as given, we can't criticize a legal system based on Kelsen's theory. To be sure, Kelsen is well aware of this: he claims his pure

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periods of relative equilibrium of the social forces. The final consequences of the officially recognized positivist principle have not been clearly displayed. The science of law is not yet wholly positivistic, though predominantly so." Ibid., 484.

<sup>42</sup> Ibid., 488.

<sup>43</sup> Ibid., 486.

theory "endeavours to answer the question, What is the law? But not the question, What ought it to be? It is a science and not a politics of law."<sup>44</sup> In some ways, Hart's "rule of recognition" is more valuable because it is an empirical object, not a presupposition. Scholars do indeed debate about what the "rule of recognition" is, but since it is an empirical object and not merely presupposed, it allows one to appraise the validity of the legal system as well as its norms by evaluating to what extent they cohere to founding constitution, for example. For Kelsen, the basic norm is empirically unidentifiable, and certainly not a "fact," making it difficult to criticize or evaluate.

But despite the positive validity of a legal system, what makes a legal system efficacious? Does validity imply efficacy, or vice versa? Kelsen is ambivalent on this point. On the one hand, a norm that exists within a larger coherent legal system is a norm that is valid.<sup>45</sup> However, Kelsen also claims that a legal system's validity and its efficacy are tied together: "...there is a certain connection between the two."<sup>46</sup> But, there is more than a mere connection. Kelsen writes: "Jurisprudence regards a legal norm as valid only if it belongs to a legal order that is *by and large efficacious*..."<sup>47</sup>

This is confusing given that before Kelsen stated the concept of validity was to be completely separated from all non-legal domains of thought: sociology, morality, psychology, and politics. Yet, the concept of efficacy is an empirical, sociological concept. The relationship as it stands now is that if a legal system loses its efficacy, then it also loses its validity. In other words, a law's validity is somewhat dependent upon criteria outside of law. The only way to

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<sup>44</sup> Ibid., 477.

<sup>45</sup> Hans Kelsen, "The Pure Theory of Law and Analytical Jurisprudence," *Harvard Law Review* 55, no. 1 (1941): 44-70, 50.

<sup>46</sup> "Validity and efficacy are two completely distinct qualities; and yet there is a certain connection between the two." Ibid.

<sup>47</sup> Ibid., (my emphasis).



make sense of this connection between validity and efficacy is to rank the concepts hierarchically. We must presume that an efficacious law is a law that positively exists, such that efficacy can only follow from positivity. So, a law cannot be efficacious if it does not exist. Therefore, we might say that validity is always anterior to efficacy, and therefore primary, because an efficacious law that is not a law is unintelligible. The opposite -- an efficacious yet invalid law -- would privilege a law's facticity over its validity and undermine the normative ordering of the legal system. Yet, in Kelsen's view, just because a law or command is efficacious because it is followed, such as when the entire legal system itself is suspended, does not mean that such a command is valid. In that case, suspending the legal system at large could only be an act of will, and not derived from a norm, therefore making such an act of will invalid. These questions relate to larger questions regarding the tension between facts and norms as legal categories, and I will return to them in the next chapter on Schmitt, as well as in chapter 3 on Habermas. But, for now, there is reason to say that Kelsen's pure theory of law requires a sociological concept (efficacy) that takes into consideration social "facts" outside the law, despite the "purity" of his formal jurisprudence. The traces of "impurity" of this otherwise "pure theory" do not contradict his accomplishments, but it does give cause to rethink whether it is even possible to think about legal validity in purely formal terms.

Kelsen is unequivocal that his theory of law is not a system of "co-ordinate norms," but a hierarchical system of "superordinate and subordinate norms."<sup>48</sup> Kelsen suggests that adjudication is fundamentally part of the lower part of this structure. The legal process always "moves" from higher levels of norm creation to lower levels of norm regulation. The former is the domain of legislation, the latter the domain of adjudication. Put another way, laws always

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<sup>48</sup> Hans Kelsen, "On the Theory of Interpretation," trans. Bonnie Litschewski and Stanley L. Paulson, *Legal Studies* 10, no. 2 (1990): 127-135, 127.

move from an abstract position in the structure during legislation, where the meaning of law is necessarily abstract, to "lower" levels of adjudication, where law must be applied to concrete situations that are in dispute, ultimately concretizing and de-abstracting the law. Though Kelsen does not state the legal process explicitly in an abstract-to-concretizing language, such a characterization of his legal system seems correct given that he does say "...the process of creating and implementing the law moves from one level of the hierarchy to the next."<sup>49</sup>

However, these two processes are not completely separate. Kelsen writes that higher level norms have a determining effect on lower norms, although he is not clear how this works.<sup>50</sup> Insofar as higher-level norms determine the procedure and content of lower-level norms, "...this determination, however, is never complete..."<sup>51</sup> Principles, values, and all non-positive norms are not and cannot be determined by positive law itself. Decisions made that cite phrases like "welfare of the people," or "public interest," or "progress" have no source in positive law, Kelsen says, and therefore have no positive validity. For Kelsen, they are just "catch-phrases."<sup>52</sup> As such, the determination process that higher level norms have on lower level norms is a process of positive, not non-positive, determination. Higher norms only create and regulate the positive content and procedures of other norms, but they do not determine "metalegal norms" such as morality or justice, which may or may not be cited in a legal decision. By extension, Kelsen thus suggests that when a judge uses metalegal principles within her legal decisions, she is free from

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<sup>49</sup> Ibid.

<sup>50</sup> This claim is evident from the quote: "The higher-level norm determines not only the procedure whereby the lower-level norm is created but possibly the content of the norm to be created as well." Ibid., 128.

<sup>51</sup> Why can such a determination process never be complete? Kelsen gives two reasons: 1.) the ambiguity of language, and 2.) intentional vagueness. The first situation takes issue with words themselves, such as what "marriage" as a legal term means, what it has historically meant, and what it should or should not be used in specific ways. The second situation describes intentional acts by legislators who seek to only provide general guidelines for a specific rule, such as when a health law prescribes cities to take "certain precautions" to prevent an epidemic from spreading. From there, a legislator intentionally empowers the administrative agency to interpret what that means depending on its technical knowledge. Ibid.

<sup>52</sup> Ibid., 131-2.

positive-legal constraints, and ultimately is acting upon her own will. In Kelsen's view, metalegal principles cannot be separated from a judge's ideology and discretion, even when a judge claims that she must use metalegal principles to fill a "gap" in positive law. Kelsen views technical gaps in the law -- cases in which a legislator fails to foresee exceptions to a law -- as often confused with the desire of some judges to replace a law with something more desirable. In other words, the discrepancy isn't between the truth and the text, but between positive law and "desired law," which is not a technical gap, but a self-imposed and self-created gap brought on by the judge.<sup>53</sup>

So, then, what is Kelsen's view on legal interpretation? Kelsen doesn't have a fully-fledged interpretive theory like he does a theory of jurisprudence, so it's not possible to criticize him on systematic grounds. Yet, the points he makes do give some insight into his broader views of adjudication. We know that he rejects the notion of a "mechanical" application of law; he calls it a fiction, "...as though the interpreter had only to set into motion his mind and not his will..."<sup>54</sup>

One key reason why Kelsen doesn't say much about adjudication is that from the standpoint of legal positivism, it is agnostic about how the law is applied; legal positivism, at least in Kelsen's scheme, is a theory about legal validity that stems from hierarchical norms in reference to one another. There are no positive rules to adjudicate. Even where there are traces of them, those rules must be interpreted and applied just like the individual norm in question. For Kelsen, since positivism can't evaluate the merit or correctness of a decision, there may exist

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<sup>53</sup> Kelsen writes: "For the official applying a statute, only the greatest divergence between the statute and his own sense of the law will appear to be a real 'gap', that is, a case that the legislator himself did not wish to regulate and that the statute therefore does not regulate..." Ibid., 135.

<sup>54</sup>Ibid., 130.

two incompatible yet equally valid conclusions. He writes: "It is futile to try to establish 'legally' one possibility by excluding the others."<sup>55</sup> In fact, to use the term "valid" to describe a legal decision is confusing because the conditions for what marks a valid law is completely different from what a "valid" decision might look like, Kelsen suggests.

Kelsen's "pure" theory does not address questions of justice, only validity. The non-scientific and non-objective nature of justice is presupposed if one believes, as Kelsen does, that areas of knowledge like morality and ethics are contingent upon the society in which they are interpreted. In other words, there are many conceptions of justice, but only one pure theory of law. Kelsen goes on to state that "justice is an irrational ideal."<sup>56</sup> The objectivity that his "pure" theory seeks to obtain becomes impossible when including necessarily plural and hence messy concepts of justice that would otherwise soil his pure theory of law. Kelsen does, however, make an exception. He claims that the only area of law that necessarily includes a concept of justice is adjudication. Kelsen suggests that the concept of justice only relates to the application of law, not the legal system as a whole. By "justice," Kelsen means the "maintenance of a positive order by applying it conscientiously. It is 'justice under the law.'"<sup>57</sup> It is clear that adjudication, at best, finds itself in an awkward place within Kelsen's theory of positive law. On the one hand, it uses a concept of justice that is unintelligible to Kelsen's analytical theory, yet it is an area of law that is by no means ancillary or secondary to the structure and integrity of the legal system as a whole since it "maintains" the positive ordering of law. In other words, Kelsen does not include adjudication in his normative theory of law because it cannot be accounted for within his understanding of legal validity. This is a limitation in Kelsen's approach to

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<sup>55</sup>Ibid.

<sup>56</sup> Kelsen, "The Pure Theory of Law and Analytical Jurisprudence," 48.

<sup>57</sup> Ibid., 49.

jurisprudence. What is needed is an "impure" theory of legal validity that includes a framework of "valid" legal decision-making.

## **Adjudication, Interpretation, and Legal Indeterminacy**

From the above discussion, it is clear that Kelsen is concerned with the formal validity of law. However, Kelsen's formal approach is problematic because it lacks an account of adjudication. As part of my post-positivist framework, this section outlines some of the major contours of what "valid" adjudication might look like, and its indirect contribution to legal validity in general.

By the mid-1960s, an epistemological shift in studying adjudication was taking place that was part of a larger movement of interpretivism and hermeneutics, which one might call "the interpretive turn" in adjudication. Scholars such as Ronald Dworkin related adjudication to fields of literature in the humanities, implicitly analogizing literature with law. Legal theorists thought, I assume, that given the wealth of literature on interpretation within the humanities, there was something to learn. As such, legal interpretation came into contact with discussions of nihilism, power, deconstructionism, rhetoric, and philosophical hermeneutics. What developed was a methodological kinship between literature, law and the study of adjudication.

At the same time, the new shift towards adjudication distinguished itself from the two most pronounced paradigms of jurisprudence at the time: legal positivism and legal realism. The interpretive turn rejected the strict formal-analytical confines of legal positivism that reduced legitimacy to legality. It also rejected the empiricism of legal realism that prioritized predicting judicial behavior over legal validity.<sup>58</sup> Its most significant difference to both is its focus on the

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<sup>58</sup> "The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts." Oliver Wendell Holmes, "The Path of Law," *Harvard Law Review* 110, no. 5 (1997):

normative aspects of adjudication, the practice of applying law in valid ways. Whereas Kelsen's legal positivism ignored adjudication, claiming it was irrelevant to legal validity, legal realism focused heavily on adjudication but regarded the topic of legal validity irrelevant. As evident, what is missing is a theory of adjudication that is concomitantly a theory of legal validity, which in some ways the interpretivist movement sought to provide.

The problem with locating legal validity in interpretive practices, however, is that law is inherently indeterminate. To say a "the law is valid yet indeterminate" is incoherent. Furthermore, how can one say a legal application is correct if the law being applied is vague and its purpose is unclear? As such, theorizing about a normative account of adjudication involves also theorizing law's indeterminacy.

Below I introduce a few major themes, topics, and problems of legal indeterminacy and the problems it poses for adjudication. This sub-section serves to draw some rough contours around the problems, difficulties, theses, and general topics of discussion associated with legal indeterminacy and their indirect and direct relevance to adjudication.

There are two extreme versions of legal indeterminacy that don't exist in reality, but are useful for charting out its theoretical scope. On the one hand, absolutely indeterminate laws would give license to vulgar adjudication, whereby the meaning of law derives from judges' idiosyncratic political and moral views. Absolute indeterminacy would render any attempts to interpret norms futile. For legal interpretation to be valuable, one cannot assume that law is absolutely indeterminate, such that laws are anything the adjudication decides. On the other hand, if law were absolutely determinate, adjudication would be redundant. If the law were so

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991-1009, 991. This essay was an address originally given by O.W. Holmes in 1897. The address is said to be the beginning of legal realism, which took many forms after Holmes' address. Lon Fuller sees Karl Llewellyn as the key "representative" of the realist movement. Lon Fuller, "American Legal Realism," *Proceedings of the American Philosophical Society* 76, no. 2 (1936): 191-235. The realist movement was revived in some ways during the 1960s under the heading of Critical Legal Studies.

intelligible and readily applicable to all foreseeable situations without exception, all that would be needed is legal execution, not legal adjudication. Of course, in reality, no law can foresee all possible situations of its potential application, so adjudication is needed to judge whether a law is applicable to a situation or not. Like absolute indeterminacy, norms of interpretation would be equally useless if law were completely determinate.

Given these considerations, what accounts for law's relative determinacy and indeterminacy? In order to answer this question, I must first briefly outline the four broad reasons for legal indeterminacy.<sup>59</sup> First, legal indeterminacy arises when a law has unclear vocabulary or phrasing that makes it vulnerable to confusion about its precise meaning. Included in the category of "vagueness," a legislator's purpose in making the law may be unknown or unclear. Second, it arises when there is conflict between two norms, whereby one norm posits that an action is legal while another says it is illegal. Third, it arises when a dispute may be needed to be resolved for which there are applicable statutes, precedents, or any other existing valid norms. Fourth, legal indeterminacy arises when there are special cases that recommend going against the "strict letter of the law" in order to avoid a gross violation of fairness of justice.

The problem of vagueness, however, is perhaps the most widespread reason for indeterminacy. H.L.A. Hart uses a borrowed term – "open texture" – to describe vagueness in more precise detail. Hart's appropriation of the term serves to demarcate the ordinary or "core" meaning of a word or phrase from the infinitely possible fringe meanings known as its "penumbra." He used this term in the context of law, but the term comes from a more abstract analysis of the use of language.

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<sup>59</sup> Robert Alexy, *A Theory of Legal Argumentation*, trans. Ruth Adler and Neil MacCormick, (Oxford: Oxford University Press, 1989), 288.

The term was originally coined by the philosopher Friedrich Waismann. For Waismann, there always exists a tension between certainty and uncertainty within empirical concepts. No empirical concept can ever be so accurately defined that it can be applied to every possible situation; all concepts are "...rooted in that particular incompleteness of our factual knowledge..."<sup>60</sup> For example, if I issued the command: "sit at the table," one can immediately grasp the intuitive meaning of this command. However, one can also easily imagine situations where this is unclear. What if the "table" was a large flat rock in the middle of a living room? Can we call something a "table" even if it has no legs? If so, do we call it a "table" because it functions like a table, e.g., where a family eats dinner? What if there were two tables? What if there was a dinner table and a periodic "table" of elements on top of it? In reality, such a situation wouldn't be that problematic because one could always ask the other for clarification. Waismann's broad point is that the "open texture" of language only appears to be a problem when we expect too much determinacy from language. Indeed, language serves our everyday functions without significant deficiency; people communicate everyday with relative clarity. Yet, concepts are always vulnerable to imprecision when confronted with new situations or contexts.<sup>61</sup> Due to the open texture of concepts, statements about the verifiability of empirical objects are never conclusive.<sup>62</sup> For a concept to be determinate, it would require a definition to cover an infinite number of situations and applications. What we are left with, suggests Waismann, are concepts that must be repeatedly nourished with further elaboration.

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<sup>60</sup> Friedrich Waismann, "Verifiability," in *Logic and Language*, ed. Antony Flew, (Garden City: Anchor Books, 1965), 130.

<sup>61</sup> *Ibid.*, 126. Waismann distinguishes vagueness from open texture, where the latter means the "possibility of vagueness."

<sup>62</sup> *Ibid.*, 128-9. Bix claims that Waismann and Wittgenstein agreed on the concept of "open texture," but that Wittgenstein then made the further claim: "if it does not make sense to speak of there being a *complete* set of rules defining and delimiting concepts, then one should not characterize concepts as being '*incomplete*' or '*indeterminate*'" (original emphasis). Brian Bix, "H.L.A. Hart and the 'Open Texture' of Language," *Law and Philosophy* 10, no. 1 (1991): 51-72, 62.



Put metaphorically, our concepts are not robust skyscrapers that sit in fixed positions, barely swayed even by earthquakes, but fragile sand castles we must constantly fix, rebuild and strengthen after the withering effects of each passing tide. As a result, we try to anticipate the next tide and build up the castle where it was weak prior, but such attempts are always in vain. The sea is unremitting. As a result, the castle, like our concept of a table, is vulnerable to unending reevaluation with each tide cycle. This is broadly what Waismann means by "open texture."

Additionally, the fragility of meaning and semantic determinacy is further undermined in a legal courtroom that is adversarial in nature. Whether or not a word is vague or unclear is often motivated for strategic reasons. When one party wants something read a specific way, she is taught to interrogate the meaning of the word and exploit its "open texture," pulling the meaning in a more favorable light.<sup>63</sup> In legal discourse, this adds an extra layer of indeterminacy that goes beyond everyday discourse, despite courtrooms' "epistemically favorable circumstances."<sup>64</sup> Bix suggests that Hart "asserted" open texture rather than "argued" for it.<sup>65</sup>

A possible criticism of Hart's use of the "open texture" is that legal knowledge and legal concepts are involved in a specific style of discourse that is procedure-based. Such procedures are meant to clarify which kinds of statement and evidence are allowed in court. For example, if a law said something silly, like "anyone who steals a table gets a mandatory one-year sentence," opposing counsels would not likely engage in a philosophical debate. They would likely look at the evidence and make the case that an earlier decision is sufficiently similar to warrant the same

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<sup>63</sup> Taken generally from "This shifting from normal to abnormal meaning can be done systematically, and making such a shift is entirely a political, rather than a semantic, decision" (full quote). Robert Justin Lipkin, "Indeterminacy, Justification and Truth in Constitutional Theory," *Fordham Law Review* 60, no. 4 (1992): 595-643, 609.

<sup>64</sup> *Ibid.*, 600n.23.

<sup>65</sup> Bix, "H.L.A. Hart and the 'Open Texture' of Language," 65.

verdict. The judge would decide which is more persuasive, given further procedural requirements, and make a decision. Whether or not such a proceduralized form of discourse has an effect on the "open texture" of language is itself an open question, and Bix suggests that Hart lacked that kind of careful use of the term.<sup>66</sup>

Rather than taking a direct position on whether or not law is determinate, Robert Lipkin views the controversy in more interesting terms: as a controversy between truth and justification. Is it possible for a law, or a constitutional clause, to provide a "true" answer to a conflict? Or is a "best justification" of its use and application the best for which we can hope? Lipkin argues that the search for legal or constitutional "truth" must be abandoned because it is nothing more than the "trivial result of the best justification."<sup>67</sup> Although it is not exactly clear what "truth vs. justification" means in a legal context, they seem to map onto two other categories: certainty and agreement. If a legal case has one uniquely correct answer, and that correct answer is knowable, then one can infer it is possible that all lawyers and judges can arrive at the same conclusion.<sup>68</sup> By contrast, if a case has many correct answers, or has one correct but unknowable answer, then there will likely be disagreement, and so a judge must revert to the best justification for a decision. Using this framework we can say that legal truth and justification have certain conditions of possibility, namely that if law is determinate, then true answers are at least possible, and if law is indeterminate, a best verdict is the most justifiable. By correlating truth with certainty, and justification with agreement, we may then say that a correct legal decision is not contingent upon agreement, while a justified decision is. Disagreement about a law doesn't

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<sup>66</sup> See *Ibid.*, 71*f* for comments regarding how we must "disentangle the various strands" of open texture theory.

<sup>67</sup> Robert Justin Lipkin, 1992. "Indeterminacy, Justification and Truth in Constitutional Theory." *Fordham Law Review* 60 (4): 595-643, 642.

<sup>68</sup> Even all judges agreed with a decision without exception, we wouldn't say that the decision is right because of unanimous consent, just like one wouldn't say  $1+1=2$  because everyone agrees to it. The decision is true with or without agreement about its being true. Unanimous consent and truth are not equal.

necessarily mean that law is indeterminate; but if a law is indeterminate, it is purely a matter of faith to say there are true ways of interpreting and applying it. But these considerations don't answer the question about law's indeterminacy, only what's at stake.

Wendy Olmsted challenges the binary antithesis between indeterminacy and determinacy by illustrating their "closely inter-related functions."<sup>69</sup> Olmsted advises that rhetoric helps us understand the hollow opposition between determinacy and indeterminacy: "from a rhetorical point of view, meanings of words, distinctions, arguments and figures are partly determinate and partly open."<sup>70</sup> Similar in form to Gadamer's prejudice-as-productive thesis, Olmsted also suggests that indeterminacy, far from being a barrier to legal application, is one of its ontological conditions.<sup>71</sup> Olmsted's reasoning is that "...language needs to be flexible and to leave room for interpreters to adjust meaning to a situation."<sup>72</sup> In sum, determinacy and indeterminacy should be treated as relative categories, not absolutes that signify literary objects as either "precisely definite, univocal and repeatable" or "ambiguous and figurative," but as both.<sup>73</sup>

By extension, we can infer a few interesting and useful ideas from Olmsted's thoughts. First, the notion that there exist completely determinate laws is conceptually void. Even if we invented a machine that cranked out the clearest and most unambiguous laws, laws which were so determinate that they could proactively identify all possible situations to which they must be applied, such laws could still not disavow their relations to indeterminacy. One reason is that even if all possible situations were somehow proactively exposed, there would still exist the possibility of persuading others that certain words should be interpreted in novel ways. The

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<sup>69</sup> Wendy Raudenbush Olmsted, "The Uses of Rhetoric: Indeterminacy in Legal Reasoning, Practical Thinking and the Interpretation of Literary Figures," *Philosophy & Rhetoric* 24, no 1 (1991), 1-24, 21.

<sup>70</sup> *Ibid.*, 2.

<sup>71</sup> "The relative indeterminacy is constructive, not destructive as it might be considered in deconstruction." *Ibid.*, 17.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*, 21.

determinacy of a law is always potentially jeopardized when confronted with persuasive rhetoric to the contrary. Rhetoric de-centers determinacy by attaching its condition of possibility to the chance that one can persuade others to adopt a "new perspective" on the object. Such a rhetorical thesis denies attaching any metaphysical meaning to a legal object, and instead sources the meaning of legal objects as a function of persuasion, or persuading others that a certain rule or word or interpretation is "decisive."<sup>74</sup>

Likewise, if the same machine cranked out vague and general laws that gave little or no guidance on how they should be applied, the goal of the same actors -- lawyers and judges -- is to persuade others about the determinacy of otherwise indeterminate laws. Again, as Olmsted suggests, an indeterminate law retains its relations to determinacy, and vice versa. In sum, if laws are objects of persuasion, then legal argumentation consists of attaching or detaching a law from its presumed clarity or obscurity.

Olmsted's argument reveals legal indeterminacy to be an evitable condition of rhetoric, which implies agnosticism towards indeterminacy. But those within the Critical Legal Studies (CLS) movement claim that legal indeterminacy threatens legal validity.<sup>75</sup> Their reasoning is as follows: If law is irretrievably indeterminate, then this allows for considerably latitude in a judge's judgment, which reflects the perspective of a specific elite class.<sup>76</sup> Even if this class acts responsibly and genuinely, as it may, law's validity is inseparable from larger structures of power

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<sup>74</sup> "Thus, a lawyer persuades not only by finding relevant considerations but by persuading that certain words or interpretations of words are decisive." *Ibid.*, 11.

<sup>75</sup> CLS grew out of the 1960s Civil Rights Movement and Vietnam War opposition. *The Conference on Critical Legal Studies* operated annually from the mid-1970s until the late 1980s and gained popularity among scholars on the left. The movement eventually died out in the early 1990s, with far fewer legal scholars using it today as a dominant paradigm. Mark Tushnet, "Survey Article: Critical Legal Theory (without Modifiers) in the United States," *The Journal of Political Philosophy* 13, no. 1 (2005): 99-112, 99f.

<sup>76</sup> Justice Scalia writes, "But we federal judges live in a world apart from the vast majority of Americans. After work, we retire to homes in placid suburbia or to high-rise co-ops with guards at the door. We are not confronted with the threat of violence that is ever present in many Americans' everyday lives." *Glossip et al. v. Gross et al.*, 576 U.S. 5 (2015).

that reflect specific forms of life based on racial, gender, economic, or cultural criteria. The result of this arrangement, as suggested by CLS, is a biased judicial order.<sup>77</sup> The core idea in the above chain of reasoning is that legal indeterminacy leads to a partial and therefore unjust legal system.

Though one cannot deny that structural inequalities of the American criminal justice system,<sup>78</sup> for which the courts are perhaps no less responsible than law enforcement, it is not persuasive to say this is a result of indeterminacy. It is not clear that even if law were completely determinate, reducing the role of a judge to a technician, that laws would be equally applied in a way that justice requires. In contrast to the indeterminacy-as-injustice thesis espoused by CLS, interpretive approaches look at the normative aspects of indeterminacy. Not only is indeterminacy a fact of law, it is a necessary normative part of it as well, especially in regards to non-positive principles that stand "behind" and orient positive law. I will return to this topic more specifically in Chapter two.

The claim implied by CLS is that so long as structural inequalities exist, legal indeterminacy makes "correct" interpretations impossible. This claim connects with an existing paradox regarding the publicity of positive law. If positive law were truly open and public, and therefore accessible to the public, it would be odd to say that law requires skilled interpretation and learned knowledge to understand its meaning. In other words, if positive law can only be understood, interpreted, and known by a select group of highly trained professionals with

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<sup>77</sup> See Ken Kress, "Legal Indeterminacy," *California Law Review* 77, no. 2 (1989): 283-337, 285, 293. There is some disagreement within the movement regarding placing emphasis on whether indeterminacy is ever-present, or if is merely an excuse for judges to decide in a specific direction according to their interests.

<sup>78</sup> In 2010, black men were six times as likely to be incarcerated as white men in the U.S. Bruce Drake, "Incarceration gap widens between whites and blacks," *Pew Research Center* (2013), accessed April 22, 2016, <http://www.pewresearch.org/fact-tank/2013/09/06/incarceration-gap-between-whites-and-blacks-widens/>.

technical skill, the publicity of law is compromised by its obfuscation that arises from its technicality.

Connected to, but not embraced by the CLS movement, is the “objectivist” interpretive model. Robin West claims that the purpose of the “objectivist” interpretive turn, which advances a strong thesis about correct answers, was ultimately “...rooted in a fear of power.”<sup>79</sup> West suggests that for objectivists, the text itself, as opposed to a judge's whim, is responsible for correct legal decisions.<sup>80</sup> Put more abstractly, objectivists attempt to source decision-making in the “object” (the text) itself, while deemphasizing or eliminating the “subject” (the judge) from the decision-making process. The idea is that by sourcing decision-making in the text and not in the judge, it would remove a pernicious source of power within a *prima facie* “neutral” adjudicator.

The problem with the objectivist thesis, which seeks to restrain power, is that adjudication is itself an act of power. Legal interpretation has more in common with legislation or other institutions of power than it has with literary interpretation, since the latter is not a proper domain of power per se while the former is. As such, there are three major discrepancies between law and literature that make the analogy quite hollow.<sup>81</sup> First, law is “backed by sanctions” while literature is not; there is much more a stake at getting a legal interpretation right than there is when one interprets a novel. Second, “the legal text is a command; the literary text is a work of art.” In other words, law was created from power while literary texts are typically not. Third, “legal criticism -- criticism of law -- is criticism of acts of power; literary criticism --

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<sup>79</sup> Robin West, “Adjudication Is Not Interpretation: Some Reservations About the Law-As-Literature Movement,” *Tennessee Law Review* 54 (1987): 203-278, 210.

<sup>80</sup> *Ibid.*, 215.

<sup>81</sup> *Ibid.*, 277.

criticism of literature -- is the criticism of acts of expression." Legal interpretation has tangible effects of power that make it qualitatively different from interpretation of any literary text.

Joseph Raz suggests that even though all positive law is potentially vague or unclear, this doesn't disqualify judges and lawyers from making "correct" judgments.<sup>82</sup> If we assume that positive law requires interpretation in order to be applied, this suggests that the law itself is not only vague or unclear in areas, but is also silent in other areas. In other words, the law also has "gaps" in it. Taken further, if there are gaps in law, then it begs the question about whether judges must to some degree make law when they need to apply it to areas that it does not stipulate or cover. So, does interpretation prescribe creating law? Raz implies this is a false conclusion; instead, "Interpretation straddles the divide between the identification of existing law and the creation of a new one."<sup>83</sup>

Raz claims that since applying law will always lead to a plurality of interpretations, many falsely believe that interpretation is therefore without a basis in objective criticism: "law, like beauty, is in the eye of the beholder."<sup>84</sup> In addition, Raz claims "there is no conflict or tension between pluralism and objectivity as such."<sup>85</sup> He suggests that the utterance "I like this interpretation more than the other," qualitatively differs from the utterance "This interpretation is correct, and the other is not." The former relies on internal criteria, the latter on external criteria. It is possible to prefer one interpretation over another, yet still recognize that the less preferable interpretation is more correct.<sup>86</sup> Raz's claim is that, grammatically, we presuppose objective

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<sup>82</sup> See Joseph Raz, *Between Authority and Interpretation*, (New York: Oxford University Press, 2009).

<sup>83</sup> *Ibid.*, 224.

<sup>84</sup> *Ibid.*, 225.

<sup>85</sup> *Ibid.*, 228.

<sup>86</sup> As a counterfactual example, one *could* say that Habermas's interpretation of Arendt is plain wrong, and *still* say that it is brilliant without committing a contradiction. See Margaret Canovan, "A Case of Distorted Communication: A Note on Habermas and Arendt," *Political Theory* 11, no. 1 (1983): 105-116.

criteria for ranking the correctness of interpretations. The problem is that this thesis leaves one unaided with the nagging question of how we ought to rank *more correct* from *less correct* interpretations. I will return to this question later as it will be one of the primary themes of the remaining chapters.

Like Raz, Robert Alexy claims that legal decisions presuppose a claim to correctness. If we presuppose that a legal decision can be incorrect, then we must presuppose there also exists correct legal decisions, otherwise either claim would be unintelligible without the other. He suggests that without the possibility of a correct claim, legal decisions would be reduced to decisionism: "In this way, the claim to correctness would be replaced by something like a power claim."<sup>87</sup> If that is the case, then legal categories like "truth, correctness, objectivity, and 'ought'" would be replaced with categories like "power, emotion, and subjectivity."<sup>88</sup> In addition, we would not have a legal system; we would have "a system of brute force, manipulation, and emotional response."<sup>89</sup> Therefore, "there cannot be law without the claim to correctness."<sup>90</sup> Implicit in Alexy's comments is an account of justice, such that correct decisions sometimes require going beyond what is legal and tying correctness to what is just. And since enacting a decision in the name of justice requires moral reasoning, the connection between morality and positive law, at least in hard cases, is manifest.<sup>91</sup>

What I suggest above is how interpretation is married to the topic of legal indeterminacy. A few points of summary/implication are in order. First, indeterminacy is a fact of language

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<sup>87</sup> Alexy, "The Nature of Arguments about the Nature of Law," 12.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid., 13.

<sup>90</sup> Ibid.

<sup>91</sup> Alexy admits that although correct decisions in controversial cases often require thinking beyond what the law explicitly states, it doesn't *always* involve moral reasoning. It can include "...utility, tradition, and common ideas about what is good and bad, *as well as* principles of justice." (my emphasis). Ibid., 14.



itself, so the goal of any interpretive theory, legal or otherwise, should not be to cleanse law of indeterminacy, but to reconstruct what it is and what it can do for a normative theory of adjudication. Second, rhetoric reveals that no interpretation can escape the circular referentiality between determinacy and indeterminacy; a perpetual tension exists between them. Third, legal indeterminacy has historically been linked to power and injustice, suggesting that structures of exclusion and inequality result, in part, from legal indeterminacy, a claim I view as unfounded. Fourth, if we want to hold onto the regulative ideal of "correct" answers to indeterminate legal questions, interpretation offers the best route towards achieving this. As such, we can finally draw links between some of the major concepts I've been using. Legal validity is thus tied to legal correctness, which can only be assessed and obtained through judicial practices of adjudication. Adjudication cannot be separated from legal interpretation, which itself is inseparable from legal indeterminacy.

## **Post-Positive Validity**

The above discussion represents an epistemological turn that provides access to what is entailed by the term legal validity. Though the remaining three chapters of this project don't present new interpretivist theories per se, they do continue what the interpretivist turn in adjudication started, but never completed -- a post-positive concept of legal validity that is constituted through legal practice. Such a goal cannot be done solely by theorizing interpretation as there is much more entailed in adjudicative practices than interpretation alone. The post-positive approach attempts to derive legal validity from legal practices, not from law itself.

To speak of legal validity without reference to legal positivism disregards a large history of the concept. However, as the discussion above shows, legal positivism cannot adequately

account for the validity of law. What is needed is an account of valid legal application. Without uncovering valid practices of adjudication to complement its concept of legal validity, legal positivism prevents itself from illuminating legal challenges and solutions in the real world. The goal of this project is not to contribute to the already saturated literature on anti-positivism, but, rather, to think past positivism, to go beyond its horizon and found new, fertile terrain to think about the *practices* involved in legal validity.

In many ways, “post-positive” legal validity is motivated by the following premise: It is not possible to speak of legal validity if laws are applied in invalid ways. What is needed is a framework for adjudicative validity to fill the gap. In the following chapters, I provide three distinct normative theories of adjudication that hopefully compel the reader to think about an “impure,” practical basis of law’s validity.

## Chapter 2: Ronald Dworkin: Adjudication as Interpretation

As illustrated in chapter one, Hans Kelsen sought to analytically separate law from other domains of social and political life. The "purity" of his legal theory was a result of its isolation from all extra-legal variables. As I argued, the upshot of his scheme was analytical rigor and scientific explanation, but such parsimony came at a heavy price. His pure theory prevented one from reconciling a community's values and normative practices with law. Their entrenched separation necessarily prevented any reasonable settlement.

Yet, despite the contemporary limitations of his thinking, Kelsen's legacy lives on. His concept of a basic norm contains within it an image of law inspired by a notion of disembodied sovereignty, a hallmark of contemporary liberal thinking. His legacy is and will always be one that created an image of faceless sovereignty, guided and sustained by norms over which no one person or authority has interpretive or decisive power.

Oddly enough, Ronald Dworkin, the vociferous critic of legal positivism, continues similar lines of thinking put forth by Kelsen. Curiously, he has written almost nothing at length about Hans Kelsen; his diatribes against legal positivism are primarily directed at his teacher's variety, that of H.L.A. Hart. This is peculiar, especially since Kelsen and Dworkin can be read as either having nothing in common, or something deeply in common. As a post-positivist, Dworkin's conception of law includes a robust notion of non-positive principles. In his view, law is a complicated mix of positive and non-positive norms, and he even goes so far as to privilege the latter over the former. In this way, Dworkin couldn't be more unlike Kelsen. But in a more careful reading, Dworkin argues for and gives substance to what Kelsen only assumed as an *a priori* concept. Both thinkers are concerned with the coherency of law, and both thinkers claim that such coherency can only be a product of some ultimate and fundamental norm.

Dworkin's principle of equality, and its derivative principle "integrity," functions like Kelsen's *Grundnorm* by giving coherency and systematicity to the legal system as a whole. In both cases, this fundamental norm is non-positive. But rather than just assuming it is *a priori* like Kelsen, Dworkin grounds the basic norm in a conception of a political community. For the purposes of this chapter, I wish only to say that one can read Dworkin's post-positivism as a companion to, and perhaps a continuation of various themes within Kelsen's work.

This chapter will focus primarily on Dworkin's conception of adjudication, but attempts to position his adjudicative theory within the major parameters of his work. Dworkin's legal theory is connected in important ways to his political theory. Though he often works under the heading of adjudication, his thoughts on the subject almost always extend into deeper debates about larger political and legal questions: What are the rights of individuals? What is the relationship between liberty and equality? How can one reconcile democracy with judicial review? What kind of community corresponds to the interpretive scheme adopted by a court? What is law? These questions require reading Dworkin beyond the confines of adjudication and jurisprudence. He is explicit that his approach aims to "unite jurisprudence and adjudication," yet implicitly he claims that this can only be done by bridging it within a broader context of democracy and community.<sup>92</sup>

My primary argument in this chapter is that Dworkin's adjudicative theory relies so heavily on a subject-centered conception of legal interpretation that he ultimately conflates interpretation with decision-making, leaving his theory quite vulnerable to a type of decision-making that jeopardizes his entire liberal project.

The chapter is divided as follows. I begin with a broad background analysis of Dworkin's "rights-based" community and how it differs from other forms of political

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<sup>92</sup> Ronald Dworkin, *Law's Empire*, (Cambridge: The Belknap Press of Harvard University Press, 1986), 410.

community. Though only indirectly related to his theory of adjudication, his notion of community is fundamental to understanding how principles of justice and fairness, which are grounded in associative rights and duties, guide judicial thinking. I then provide a different yet related background context from which his adjudicative theory operates by situating Dworkin's jurisprudence against legal positivism. This section positions Dworkin's work within my post-positivist paradigm. Next, I explore Dworkin's thoughts on interpretation in general, then apply them specifically to his adjudicative theory. This section is pivotal to the overall argument of the chapter as it sets up the major problems and limitations I later identify. I then address Dworkin's most controversial and misunderstood claim regarding there being a "right answer" to hard cases. At the end of this section, I synthesize many of the arguments above and apply them to what Dworkin's mythical judge, Hercules, must actually do when confronted with a hard case. Given all Dworkin writes regarding community, principles, rights and duties, interpretation, etc., this section brings them together into a concrete synthesis of legal application.

I criticize Dworkin's interpretive scheme of adjudication by arguing he misleadingly conflates legal interpretation with legal decision-making. By failing to recognize both the institutional and analytic differences, Dworkin's adjudicative theory is threatened by its similarity to Carl Schmitt's decisionism. I then explore Schmitt's thoughts on adjudication, sovereignty, and decisionism, and how they partially handicap Dworkin's judge-centered view of adjudication. Lastly, I look beyond Dworkin for possibilities on how to address the problem of decisionism advanced by Schmitt. The solution, which I develop in the next chapter on Habermas, is conceptualizing court decisions as cooperative non-embodied acts, as opposed to Dworkin's judge-centered model that is so vulnerable to the specter of Schmitt.

## Dworkin's Rights-based Community of Principle

At the base of Dworkin's political and legal theory is his conception of community, which he calls a "community of principle." The community of principle is more than an arrangement that serves pragmatic or efficiency functions. It is also not a romantic conception whose meaning is exhausted by its tie to land, its original founding or lofty notions of fraternity. It is also neither exactly a community of citizens who have habits of reason-giving like those within various constructions of "constitutional patriotism," nor is it a community that is marked by political action and resistance. Instead, Dworkin's conception of community is a liberal society based on a principle of equality and the derivative principles thereof: justice, fairness, and what he calls "integrity."<sup>93</sup>

Dworkin differentiates three distinct conceptions of the concept of community.<sup>94</sup> The first kind is what he calls a "goal-based" community that puts the community's interests and goals above any individual or group thereof. If rights are found anywhere within this conception, they only exist to the extent that they contribute to the collective good or common welfare.<sup>95</sup> Dworkin likens this kind of arrangement to forms of utilitarianism that merge individual preferences into "overall totals or averages."<sup>96</sup> This form of community has strong republican practices, but lacks a substantive conception of individual rights, especially for those in the non-majority. This form of community Dworkin throws out as a workable model. I will return to this topic below while discussing policies vs. principles (collective goals vs. individual rights).

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<sup>93</sup>Dworkin defines justice as how resources and opportunities *ought* to be distributed, regardless of how the political institutions that make those decisions were formed. Fairness is how political power *ought* to be constituted, regardless of how such political power is used after it has been constituted. Integrity is the requirement that government "speak with one voice" by extending and applying the same rights, standards, and principles to all individuals and cases. *Ibid.*, 164ff.

<sup>94</sup> Dworkin uses "concept" and "conception" differently. "Concepts" are analytic categories, whereas "conceptions" are specific perspectives on or ideas about such concepts.

<sup>95</sup> Ronald Dworkin, *Taking Rights Seriously*, (Cambridge: Harvard University Press, 1978), 172.

<sup>96</sup> *Ibid.*

The second conception is a Kantian one that Dworkin calls a “duty-based” community. This conception, unlike the goals-based one, puts the “individual at the center,” because it takes the individual’s “decision or conduct” as fundamentally important.<sup>97</sup> For Dworkin, this model prescribes certain “codes of conduct” that regulate individual action in a uniform way. When such codes are broken, the individual is punished formally or informally, legally or socially. The problem is that individual autonomy is compromised by moral conformity. Put differently, individuals are not free to decide their own codes of conduct. Instead, they must follow rules and fulfill obligations laid out in advance of their agreements to them. Though individuals have individual rights in the duty-based conception, their moral autonomy is quite limited; their freedom to decide how they ought to act is limited by collective authority.

The third conception of community is a “right-based” theory that, like the duty-based one, puts the individual at the center. Yet, unlike the duty-based conception, it protects the value of individual thought and choice because it doesn’t require moral conformity. Instead of morals and social “rules” or codes of conduct being at the center of this picture, such obligations are only “instrumental” to promoting and protecting individual rights. He writes:

Rights-based theories, however, treat codes of conduct as instrumental, perhaps necessary to protect the rights of others, but having no essential value in themselves. The man at their center is the man who benefits from others’ compliance, not the man who leads the life of virtue by complying himself.<sup>98</sup>

Individual rights are thus not deontological concepts, but teleological. A community’s rules or moral code is thus secondary to the rights of citizens. Rights are “trumps” over rules and collective goals.

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<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

But what are rights? Rights against what? For Dworkin, rights exist when a community decides that “a collective goal is not a sufficient justification...” for a certain course of action. In other words, rights exist when there are boundaries to fulfilling collective goals, especially when weighed against any damages that are likely to be caused to individuals while pursuing them. Rights are instruments of autonomy against the pressure of collective goals. The rights-based theory of community is thus one that places the autonomy of the individual at the center. This does not mean, however, that Dworkin has an unqualified account of rights. Rights do have limits, but that is only to say that any compromise of rights must come from other arguments of rights, not from arguments of policy or the collective good.<sup>99</sup>

So we know that rights are meant to protect individuals from collective goals that might interfere with their own autonomy. But what rights do individuals actually have? First and foremost, Dworkin claims people have a right to equality, which means being treated with “equal concern and respect.”<sup>100</sup> Derived from this right of equality are two further specifications: 1.) a right to “equal treatment” and 2.) a right to “treatment as an equal.”<sup>101</sup> The right to equal treatment is a right to an equal share of resources, goods or opportunities. It contains an element of distributive justice. The second is more fundamental; whereas the right to equal treatment concerns the distribution of goods, opportunities, etc., the right to treatment as an equal is a right to participate in the decision-making processes pertaining to such distribution of goods, opportunities, etc. Put another way, equal treatment is a right to an outcome; treatment as an equal is a right to participate in the procedures of that outcome. The right to treatment as an equal includes determining what policy best serves the general interest, and by extension, what the general interest actually is.

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<sup>99</sup> Ronald Dworkin, *A Matter of Principle*, (Cambridge: Harvard University Press, 1985), 363.

<sup>100</sup> Dworkin, *Taking Rights Seriously*, 273.

<sup>101</sup> *Ibid.*



One might notice a peculiarity in Dworkin's reasoning. He claims that a right to equality is the basis of all rights, and that rights are "trumps" over collective goals.<sup>102</sup> Yet, collective goals are supposed to be predicated on the right to not be ignored in the decision-making process of such collective goals. Perhaps Dworkin assumes that individuals will not want to pass legislation that will strip them of their rights. In that case, there is no contradiction. But what if individuals *themselves* prefer to give up some rights in favor of, say, national defense? Would it violate the rights of citizens if they stripped themselves of such rights by privileging collective concerns as primary? This is where the rubber of democracy meets the road of Dworkin's theory of equality. Though my criticism is simplistic and assumes that society is homogenous enough for all individuals to vote in a certain way, it does beg the question whether those entitled to rights are also entitled to the right to make policies that strip themselves of such rights.

Nevertheless, being treated as an equal, in Dworkin's view, is more fundamental than equal treatment.<sup>103</sup> In sum, Dworkin writes: "The liberal conception of equality sharply limits the extent to which ideal arguments of policy may be used to justify any constraint on liberty," which means that any government is prohibited from relying on claims that privilege or assign more value to certain forms of life than others.<sup>104</sup> What Dworkin means by "forms of life" is vague, but perhaps he means factors we normally consider as constitutive of plural societies, such as diversity in race, age, sex, sexuality, culture, gender, or religion. So, taken at face value, arguments of policy that privilege some form of life, and by extension, privilege certain individuals over others violate one's right to equal treatment and/or treatment as an equal.

As a third category that Dworkin doesn't consider, but which is latent within his theory, is a right to equality *among* equals. This, I think, captures the community of equality he strives

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<sup>102</sup> See Dworkin, *A Matter of Principle*, 360ff.

<sup>103</sup> Dworkin, *Taking Rights Seriously*, 273.

<sup>104</sup> *Ibid.*, 274.

for in a way that is less atomistic than the other two conceptions of equality. Equality among equals suggests a community of equals, not only a community whose principles are that of equality. Given Dworkin's theory of equality and rights thus far, it may seem that policies have only a secondary role within his conception of community. For a right to equality among equals to mean something, there must be practices of debate about what equality means. Put differently, a community of principle requires enlightenment about what its principles are, and equality among equals addresses the mechanism that gives meaning to its principles. If a "theater of debate" is required to ensure some common agreement about values, which entails discussion among individuals, the right to be an equal participant in public discussions would seem necessary if one claims that, as Dworkin does, this kind of society is one whose "rationale tends towards equality."<sup>105</sup> Unless Dworkin is in favor of accepting that a community internalizes its principles in an intuitionistic way, there must be some collective practices that form public opinion. Equality among equals seems to be a third and necessary conception of equality, for otherwise, the formation of principles that supposedly lend themselves to an equal society come from unequal practices of collective opinion-formation.

So what rights besides equality exist? In Dworkin's scheme, all principles are subordinate to equality in some way. This might mean that arguments in the name of justice or fairness must not radically contradict equality, but preserve and expand equality in some way.<sup>106</sup> Since it is equality that upholds associative obligations, state coercion is legitimate so long as citizens' right to equality is upheld. State coercion of the legal system is thus legitimate only if establishes a coherent scheme of rights and duties. Though government policies, which are collective goals, may or may not be consistently and equally applied throughout a legal system,

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<sup>105</sup> Dworkin, *Law's Empire*, 211, 213.

<sup>106</sup> See Kenneth I. Winston, "Principles and Touchstones: The Dilemma of Dworkin's Liberalism," *Polity* 19, no. 1 (1986), 42-55, 44.

rights, which stem from a principle of equality, must be consistent and adhere to what Dworkin calls “integrity.”<sup>107</sup> As such, there are arguments of policy and arguments of principle that Dworkin differentiates at an abstract level.

Policies can follow what Dworkin calls a “checkerboard” pattern: a policy can disproportionately favor some group or individual or geography depending on the purpose and function of the policy. For example, if a government gives subsidies to corn farmers to make their product more competitive in foreign markets, this doesn’t entitle auto manufacturers or even soy farmers to the same right.<sup>108</sup>

But a community of principle that is rights-based, and thus one that lends itself to equality, cannot distribute rights in a hodgepodge way. Instead it requires the legal system to adhere to a morally coherent scheme of principles rather than a system of rules that lacks principled coherence.<sup>109</sup> In this way, law is more than a system of rules whose function is to order the interactions and behavior between individuals. Dworkin suggests that law’s principled coherence is even more important than its functionality marked by predictability and certainty.<sup>110</sup> The ultimate purpose of law is to secure equality, for which rights are an instrument.

In sum, Dworkin suggests that law is a representation and concretization of a community’s otherwise vague and contestable values and principles.<sup>111</sup> Law, as a representation of cultural principles, is a kind of personification of the community itself; even Dworkin’s

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<sup>107</sup> Dworkin is careful to note that arguments of principle and policy do not “exhaust” all possibilities of political argument; rather, they are two “major grounds of political justification.” Ronald Dworkin, “Hard Cases,” *Harvard Law Review* 88, no. 6 (1975), 1057-1109, 1059.

<sup>108</sup> In reality, however, one must not forget that the language of rights vs. goals is highly political. One could imagine that, to a soy farmer, who claims to be indirectly affected by the favoritism given to the corn farmer, the unequal treatment is unfair, and thus a violation of a one’s right to economic principles such as free and open competition.

<sup>109</sup> Ken Kress, “Review: The Interpretive Turn,” *Ethics* 97, no. 4 (1987): 834-860, 848f.

<sup>110</sup> Ronald Dworkin, “Law, Philosophy and Interpretation,” *Archives for Philosophy of Law and Social Philosophy* 80, no. 4 (1994), 463-475, 471.

<sup>111</sup> Whether or not these values exist independent of or prior to the constitution of a legal system, however, remains unclear in Dworkin’s work.

rhetoric of integrity -- that law should be interpreted as if it “speaks with one voice”-- suggests that law is, to some degree, a unified medium existing between a community of citizens and the values that hold it together.

So for example, Dworkin speaks of hypothetical checkerboard abortion laws. Suppose that the issue of abortion is highly contentious, as it is, where a community is split evenly into pro-life and pro-choice. In the interest of raw *fairness*, we could allow women born on odd days to have the choice, but disallow those born on even days a choice. Dworkin calls this fair because the half-and-half distribution of the right would mirror the split in popular opinion. Yet, despite its fairness in whole, it would violate law’s integrity because a certain right would be unevenly distributed, arbitrarily privileging some while denying others. But what if there was good justification for the law, such as curtailing population growth? Dworkin’s fundamental claim is that a checkerboard abortion law as such is not justifiable because it violates some individuals’ right to equality (i.e., equal treatment and being treated as an equal). Rights can neither be negotiated nor compromised. He writes:

If there must be compromise because people are divided about justice, then the compromise must be external, not internal; it must be compromise about which scheme of justice to adopt rather than a compromised scheme of justice.<sup>112</sup>

Let us assume that the abortion issue has been settled, and the solution is to deny everyone the right to an abortion. If that is the case, then it would satisfy integrity and coherence, but may violate another principle – say, justice – because government has no right to control a woman’s body. As we will see below, there are a variety of principles to consider within Dworkin’s overall interpretive scheme. So, in addition to justice and fairness, Dworkin’s

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<sup>112</sup> Dworkin, *Law’s Empire*, 179.

“integrity” is a distinct ideal that sometimes may conflict with either justice or fairness.<sup>113</sup> Yet, there is no consensus within the literature whether integrity is simply one principle among many, or if justice and fairness are subordinate to it.<sup>114</sup> In the example above where odd- and even-birthdays decided one’s right to have an abortion, integrity yielded to fairness, but in the case where abortion was outlawed for everyone, justice yielded to integrity. The point is that Dworkin does not establish a static ranking of principles, and some principles outrank others depending on the situation. As I develop below, such outranking has limits, however. No argument of integrity, justice, or fairness can ever be justified if it results in an extreme deprivation of another principle. A majority that votes for racial segregation would radically violate principles of justice, even if the decision was “fair” in the proceduralist sense. Likewise, a community that creates “just” laws about the humane treatment of refugees, but systematically excludes those refugees from giving their input on those decisions, would be unfair.

For now, we can say that Dworkin’s right-based community of principle requires that rights be evenly distributed and bestowed, with no individual or group entitled to more rights than others. His novel contribution with the concept of “integrity” is thus meant to provide a minimum guarantee of formal equality. It is in this sense Dworkin can say “equality grounds integrity, and justice, and fairness...”<sup>115</sup>

There are a few problems associated with Dworkin’s otherwise clean differentiation between a rights-based community that constitutes itself through principles of equality, and a rule- or goal-based community that constitutes itself through collective welfare. It is clear that principles of right are “individuated political aim[s]” while policies are non-individuated,

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<sup>113</sup> T.R.S. Allan, “Dworkin and Dicey: The Rule of Law as Integrity,” *Oxford Journal of Legal Studies* 8, no. 2 (1988), 266 - 277, 266.

<sup>114</sup> Albert Calsamiglia, “Dworkin and the Focus on Integrity,” *Archives for Philosophy of Law and Social Philosophy* 80, no. 1 (1994): 52-65, 63.

<sup>115</sup> Stephen Guest, “How to Criticize Ronald Dworkin’s Theory of Law,” *Analysis* 69, no. 2 (2009): 352-365, 361.

collective political aims.<sup>116</sup> But it is not clear whether a policy can ever trump a right, or if it can, how such a situation would fit within his scheme of rights and duties. Consider the following statement by Dworkin:

Rights may also be less than absolute; one principle might have to yield to another, or even to an urgent policy with which it competes on particular facts. We may define the weight of a right, assuming it is not absolute, as its power to withstand such competition. It follows from the definition of a right that it cannot be outweighed by all social goals. We might, for simplicity, stipulate not to call any political aim a right unless it has a certain threshold weight against collective goals in general; unless, for example, it cannot be defeated by appeal to any of the ordinary, routine goals of political administration, but only by a goal of special urgency.<sup>117</sup>

I am unsure how to reconcile two claims suggested by Dworkin. He claims that 1.) rights are “trumps” over collective goals, but that 2.) rights are non-absolute and must be weighed against collective goals. It’s not clear that rights are indeed “trumps” over policy if, in some situations, they must be weighed against policies. What are the criteria for weighing one against the other? What does a “goal of special urgency” require? *Who decides* the urgency of such policies, especially when the stakes are so high? These questions lead to a second set of related problems.

Is the differentiation between rights and policies a mere semantic one? Must controversial policies be clandestinely dressed up in the language of rights in order to be persuasive? In other words, is defining something as a right always a political – and hence, rhetorical – strategy? Dworkin acknowledges that even if there are semantic tricks to code policies in the language of rights, it would be wrong to assume those arguments would “...be as cogent or powerful as the appropriate argument of policy would have been.”<sup>118</sup> But to make this

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<sup>116</sup> Dworkin, “Hard Cases,” 1068.

<sup>117</sup> *Ibid.*, 1069.

<sup>118</sup> *Ibid.*, 1073.

claim, a community of principle must have some built-in discursive methods for testing whether or not a case is a matter of principle or policy, for otherwise, the non-absolute character of rights puts the whole framework in jeopardy; rights thus become weighed against policies rather than trumps over them. However, Dworkin has no discursive or democratic framework for working out the issues pertaining to the “politics of language” and its importance for how issues are framed, discussed, and resolved.

Aside from the semantic difficulties in defining a principle vs. policy, there are also theoretical problems regarding weighing certain principles against other principles. What is clear is that principles *do* sometimes compete with one another, like the abortion example showed. Allan suggests that their occasional competition is unproblematic in Dworkin’s grand scheme of rights and responsibilities.<sup>119</sup> Justice, fairness, and integrity do sometimes conflict but, at the abstract level, this does not pose a problem, so long as no principle is championed at the radical expense of another. For example, radically unjust laws that are consistently applied in equal ways breaks the contract between individuals and the state despite the “integrity” of law (i.e., overly cruel punishments against certain kinds of political speech). Likewise, radically unfair procedures that produce “just” outcomes would also violate equality (e.g., an all-white jury deciding the fate of a black person accused of a crime, despite it reaching the “right” decision), as would fair procedures that produce radically unjust results (i.e., tyranny of the majority). As suggested, there are thresholds when weighing one principle against another; as such, it might be better to say principles are “trumps” against other principles when one is grossly violated.

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<sup>119</sup> T.R.S Allan, "Law and Integrity: The Paradox of Wicked Laws," *Oxford Journal of Legal Studies* 29, no. 4 (2009), 705-728, 713ff.

Allan's suggestion is a good one; principles do compete, and when they do, one principle must sometimes take precedence. This only becomes problematic when one principle is radically separated from the others, akin to using one principle to *negate* rather than *outweigh* another principle. To make sense of Dworkin's principles, it must be presupposed that all principles live within a system that interact and compete but never alienate or excise others from the system itself. As such, a community of principle is thus a community whose principles adhere to the substantive value of equality, the value that orients the persuasiveness of all other arguments of principle.

I will now leave Dworkin's thoughts on community and move on to his more specific ideas of law and jurisprudence.

### **The “Semantic Sting” and Dworkin’s Jurisprudence**

Dworkin constructs his theory of jurisprudence in response to what he calls “semantic” theories of law. Semantic theories are those that “...follow certain linguistic criteria of law for judging propositions of law...”<sup>120</sup> It is not clear why Dworkin is insistent on using the term “linguistic criteria,” because it tempts one to wonder what other kinds of criteria exist. Nevertheless, the term semantic refers to a problem pertaining to criterial concepts. The story goes something like this: semantic theories rely on and presuppose certain stationary, clear and crisp criteria for constructing their concepts. In the cases of legal positivism and natural law, the concept of “law” is understood through criteria established by convention. This isn't very controversial; after all, all words and concepts we employ in language follow this formula (i.e., a table has four legs, is usually flat, is useful for placing things on, etc.). So why does Dworkin label semantic theories as fatally mistaken?

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<sup>120</sup> Dworkin, *Law's Empire*, 32.



He suggests that the semantic assumptions of legal positivism put it in a dilemma regarding what kind of disagreement is possible within its paradigm.<sup>121</sup> This point requires some excavation. Dworkin's criticism starts with a criterial assumption about semantic theories of law. He writes:

Semantic theories suppose that lawyers and judges use mainly the same criteria (though these are hidden and unrecognized) in deciding when propositions of law are true or false; they suppose that lawyers actually agree about the grounds of law.<sup>122</sup>

The problem, from Dworkin's perspective, is that in reality, lawyers don't actually agree about the "grounds" or validity of law. "Hard cases" exemplify this fact. Cases brought to a court with no settled precedent, no applicable statute, or no prior case of constitutional review provoke debate and disagreement about what the law actually is.<sup>123</sup> Criterial definitions are no help since there is no agreement about what law to apply; what is needed is interpretation. This is why Dworkin states that although we might have "rules" about what we think constitutes the appropriate use of the word "law," "it does not follow that all lawyers are aware of these rules in the sense of being able to state them in some crisp and comprehensive form."<sup>124</sup> Is Dworkin claiming that unless there is no uncertainty, no "open texture" around the concept of law, legal positivists are fooling themselves, or acting insincere when speaking of law at all? If so, then to say that a word needs complete certainty and closed-texture in order for it to be theoretically illuminating would seem to disqualify most if not all concepts from our theories. But this interpretation would actually miss Dworkin's point. Dworkin is not claiming that the concept of law needs *more or more robust* criteria; he is claiming that any criterial conceptions of law, no

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<sup>121</sup> See generally Dale Smith, "Theoretical Disagreement and the Semantic Sting," *Oxford Journal of Legal Studies* 30, no. 4 (2010): 635-661, 644ff.

<sup>122</sup> Dworkin, *Law's Empire*, 33.

<sup>123</sup> Dworkin, "Hard Cases," 1060.

<sup>124</sup> Dworkin, *Law's Empire*, 31.

matter how complete they may seem, obscure and distort the concept of law. As we will see, Dworkin opts for an interpretive concept of law because it is the only option for explaining the wide discrepancies about *what law is*.

As one might suspect, semantic theories are relatively unproblematic in “easy” cases where there is a clear constitutional, statutory, or historical precedent. Here is where Dworkin differentiates “easy” from “hard” cases. Easy cases are cases of empirical disagreement whereby lawyers and judges “might agree about grounds of law – about when the truth or falsity of other, more familiar propositions makes a particular proposition of law true or false -- but disagree about whether those grounds are in fact satisfied in a particular case.”<sup>125</sup> For example, lawyers may agree about the validity of a California statute regarding speed limits, but disagree about whether the speed limit was actually broken by a specific individual. In “easy” cases, disagreement is empirical in nature, not theoretical; it is disagreement about facts, not about the abstract validity or grounds of a specific law.

By contrast, “hard” cases are defined by theoretical disagreement. Theoretical disagreements are those pertaining to the abstract grounds of validity of law, “...about whether statute books and judicial decisions exhaust the pertinent grounds of law.”<sup>126</sup> As one might suspect, Dworkin is implying that these types of discussions include disagreements about the grounds of non-positive norms, or put another way, about the non-exhaustive validity of positive norms. In cases that have no precedent or no applicable statute, or cases where upholding the law might violate principles in other areas of established law, lawyers and judges find themselves engaging in a type of discourse regarding the grounds of law, which, unlike easy cases, is theoretical and non-positive in nature. In sum, Dworkin’s interpretive scheme allows

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<sup>125</sup> Ibid., 4.

<sup>126</sup> Ibid., 5.

for thinking about law in more abstract, non-positive terms, which, per Dworkin, is both theoretically necessary and a factually accurate depiction of real-world practices of legal adjudication.

Returning to the semantic sting, Dworkin suggests that legal positivism has no language to explain theoretical disagreement even though such disagreement is commonplace in the actual practice of law.<sup>127</sup> In cases where there is no clear agreement about which law should govern a decision, legal positivists must explain how judges must handle this situation. Per Dworkin, the positivist might say that when a judge lacks a clear rule to follow, he must resort to pretense. Although he claims to be only applying law, he is actually creating law at his own discretion. Dworkin writes: “On this view lawyers and judges systematically connive to keep the truth from the people so as not to disillusion them or arouse their ignorant anger.”<sup>128</sup> So, instead of engaging in theoretical discussion about the validity of law that goes beyond established rules or precedent, and by extension, instead of finding the appropriate principle to justify a decision, the positivist must shift registers from *what is law* to *what ought law be*. Dworkin remarks that this is the “crossed-fingers” defense which, if true, would reveal judges to be “well-meaning liars.”<sup>129</sup> In the positivist scheme, judges thus become quasi-legislators who must create law in order to solve hard cases. Since the interpretivist judge has access to non-positive norms that he considers legally valid, he can solve hard cases without switching registers into what *law ought to be*, and avoid the problem of legislation.

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<sup>127</sup> Dworkin situates his interpretive theory vis-à-vis legal positivism by advocating the consolidation of moral and legal systems into one, as opposed to separating them into different registers. Baxter puts it succinctly: “But while autopoietic theorists take system self-referentiality to be a basic condition, even one to be exploited, Dworkin instead regards it as something to escape.” Hugh Baxter, “Dworkin’s ‘One-System’ Conception of Law and Morality,” *Boston University Law Review* 90 (2010): 857-862, 860.

<sup>128</sup> Dworkin, *Law’s Empire*, 37.

<sup>129</sup> *Ibid.*, 41.

The other problem of legal positivism regarding hard cases concerns the vulnerability of “open texture” in law. Rather than deceiving the public like above – acting like judges when really they are legislators -- judges and lawyers simply speak past one another due to the indeterminacy of their legal language. In these cases, there is no agreed upon notion of law, causing judges and lawyers to use a “...different version of the main rule...”<sup>130</sup> As such, the positivist might claim that the small disagreements are only “...borderline disputes at the margin of what is clear and shared.”<sup>131</sup> So, rather than admitting the absence of law, the positivist explains that there is a clear “core” law even though there is minor disagreement about its details. Whereas before judges were noble liars, in the case of borderline cases, they reveal themselves to be “simpletons” akin to disagreeing over whether Buckingham Palace is a house or not.<sup>132</sup>

In either case, legal positivism does not provide a language to handle theoretical disagreement that is required when deciding and explaining hard cases. Whether judges pretend to disagree, or dismiss hard cases as insignificant borderline matters, the result is a kind of theoretical nihilism that “wreaks this havoc” in legal application.<sup>133</sup>

What is at stake is how to reconcile rights and obligations with a conception of law that can apply those rights and obligations in hard cases. Even in cases where there is clear precedent or a rule to follow, Dworkin relies on a framework that doesn’t hold law hostage to semantic criteria like legal positivism. As we will see, his interpretivism is an effort to reconceptualize law as something hanging on the balance between non-positive and positive norms. By conceptualizing law as such, he is able to provide a theory that can explain how to decide hard

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<sup>130</sup> Ibid., 39.

<sup>131</sup> Ibid., 44.

<sup>132</sup> Ibid., 41 and 40, respectively.

<sup>133</sup> Ibid., 44.

cases without changing registers from what law is to what law ought to be, respecting the boundaries between the judiciary and legislature. As I develop below, this ambitious project involves a complicated constellation of dynamic concepts that ultimately, if successful, must be brought together in one cohesive theory.

Dworkin's view of law is a project of continual interpretation. Law isn't good in and of itself; the purpose of law is to reflect and give concrete meaning to certain fundamental principles – justice, fairness, and integrity. This does not mean that Dworkin is a blanket moralist nor a closet natural law theorist who relies on intuitionistic claims of morality. Rather, law is a scheme of rights that lives in a tension between positive and non-positive norms. Judges shouldn't decide hard cases by moral principle alone; doing so would negate the purpose of having codified laws. On the other hand, judges also shouldn't think only within the narrow confines of positive law for it cannot help them decide hard cases. Dworkin's adjudication is neither strictly positivistic nor moralistic; it breathes in the interpretive space between both extremes.

As an interpretive scheme of rights, the concept of law must also be able to explain and defend breaking from dominant legal paradigms – historic court precedents, dominant ways of reading a constitutional or statutory clause, etc. – as well as provide a framework for justifying the correction of past mistakes. Rather than trying to provide a final answer to the disagreements about what law is, Dworkin turns such disagreement into an essential and defining category of law itself. The only approach that can capture and embrace the theoretical disagreements about what law is, is the same approach to understanding and deciding hard cases in the positive-moral tension described above. At its core, Dworkin develops an interpretive approach that ultimately breaks the positivist shell of jurisprudence.

## Law, Interpretation, and Paradigms

Whereas semantic theories assume the concept of law is agreed upon and uncontroversial, Dworkin claims that disagreements about law are not only an empirical reality, but the front and foremost conceptual problem of jurisprudence. How can agreement be made about law when it is defined by disagreement? Dworkin's short answer is interpretation. We can find agreement in law through interpretation. Such is the premise of his most impressive work, *Law's Empire*.

So what does Dworkin mean by interpretation? First, he claims that the purpose of interpreting an object is to present the object in the "best light" possible, striving to make the object the "...best it can be."<sup>134</sup> An interpreter must reconcile the various parts, arguments, subheadings, or chapters of a text in a way that explains their overall coherence. Indeed, the background assumption Dworkin makes is that texts should be interpreted as wanting coherence. Rather than *deconstructing* a text by showing its incoherence, contradictions or dissimilarities, *constructivism* attempts to create cohesive story about a text, no matter the intentions of the original author.

Dworkin is sympathetic to Gadamer's hermeneutics, yet ultimately agrees with Habermas that Gadamer's notion of prejudice as a condition of interpretation is a "too-passive view."<sup>135</sup> He agrees with Habermas "...that interpretation supposes that the author could learn from the interpreter," which rejects narrow intentionalism and originalism in favor of something both more critical and cooperative.<sup>136</sup> Indeed, neither Gadamer nor Habermas claim an author's intention is a strict rule to follow, as if figuring out an author's intention exhausts the act of

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<sup>134</sup> Ibid., 53.

<sup>135</sup> Ibid., 420 n.2.

<sup>136</sup> See David Couzens Hoy, "Dworkin's Constructive Optimism V. Deconstructive Legal Nihilism," *Law and Philosophy* 6 (1987): 321-356, 327.

interpretation. But Habermas disagrees with Gadamer's "conservativism," that one cannot critically reflect and hence emancipate one's understanding from the strict confines of one's effective historical consciousness (*wirkungsgeschichtliches Bewußtsein*). Dworkin seems to adopt this view in part by endorsing a more open approach to interpretation, one that allows for more creativity and liberality than Gadamer's hermeneutics, which places strict emphasis on the text itself (*die Sache selbst*).

Referring to Shakespeare's *The Merchant of Venice*, Dworkin suggests that the interpreter, or in this case, the director, must balance Shakespeare's intentions with what a contemporary audience would most likely relate to. He writes:

If [the director] is successful in this, his reading of Shylock will probably be very different from Shakespeare's concrete vision of the character. It may in some respects be contrary, replacing contempt or irony with sympathy...<sup>137</sup>

As suggested by this quote, Dworkin makes significant space for interpretive latitude, which, besides his rhetoric of being shown in a "best light," makes one wonder how his framework differentiates rigorous interpretations from creative misinterpretations. He rejects the thesis of strict historical intention whereby the author attempts to tap into the historical consciousness of a previous time. But he does not reject intention whole-heartedly. He suggests that intention does have a place within his interpretive scheme, but relegates it as only "...the *formal* structure for all interpretive claims," rather than the essential aspect of it.<sup>138</sup> For an object to appear in its "best light," the interpreter must use some judgment about how much liberty he can take, and how far beyond the author's intention he may go.

Interpretation requires constructing something new beyond the author's original intentions, but not so new that it radically alters the object in ways that one's contemporaries can

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<sup>137</sup> Dworkin, *Law's Empire*, 56.

<sup>138</sup> Dworkin, *Law's Empire*, 58 (original emphasis).

no longer recognize it. In the case of Shylock, if the interpreter attempts to mimic the original in too strict a way, the result might end up alienating the object from the interpreter's audience instead of bringing them closer together.

There are two different versions of "constructivism" used by Dworkin. The first is the argument that interpretation requires interpreting an object in a holistic, cohesive way. Regarding *The Merchant of Venice*, this poses several questions for the interpreter. Must one interpret the play in a way that reconciles it with Shakespeare's work in total, as if it has similar form to his other plays? Must one interpret Shylock in a way that reconciles him with other characters in other plays? Or must one reconcile Shylock himself, within the various scenes and acts, as a character free from contradiction? These questions seem to be open to the interpreter's judgment, and represent one hypothesis of Dworkin's use of "constructivism."

The second use of constructivism is a balancing act between interpretive liberty and conservatism. In this regard, an interpretation cannot be so creative that it breaks off all relations from the original object, yet also cannot be so chained to the original that it resists any relations to contemporary social culture. Both can result in a type of alienation between object and subject. The balance between originality and contemporary relatability is mirrored in Dworkin's theory of legal interpretation. A judge must "fit" his interpretation in a way that respects the object (law), yet must also reconcile that "fit" with other interpretive principles. I will return to this later, but the Shylock example illustrates a more important point: like a director of a play, a judge must respect the positivity of a law, yet also make interpretations that extend beyond its positivity in order to present it in its "best light."

However one interprets Dworkin's constructivism, what is clear in either conception is a presupposition of what he calls "paradigms," which are uncontroversial, established legal



meanings and practices. In “collective” interpretive projects, of which law is the archetype, paradigms provide the basis of intelligibility. They perform the function of being critical backstops against which all interpretations are judged. Because law is a communal set of norms, no one person determines its meaning or application. This makes law a collective interpretive project, one that relies on shared cultural understandings about its facticity and normativity. It is here I break from Dworkin's thoughts on interpretation at large, and move towards his thoughts on law as an interpretive scheme of rights and duties.

“Paradigms give shape and profit to interpretive debates about law,” remarks Dworkin, and without them, “law would founder.”<sup>139</sup> In other words, paradigms provide the abstract and relatively uncontroversial foundation for adjudication.<sup>140</sup> Paradigms include historical vocabularies, dominant interpretations, and canonical case decisions that have given concrete form to abstract rights.<sup>141</sup> Despite their popularity aided by their “normal intellectual inertia,” paradigms are not rigid and static; they are capable of either gradual or abrupt change.<sup>142</sup> Dworkin suggests they can survive for decades or longer, but sometimes change when confronted by hard cases, changes in public morality, or judicial activism of one type or another. As I will develop below, one question to consider about paradigm shifts is whether they can occur through justification and legal/moral reasoning alone, or if they require a decision marked by some sort of sovereignty. In other words, can one explain paradigm shifts as a phenomenon without a concept of Schmittian decisionism? Even if paradigm shifts can be justified after the

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<sup>139</sup> Dworkin, *Law's Empire*, 91f., 88.

<sup>140</sup> One might reply, “but adjudication is surely different from legal philosophy: the former is about interpreting and applying concrete laws, and the latter is about thinking of those activities only in the abstract non-concrete sense.” Dworkin’s reply would likely be that the two aren’t separate; the kind of interpretivism that Dworkin thinks necessary in adjudication requires a kind of philosophizing about law.

<sup>141</sup> *Ibid.*, 89.

<sup>142</sup> “Suddenly what seemed unchallengeable is challenged, a new or even radical interpretation of some important part of the legal practice is developed in someone's chambers or study which then finds favor within a 'progressive' minority. Paradigms are broken, and new paradigms emerge.” *Ibid.*, 89f.

fact, can rational procedures of argument alone produce paradigm shifts? My hunch is that decisionism is analytically distinct from justification, and that decisionism is essential to paradigm shifts while the justifications are not. I will return to this theme at the end of the chapter when criticizing Dworkin via Carl Schmitt.

The point of mentioning paradigms is to address the philosophical yet decisionistic task that confronts judges who adjudicate hard cases.<sup>143</sup> Paradigms are not given to each judge like a well-packaged gift. Even at what Dworkin calls the “preinterpretive” stage, a judge must make a fallible attempt to understand the established paradigm, which he may get wrong. Afterwards, he must understand how the specific statute or precedent fits within that domain, and decide whether or not to stay within the paradigm or to challenge it, which, furthermore, requires philosophizing about the abstract justifications that support the paradigm itself. As one can infer, this is neither an easy nor straight-forward task. At a distance it is clear that interpretation and argumentation can provide the necessary justification for paradigm shifts. But under closer examination, his interpretivism becomes blurry: what does his interpretive-philosophical project actually entail? What model is it supposed to follow? What differentiates legitimate judicial activism from non-legitimate activism? What is interpretation supposed to accomplish in more concrete terms? Which value(s) must such interpretive acts strive to meet, uphold, or prioritize? Dworkin answers these questions by referring to a concept of “integrity.”

“Law as integrity,” as the name suggests, assumes a sort of abstract unity, solidity, or coherence of a legal system. When law has integrity, all judicial decisions express a single political theory that itself articulates an idea of community based on a “...single, coherent

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<sup>143</sup>Dworkin implies that every act of adjudication is also an act of legal philosophy. He writes: “Jurisprudence is the general part of adjudication, silent prologue to any decision at law.” *Ibid.*, 90.

scheme of justice and fairness in the right relation.”<sup>144</sup> Even though in reality there are inevitably conflicting laws, rules, or decisions, law as integrity presumes that law ultimately works itself “pure” not in the Kelsenian sense of law abstracted from any sociological, political or evaluative criteria, but “pure” in the sense that all of its laws and legal applications are oriented around principles of equality (and its sub-principles: integrity, justice, and fairness). This presupposition is warranted by the fact that, per Dworkin’s interpretive scheme, the judge must justify his decision by referring to the comprehensive principles on which the entire legal system’s legitimacy hangs. In reality, of course, a judge isn’t expected to provide a comprehensive, principled justification of the entire legal system in every decision he delivers; but he is expected to reconcile his decision, and the principles which support it, within broader paradigms about the justifications of the legal system itself.<sup>145</sup> His particular decision must somehow be a reflection of the abstract principles that govern the legitimacy of the legal system as a whole. What this means in practice is that a decision must be more than correct in isolation; it must be shown to be consistent with “...some comprehensive theory of general principles and policies that is consistent with other decisions also thought right.”<sup>146</sup> Furthermore, law as integrity means that rights and responsibilities are sourced from a complex mixture of positive norms (i.e., past decisions, statutes, etc.) and non-positive norms (i.e., abstract communal principles). Dworkin writes:

[Integrity] argues that rights and responsibilities flow from past decisions but also when they follow from the principles of personal and political morality the explicit decisions presuppose by way of justification.<sup>147</sup>

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<sup>144</sup> Ibid., 219.

<sup>145</sup> Dworkin distinguishes Hercules from ordinary judges as a matter of the “...direction and ambition of their reflections but not in the material on which they reflect or the character of the reflection.” Ronald Dworkin, *Justice in Robes*, (Cambridge: The Belknap Press of Harvard University Press, 2006), 68.

<sup>146</sup> Dworkin, *Taking Rights Seriously*, 87.

<sup>147</sup> Dworkin, *Law’s Empire*, 96.

So, there exists a tension within the act of adjudication. On the one hand, a judge knows that citizens' rights and government duties are sourced from previous decisions and existing statutes; however, these “positive” sources of rights and duties don’t exhaust a judge’s repertoire of justification. He must also reconcile his decision with broader principles that are non-positive. This may require that a judge to claim an earlier decision was a mistake, or that a law should be interpreted in a new light. Similar to the discussion above about paradigm shifts, when precedent, statutes, or customary interpretations of constitutional clauses contradict more abstract political ideals already presupposed by other areas of law, the former must not trump the latter. Dworkin cites fugitive slave laws as an example of this. If an antebellum judge had to decide a case about a fugitive slave, he would be caught between “fitting” his decision within a series of unjust, “wicked” precedents and acting upon principles of justice, declaring those precedents were mistakes. The tension is not always present; sometimes fit and political morality are consistent. But when they are inconsistent, Dworkin suggests, in my reading, political morality should prevail. Dworkin would reject my criticism, claiming even the hardest cases have “right answers” that reconcile the law with principles. But how could one reconcile a fugitive slave law or an Aryan restoration law with principles of equality? At some point, Dworkin must admit that his adjudicative theory has limits, and those limits come in the form of “wicked” laws that require judicial review. This suggests that Dworkin's framework must allow for some degree of judicial activism, if by "activism" one means exercising various means of judicial sovereignty.

To be fair to Dworkin, his theory is meant to work within a liberal society with established norms of equality, and not in a society where a community of rights is shattered by majoritarian racism. Judicial sovereignty is thus bracketed within Dworkin’s scheme, so long as one assumes that the rights-based community he espouses is thoroughly internalized by citizens

and consistently realized by legislative acts.<sup>148</sup> His adjudicative theory is heavily dependent on a liberal culture.

At its core, Dworkin is offering a theory for what judges should do in principle.<sup>149</sup> "Law as integrity" is supposed to be a more even balance between conservatism and activism because it contains within its framework a tension between two competing ideals. Whether law as integrity is a procedural or substantive claim is debated.<sup>150</sup> On the one hand, decisions must be consistent with past decisions in order to be fair. On the other hand, decisions must break from established norms or precedent when they radically violate moral and political principles in order to be just. Dworkin refers to this as a tension between "fit" and "principle." In easy cases, Dworkin suggests there is no tension because there is no contradiction between the two. In hard cases, however, a judge must decide whether to follow established law to be fair, even if the precedent is unjust, or to break from established law in order to find a more just decision. Ken Kress claims that Dworkin seems much more relaxed on the issue of "fit" than on principle; he claims, the "activist charge rings true."<sup>151</sup> Others read Dworkin differently; Alexander and Bayles claim his interpretive theory allows for correct decisions that are ultimately immoral.<sup>152</sup> I think both are incorrect, although I am more sympathetic to Kress's reading. Rather than

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<sup>148</sup> Dworkin contrasts law as integrity with what he calls "conventionalism" and "pragmatism." Conventionalism is past-oriented, such that rights and duties flow from past decisions, and when they don't exist, the judge uses his own discretion. By contrast, pragmatism is a future-oriented, "skeptical conception of law" that claims that judges should make decisions that are morally right for the community, discounting the need to be consistent with past decisions. Law as integrity, Dworkin claims, avoids 1.) the strict confines of conventionalism that lend themselves to a stale and unprogressive system of rights, and 2.) the overly liberal view of pragmatism which relies too heavily on judicial discretion at the expense of established norms. Whereas conventionalism lends itself to a more "conservative" decision-making process, pragmatism lends itself to a more "activist" court that interprets cases primarily on a variety of non-legal factors. *Ibid.*, 95. See also Kress, "Review: The Interpretive Turn," 843.

<sup>149</sup> Dworkin, *Law's Empire*, 112

<sup>150</sup> In Ross's view, integrity is a formal, not substantive norm; it is an "approach" to law, but prescribes no content about law itself. Steven Ross, "Law, Integrity, and Interpretation: Ronald Dworkin's 'Law's Empire,'" *Metaphilosophy* 22, no. 3 (1991): 265-279, 271, 273.

<sup>151</sup> Kress "Review: The Interpretive Turn," 845.

<sup>152</sup> Lawrence A. Alexander and Michael D. Bayles, "Hercules or Proteus? The Many Theses of Ronald Dworkin," *Social Theory and Practice* 5, no. 3/4, Special Issue: Taking Dworkin Seriously (1980), 267-303, 274.

advocating moral “activism” or a conservative form of positivism, Dworkin’s interpretive scheme asks judges to reconcile positive and non-positive norms, not to pick one over the other, which means making interpretive judgments about the morality already presupposed but not concretized in positive law.

## **The Right-Answer Thesis**

Before Dworkin’s fully-fledged concept of rights, community, and principle were laid out in *Taking Rights Seriously* and *Law’s Empire*, his earliest work began mapping out what would later become his “right-answer thesis.” As early as 1963, Dworkin renounced arguments for judicial discretion and, instead, argued for objectivity in interpretation. Rule-based conceptions of law like legal positivism relied on a “distorted” view of judicial discretion.<sup>153</sup> Judicial discretion or a judge’s “judgment” is a term that describes what happens when the law runs out, becomes extremely vague, or when two laws or precedents conflict, leaving the judge “free to choose.”<sup>154</sup> The problem with a rule-based conception of law, which differs from what Dworkin will later call his rights-based conception, is that it “misdescribes judicial obligation.”<sup>155</sup> He maintains that hard cases can be solved with a correct answer “...by the application of standards other than rules.”<sup>156</sup> The standards he speaks of are non-positive principles that are embedded not within law per se, but within a culture of equality that law is meant to indirectly reflect. We might call Dworkin’s “right-answer thesis” a reply to the “no determinate answer thesis” that judicial discretion presupposes.

Since non-positive norms are necessarily abstract, interpretations of them will likely be contentious, debatable, if not downright antagonistic. Furthermore, they aren’t codified, so there

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<sup>153</sup> For more on Dworkin and judicial “discretion,” see Barry Hoffmaster, “Understanding Judicial Discretion.” *Law and Philosophy* 1, no. 1 (1982): 21-55, 23.

<sup>154</sup> Ronald Dworkin, “Judicial Discretion,” *The Journal of Philosophy* 60, no. 21 (1963), 624-638, 625.

<sup>155</sup> *Ibid.*, 637.

<sup>156</sup> *Ibid.*, 634.

is no authoritative source about what they actually are. This poses a new problem for Dworkin: How is an ordinary judge supposed to interpret abstract principles in a way that leads to a right answer when such an exercise naturally leads to a plurality of interpretations, perhaps even more plural than interpretations of codified law? The latter at least has a clear object to be interpreted. The vagueness and generality of non-positive norms poses a new problem about sovereign judgment. How can Dworkin's theory avoid turning this "interpretive" exercise into a legislative one? After all, Dworkin claims "integrity does not enforce itself: judgment is required."<sup>157</sup> The controversy over sovereign judgment introduces questions about the democratic legitimacy of the court, and its murky separation from the legislative branch. As such, Dworkin must somehow reconcile democratic ideals with controversial judicial decisions in order to defend his right-answer thesis.

If judges "make" law, as if they were legislators, we call this judicial "originalism." But there are two problems with originalism. First, if judges make law, they are violating their judicial duties and adopting legislative ones. If judges aren't elected, then they have no license to represent the populace by enacting laws to which such it is subject, which otherwise, violates the principle of legitimate representation on which the basic principle of democracy depends.

Second, if the consequence of a judicial decision amounts to "making" a law, then this poses a problem of fairness. Suppose a defendant is punished for breaking a law that didn't exist prior to the decision given by the judge presiding over his case. The result would be a type of retroactive legislation that would undermine the purpose of publicizing laws. One could not say the defendant broke the law because the law did not exist prior to the decision.<sup>158</sup>

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<sup>157</sup> Dworkin, *Law's Empire*, 410.

<sup>158</sup> See Dworkin, "Hard Cases," 1061.

The key difference between judges and legislators is that the latter make decisions on the grounds of policy, while judges make decisions on the grounds of principle.<sup>159</sup> Dworkin claims that judges only violate democratic ideals when they attempt to justify their decisions by reference to some argument of policy. In principle, the purpose of legislation is to create policy; law-makers create laws that are policy-oriented, rooted in rhetoric of popular opinion about what is good for the community at large. Legislators, in principle, are expected to act upon the convictions of the wider public. They certainly aren't isolated from majority sentiment, popular opinion, polls, voting results, etc. They are saturated in majority sentiment. When judges justify their decisions with reference to rights, principles, and non-positive entitlements, they are staying within the bounds of their judicial obligations. By justifying decisions based on principle, not policy, "originalism" loses its anti-democratic hue and actually supports the values and practices of a rights-based democratic community.

In contrast to legislators, the judge represents, if anyone, the rights of the minority. Judges do not make policy decisions as if they represent the "people" as defined by the immediate political will of a majority. If a judge did justify his decision by reference to policy, or the maximum happiness of a political majority, his decision, in Dworkin's view, would lose its "gravitational force" as a precedent.<sup>160</sup> The gravitation force of a decision is secured only when it is based on principle, i.e., decisions based on long-term, shared commitments of a community that transcend local politics. By deciding based on principle and not policy, judges

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<sup>159</sup> Dworkin, *Law's Empire*, 244

<sup>160</sup> Dworkin is ambiguous on this point. Though this argument holds for cases grounded in either common law or the constitution, cases involving statutory dispute do not wholly apply. In *Law's Empire*, Dworkin gives only a very abstract picture of how Hercules decides statutory cases on principle rather than on policy. Hercules "rejects the assumption of a canonical moment at which a statute is born has all and only the meaning it will ever have," and so the judge must interpret the legislator's record as an "overall institutional scheme of conviction," as well as look to public opinion and how it has changed over time since the statute has been authored. The upshot is that Dworkin wants to make room for striking down statutes that interfere with principles previously established in practice by the legislature without relying on natural law arguments. It's not clear how Hercules can avoid making policy arguments in these types of cases. Dworkin, *Law's Empire*, p.348ff, 361, viii.



give concrete meaning to otherwise abstract and general rights already presupposed from constitutional, statutory, or precedential sources. Put this way, a judge must concretize rights and duties, but not make them out of thin air. Dworkin is right to maintain that one must not confuse judicial constructivism with legislation.

“Originalism” is only a problem if one contends that a court’s institutional history is a constraining factor on a decision, and not a productive ingredient to that decision.<sup>161</sup> In other words, institutional history can provide reasons for following past decisions and reasons for breaking from them. The tension between originalism and institutional history is dissolved when it is shown that one has made a decision based on a non-positive norm implicitly enacted by a previous decision:

Judges must make fresh judgments about the rights of the parties who come before them, but these political rights reflect, rather than oppose, political decisions of the past.<sup>162</sup>

In conjunction with a judge’s “fresh judgments,” Dworkin writes that a judge need not pick “between history and justice.”<sup>163</sup> He suggests that the tension between originalism and precedent, judicial “activism” and institutional history is dissolved when controversial decisions cite institutional history. To make this more concrete, Dworkin is claiming that a judge can disregard a precedent as a “mistake” so long as he justifies his decision with an argument of principle that also has a historical basis (i.e., a previous decision was wrong and a violation of right). The purpose of this is not to give license to judicial activism, but to validate decision-making processes within common law that may be radical yet correct, controversial yet moral. Without

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<sup>161</sup> Dworkin, “Hard Cases,” 1063.

<sup>162</sup> Ibid.

<sup>163</sup> Ibid., 1064.

such a conception of progressive “originalism,” one would be forced to conclude that correct decisions like that found in *Brown v. Board of Education* were incorrect.

### **a.) Judge Hercules**

In this last section, I will briefly tie together some of the above parts into a small story of Hercules, Dworkin's model adjudicator. Let us suppose Hercules is presented with a case regarding the constitutionality of a statute. Hercules is in charge of writing the majority opinion for the court. What must he consider in his justification?

First, Hercules must adjudicate from the standpoint of rights. Even if there are policy implications that follow indirectly from his decision, he must use the language of rights, not policy. One possible implication is that court decisions must take a specific grammatical form similar to "The court finds party x is entitled to the right y" rather than "the court decides in favor of party x because it better serves the collective interest."

Second, Hercules knows that his community is one committed to equality (given that Dworkin presupposes a liberal society), so no person is entitled to rights that are denied to another. So, he must ask himself whose rights are at stake and which rights have already been settled or concretized, and decide whether those settled rights are applicable in this case. His objective is to decide and philosophize which “scheme of principle has been settled.”<sup>164</sup> If Hercules decides that there exists no applicable source of law to accomplish this, or there is no "fit" between his decision and previous decisions, he must justify his decision based on a scheme of justice implied but not posited in the law.

Third, if Hercules decides to break from precedent, he must be able to explain mistakes in the law or previous decisions about that statute, and correct them by referring to the same

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<sup>164</sup> Ibid., 1084.

comprehensive scheme of justice he uses to interpret rights and duties. This requires Hercules to also interpret and assess paradigms and dominant ways of thinking about the area of law he is adjudicating.

Fourth, even if his decision breaks from precedent, Hercules' decision must be consistent with the same principles of justice and fairness that justify the legal and governmental system as a whole. In addition, the decision must contribute to law's integrity such that it must reconcile the abstract, general principles presupposed by the legal system with the posited law itself in a consistent, coherent way. He must do this without privileging one principle at the radical expense of another.

Last, since a judge has a duty to deliver a right answer, and the disputant parties have a right to a correct decision, Hercules must have compelling reason to believe his decision is correct, and not based on arbitrary criteria (e.g., coin flip, personal preference, etc.), especially when there are two seemingly "correct" answers. Especially in hard cases, it is most important that Hercules declare and satisfy to himself and to the community that one answer is correct, and the other incorrect.

Hercules has a big job ahead of him. Yet, even if he follows this formula of interpretation, he may immediately notice that his interpretation will be "insufficiently concrete" to provide a definite answer.<sup>165</sup> It is at this point that Dworkin's Hercules, regardless of his legendary interpretive skills and infinite time, must show himself also to be a reliable decision-maker.

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<sup>165</sup> Ibid.

## Interpretation is Not Decision-Making

One potential problem in Dworkin's work is how he conflates legal interpretation with legal decision-making. What is lacking in his framework is a conception of decision-making, which in my view, is something completely different from interpretation. If the practice of interpretation is indeed analytically and practically different from decision-making, so different that conflating the two is problematic, then there is a challenging "gap" within Dworkin's adjudicative theory. What I argue below is that the difference is quite big; a "correct" interpretation gives no cause to trust that a decision about that interpretation is also "correct." In sum, Dworkin's "right answer" thesis must be differentiated from what it misleadingly connotes: a "right decision" thesis. I maintain there is no essential connection between an interpretation of law and the decisions made about law.

Interpretation and decision-making are separate at both the institutional and analytical level. As for the institutional dissimilarities, Dworkin's claim that law is akin to literature is problematic.<sup>166</sup> Like literature, Dworkin suggests, law is interpretive in nature.<sup>167</sup> The question "What law is" is not a metaphysical question like natural law theories suppose, nor is it an analytical question like legal positivism supposes. Rather, "what is law?" is always an interpretive question. Although I agree with Dworkin, his analogy proves quite limited. In literature, the interpreter who is attempting to understand a poem, for example, is not burdened with deciding what to do with that interpretation. In literature, the interpreter isn't in a position of power, nor does the fate of somebody else depend on one's interpretation of a text.<sup>168</sup> Legal

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<sup>166</sup> See Dworkin, "Law, Philosophy and Interpretation."

<sup>167</sup> Grey argues that law is more akin to scripture than literature for a variety of reasons with which I agree. For an interesting analogue pertaining to Christian hermeneutical debates, see Thomas C. Grey, "The Constitution as Scripture," *Stanford Law Review* 37, no. 1 (1984): 1-25.

<sup>168</sup> On the discrepancies between law and literature, see West, "Adjudication Is Not Interpretation: Some Reservations About the Law-As-Literature Movement," 277.

interpretation is quite different. The judge has institutional, coercive power whose decisions have concrete, public, and potentially life-altering effects. Dworkin's analogy between law and literature helps one understand the interpretive nature of law, but does little to help one understand law as a practice of power and decision-making.

As for the analytical differences, interpretation and decision-making have opposing qualities. Interpretation is marked by its *partiality* and *continuity*, both of which Dworkin presupposes in one way or another. First, all interpretations are by nature partial. Despite the rhetoric of someone providing a "comprehensive" reading of, say, Gadamer's *Truth and Method*, as a reader, one wouldn't expect every word or idea, no matter how small or insignificant, to be included in the interpretation. Rather, given his interpretive discretion, background, purposes and taste, the interpreter will focus on some ideas, parts, chapters, or sentences while ignoring others. What differentiates a valuable interpretation from a non-valuable one – regardless if one measures "valuable" in terms of its usefulness or aesthetic qualities – is whether or not the interpreter convincingly separates what is important or interesting from what isn't. Dworkin knows this; he claims that besides Hercules, nobody can provide a comprehensive interpretation of the "constitutional arrangement, statutory system and judicial precedents that make up his overall theory of 'law;'" ordinary judges can only attempt a "partial justification."<sup>169</sup> Interpreting a text necessarily involves interpreting *part* of a text.

A second defining feature of interpretation is its continuity. The act of interpretation always leaves what I call an "open remainder." That remainder may be in the form of unanswered questions, irreconcilable ideas, or a reading that fails to give a broad enough scope on the work. In fewer words, one can never answer all the questions posed by a text. One might pretend or rhetorically speak as though the answer to the text has been found; but as new

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<sup>169</sup> Ronald Dworkin, "Natural Law Revisited," *University of Florida Law Review* 34 (1983): 156-188, 157.

questions arise, the old answers prove inadequate, begging for a new reading that is somehow superior to the last one. To close off the possibility of revision of one's interpretation requires an epistemological assumption that infinite knowledge of a text is possible. Interpretation, in the way Dworkin describes it, is much more fallible, and even Hercules must be humble enough to admit when he is wrong. He is explicit that although "paradigms" in law provide institutionally-established readings of specific constitutional clauses, statutes or court rulings, which are necessary to differentiate wildly outrageous interpretations from justified ones, those paradigms are always open to "shocks," whether stimulated by events in civil society, public morality, or ideas of justice. Paradigms are only paradigmatic for a period of time. Some readings may become so established that they become canonical; but, as Dworkin's framework allows, even canonical ideas that form the basis of our constitution are open to revision, however unlikely that may be.

In contrast to the partiality and continuity of interpretation, decision-making is marked by *finality* and *certitude*. First, unlike interpretations, decisions are meant to produce some sort of action. Decisions, in principle, have the special ability to end debate, disagreements, and discussions about what course of action to take. Of course, not all decisions have the ability to do this completely in liberal societies that uphold norms of free speech and communication. One might even say it is desirable that disagreement and discussion continue after a controversial decision in order to preserve the possibility for revision. But one should not forget the pragmatic functions of decisions, either. If courts shied away from making decisions because of fractures in public opinion, this would lead to an inactive court that could play no progressive role in the development of rights. Per Dworkin, fractures in public opinion are separate from "right answers" regarding legal rights; in fact, the latter must be shown to exist especially in times of

crisis. Though I am not claiming legal decisions negate free and open communication within civil society at large, they do, in principle, coerce action. Unlike a correct interpretation that galvanizes discussion, an authoritative decision, by virtue of its ability to enact action, ends it.

Connected with its finality, a decision must be thought to be right in order to be authoritative. This does not mean it must be eternally correct, but does mean it must adhere to what I call a “performance of certitude.” For example, a court decision may be found to be wrong, and then revised or overturned later. But despite one’s fallibility, no judge should qualify a decision with grave uncertainty (e.g., “...until this is overturned later,” or “...in my fallible opinion,” or “...my verdict is X even though there is no clear answer”). Such qualifications are considered unjust because they deprive the defendant, in Dworkin’s scheme, of a right to a correct decision. Imagine being sent to life in prison by a verdict that ends with “...I think this is the right decision, although I’m not exactly sure.” The judge would likely be disbarred. Controversial decisions must be accompanied by a performance of certitude in order to be accepted as authoritative and just, even though such performance will never guarantee authority or justice.<sup>170</sup> If a court decision is incorrect, it is never, in principle, delivered as such. Judges should act genuinely, and make the best decisions they think possible. However, certitude is a performance, an outward expression of conviction that goes beyond a judge’s genuineness. By contrast, when offering an interpretation, since it is marked by its continuity and partiality, one cannot avoid delivering it as fallible unless one risks being called arrogant. But there is no equivalent in decision-making. Rhetoric of finality and certitude within decision-making are not

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<sup>170</sup> I distinguish “certainty,” which is an internal confidence, from “certitude,” which is externally performed confidence. A judge can provide a decision with certitude while nevertheless having some reservations about the decision itself.

marked by arrogance; rather, such rhetoric is a symbol of respect for both court processes and the rights of the disputants.<sup>171</sup>

I do not mean to suggest that legal decisions need *only* finality and certitude to be considered authoritative. Of course, the arguments, reasons, and justifications for a decision are what determine its precedential value and likeliness to be upheld. The “yes” or “no” of a decision in favor of a plaintiff or defendant is only the tip of the iceberg; what matters is why the decision was “yes” or “no.” Indeed, we presuppose that courts have a duty to justify their decisions, and it is those justifications that are cited by later cases, not the decision *per se*.

Dworkin would surely reject my criticisms. He would likely say that the difference between interpretation and decision-making is, in reality, quite trivial. Judicial decisions always rely on interpretations for justification and shouldn’t be separated in the way I propose. If a specific reading of, say, the 14th Amendment, was convincing, this might very well lend itself to a particular decision about a case regarding trans-gender or same-sex couples. In other words, even if they are theoretically separate, Dworkin might say, in practice, that the relationship is in some sense correlative if not causative. Interpretation will either produce a decision, or at least correlate itself strongly in favor of one decision over another. Put differently, one might argue that the interpretation provides justification for the decision, and therefore is central to the act of decision-making itself.

There are couple problems with this defense. If interpretation can produce or “cause” a specific decision, or strongly align itself with one, then this would result in a similar logic of

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<sup>171</sup> I want to make one point about authority in *both* interpretive and decision-making concepts. We must differentiate between soft authority (justification or persuasiveness) and hard authority (institutional power). Indeed, a decision may have hard authority, but be so unjust that it lacks soft authority, which could result in revolt or rebellion. In interpretation, there is no hard authority, only degrees of soft authority. For example, an interpretation delivered by an authoritative figure (say, Dworkin interpreting his own work) will lend value and interest to the interpretation, but should be treated independent of what he actually says.



legal positivism that Dworkin scorns – that decisions about hard cases can be done in a mechanical way as if one only need to apply rules. Rather than mechanically applying rules, Dworkin would be forced into the awkward position of claiming that not law but interpretations can be applied in a mechanical way. Unless one accepts that “decisions appear” in the text akin to something like revelation, as if an interpretation suggests its own application, then both the “causitivist” and “correlativist” replies must be rejected for the same reasons Dworkin rejects rule-based theories of adjudication. A judge, of course, may fool himself, as when he has a “eureka” moment of textual clarity, but this would be confusing interpretive revelation with his own decisive will, a point I will return to next.

### **The Specter of Schmitt’s Decisionism**

I find no convincing way to reconcile finality with continuity, or certitude with partiality. Interpretation and decision-making are different enterprises that should not be conflated. Referring to Carl Schmitt, I am skeptical that it is possible to claim that a decision is correct by referring only to interpretive justification. One could realistically accept an interpretation as correct without agreeing with the decision that supposedly follows from that interpretation. This may not be so much a critique of Dworkin's right answer thesis as it is a general skepticism of interpretivism and its place within adjudication itself.

If skepticism is warranted, then what is the relation, if any, between interpretation and decision-making? Schmitt has an answer to this question, but it is first necessary to provide some background on Schmitt’s view of adjudication.<sup>172</sup>

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<sup>172</sup>As a general note on Schmitt, I find his work is most useful in its ability to describe or diagnose problems. There seems to be eternal debates regarding “what to do with Schmitt.” Some liberals read him to “know one’s enemy;” others ignore him as if his work is poisoned by Nazi affiliations. I read Schmitt as a diagnostician whose intellectual legacy is in his legal theory. Liberals and non-liberals alike should be able to appreciate his thoughts on jurisprudence because they illustrate challenges to liberalism to which liberal theories are often blind (given their liberal premises).

Schmitt makes it clear that the *Staatsgerichtshof* (constitutional court) should not be the arbiter and “guardian” of the constitution. He feared that a “creative judiciary” analogous to the *Freirechtsbewegung* (free law movement), empowered with judicial review, would turn the court into a sovereign appendage of the state.<sup>173</sup> Instead, Schmitt limits the function of the court to non-political activities. This means that a constitutional court should not be endowed with the power to decide “hard cases” that are naturally prone to indeterminacy and dispute.<sup>174</sup> Schmitt rejects the role of the constitutional court to decide “substantive problems” that are relevant to the concrete ordering of a people. He discards the court’s ability to “remove, authentically and finally, doubts and disagreements of opinion” regarding the basic concrete ordering of a community.<sup>175</sup> The power to decide which disagreements to end should not be given to the court. This type of power to make political decisions is reserved for the president, not the court.

The political nature of deciding hard cases is what Schmitt refers to as decisionism.<sup>176</sup>

The nature of a hard case is such that there can never be a logical conclusion derivable from the

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<sup>173</sup> Carl Schmitt, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, trans., Lars Vinx, (Cambridge: Cambridge University Press, 2015), 88. Vinx notes that the *Freirechtsbewegung* was an “anti-formalist” movement in late 19<sup>th</sup> and early 20<sup>th</sup> century Germany that advocated for judicial discretion in order to address legal indeterminacy in the name of social reform. Ibid., 257. Elsewhere, Schmitt is explicit in his contempt for courts assuming political or legislative authority. Regarding the separation of powers, he writes: “No one will assume that [the judge] may undertake some governmental act merely because it is cast in the form of a trial and can do what he considers necessary simply by relying on his independence.” Carl Schmitt, *Constitutional Theory*, trans., Jeffrey Seitzer, (Durham: Duke University Press, 2008), 186. See also David Ingram, “Reconciling Positivism and Realism: Kelsen and Habermas on Democracy and Human Rights,” *Philosophy: Faculty Publications and Other Works*, manuscript (2013), accessed August 8, 2016, [http://ecommons.luc.edu/philosophy\\_facpubs/6](http://ecommons.luc.edu/philosophy_facpubs/6).

<sup>174</sup> See Schmitt, *The Guardian of the Constitution*, 87. Schmitt and Hans Kelsen debated about the nature and limits of Article 48 of the Weimar Constitution regarding the president’s power. The court ruled in Leipzig October 25, 1932 in favor of the federal government, claiming that the *Pruessenschlag* was constitutional. Carl Schmitt acted as counsel for the federal government. Lars Vinx, “Introduction,” in Schmitt, *The Guardian of the Constitution*, 1-20, 5.

<sup>175</sup> Schmitt, *The Guardian of the Constitution*, 119.

<sup>176</sup> Schmitt uses *decisionism* in at least two ways. He is commonly known to use the term to describe the sovereign formation or suspension of a constitution, but he also uses the word to describe the judgment necessarily involved in judicial review. Despite the varying magnitudes, decisionism is the “reflex” of a “lack of objectivity in political decisions.” Carl Schmitt, *The Concept of the Political*, trans., George Schwab, (Chicago: The University of Chicago Press, 2007), p.32. In *Political Theology* (which is to my knowledge Schmitt’s first usage of the term), Schmitt claims that decisionism is implied by Hobbes who “...rejected all attempts to substitute an abstractly valid order for a

norm in question.<sup>177</sup> No matter how good an interpretation is, how much deliberation there is, or how proceduralized the methods of argumentation are, hard cases that involve adjudicating abstract, general, and foundational norms necessarily require making political decisions that are independent from legal reasoning.<sup>178</sup> The political nature of hard cases thus “contain[s] a moment of pure decision” that is non-derivative of the interpretation that came before it; this is why Schmitt calls the inner logic of judicial decision-making necessarily “*post eventum*.”<sup>179</sup> Furthermore, defining something as a “hard case” necessarily involves an element of decisionism because neither law nor the procedures of its application can forecast and/or label such cases.<sup>180</sup>

Though he is careful to disassociate the practices of judicial review within the American Supreme Court from the German *Staatsgerichtshof*, “in order to prevent unthinking transfers and mythologizations,”<sup>181</sup> Schmitt is happy to cite the Supreme Court as evidence of his decisionism. In reference to Chief Justice Earl Warren, he notes that the most “important” Supreme Court cases have historically involved a split decision of five-to-four. He writes: “So-called ‘five

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concrete sovereignty of the state” denoted by the dictum *autoritas, non veritas facit legem*. Decisionism is also a reaction to Hans Kelsen’s “frictionless” neo-Kantian jurisprudence, which outlines a form of law that has removed all elements of “subjectivism of command” from law. Carl Schmitt, *Political Theology*, trans., George Schwab, (Chicago: University of Chicago Press, 2005), 33 and 28f. For an analysis of Schmitt’s mixed appropriation of Hobbes, see Victoria Kahn, “Hamlet or Hecuba: Carl Schmitt’s Decision,” *Representations* 83, no. 1 (2003): 67-96. In *Constitutional Theory*, Schmitt suggests that decisionism is a problem of the judiciary only in extraordinary times when the homogeneity of a people diminishes, arousing conflict. In extraordinary times, “...it would be an error in such a situation to refer the highly political task to the judiciary.” In “normal” times, however, “the judge should conform to the fundamental legal views of his time and people.” Schmitt, *Constitutional Theory*, 301.

<sup>177</sup> Kelsen also suggests a type of sovereignty is involved in acts of judicial interpretation, an “act of will,” which is to say, an act of authoritative discretion. Hans Kelsen, *Pure Theory of Law*, trans. Max Knight, 2nd edition, (Berkeley and Los Angeles: University of California Press, 1967), 354.

<sup>178</sup> Similar to his views on adjudication are Schmitt’s ideas regarding the founding of law and the state itself. Geréby writes: “The decision establishes, and becomes manifest in, the form of the law. Thereby the foundation of the state is the constitutive decision, not consent or deliberation.” György Geréby, “Political Theology versus Theological Politics: Erik Peterson and Carl Schmitt,” *New German Critique* 35, no. 105 (2008), 7-33, 10.

<sup>179</sup> Schmitt, *The Guardian of the Constitution*, 117 and 101f. (original emphasis).

<sup>180</sup> “In situations of conflict, most notably, during a state of exception or emergency, not only is the conflict resolved by some personal act of will emanating from outside the law, the decision as to whether there even is a conflict is a personal one.” David Dyzenhaus, “Now the Machine Runs Itself”: Carl Schmitt on Hobbes and Kelsen,” *Cardozo Law Review* 16, no. 1 (1994): 1-19, 11.

<sup>181</sup> Schmitt, *The Guardian of the Constitution*, 82.

against four' or 'one man decisions' do occur and are criticized, perhaps too severely."<sup>182</sup> After all, if argumentation and deliberation could secure a correct decision, what else would explain the consistent splits of opinion? Given this reality, Schmitt suggests the court cannot have the kind of authority necessary to make political decisions on hard cases without jeopardizing the sovereignty endowed in a single, embodied dictator.

In the grand outline of Schmitt's thinking, one can think of hard cases as not only situations where the law is "silent," but as conflicts between two opposing ways of life that contain a non-negotiable ordering of values. The decision is thus more than a legal dictate; it is a decree that expresses a certain unitary cultural understanding about a specific community.<sup>183</sup> Since the foundation of the constitution is an act of sovereignty, and the "sovereign is he who decides on the exception," the basis and form of law itself is intimately connected to a notion of embodied sovereignty revealed through the decision.<sup>184</sup> As such, the founding of law and its auxiliary acts -- those associated with its application, generation, and execution -- cannot be formalized under the rhetoric of liberal rationality without denying the relationship between law and the decisions about the political culture law reflects. Decisions about culture come very close to the abstract non-positive principles that guide Dworkin's interpretive scheme. Dworkin is explicit that Hercules' interpretation of the legal system as a whole must reflect the cultural and political commitments of the community at large.

Conflating acts of interpretation and decision-making isn't so problematic from the Schmittian perspective because both acts presuppose an element of embodied sovereignty. Interpreting a community's political and cultural convictions means also deciding them in a

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<sup>182</sup> Ibid., 117.

<sup>183</sup> See generally David Pan, "Against Biopolitics: Walter Benjamin, Carl Schmitt, and Giorgio Agamben on Political Sovereignty and Symbolic Order," *The German Quarterly* 82, no.1 (2009): 42-62, 60.

<sup>184</sup> Schmitt, *Political Theology*, 5. On the relation between constitutionalism and decisionism, see Schmitt, *Constitutional Theory*, 125ff.

sovereign manner. But since Dworkin's scheme denies these sovereign affinities, his conflation of the two is acutely problematic. But Schmitt has it easy. Rather than finding a way to temper the sovereignty of a constitutional court, he throws it all out. By contrast, Dworkin is working from the perspective that it is desirable to "channel" sovereignty into various branches of government, and so throwing out judicial review is no viable solution. So it's not so much that Schmitt is right and Dworkin is wrong; it's that Schmitt sets the bar quite low for himself. Liberal theories are more difficult to construct than totalitarian ones, and Dworkin's is no exception. Dworkin must provide a theory that satisfies our liberal-democratic ideals in a way that still describes what judges actually do. This latter project is much harder than Schmitt's, so the project now is to think through Dworkin's framework while addressing Schmitt's realities without throwing out the authority of the judiciary. How can one reconcile the necessary sovereignty of court decisions with our liberal-democratic principles?

## **Looking beyond a Judge-centered Judiciary**

Ultimately what lies latent within Dworkin's theory is a concept of subjective will and monological reason that work independent of his interpretive scheme. Hercules decides, interprets, and judges cases in isolation, only nominally referencing collective values, principles, and cultural ways of life. Frank Michelman expresses this sentiment best:

What is lacking is dialogue. Hercules, Dworkin's mythic judge, is a loner. He is much too heroic. His narrative constructions are monologues. He converses with no one, except through books. He has no encounters. He meets no otherness. Nothing shakes him up.<sup>185</sup>

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<sup>185</sup> Frank Michelman, "The Supreme Court 1985 Term," *Harvard Law Review* 100, no. 4 (1986-1987): 4-77, 76.

Deciding and concretizing legal principles like Hercules is not only a difficult task, but an immensely important one, and must not rest on the sovereignty of a single person, institution, or authority. Interpretive sovereignty leads to decisive sovereignty, as Schmitt showed us, and unless one disembodies sovereignty in a way that makes it more open to collective decision-making processes, the liberal project of a fair, just, and coherent legal system becomes analogous to an endangered species.

Legal principles, if ultimately legitimated through democratic practices, must be sensitive to larger collective argumentation processes. There are justifications that judges owe not only to the legal participants or to the legal community, but also the “people” at large. Rather than having a Herculean perspective on adjudication that places the burden of rational decisions on the shoulders of judges, we must adopt a perspective that makes the judicial institution more open to plurality. Such a conception, in Simone Chambers’ words, is what one might call a “Periclean” court “...whose decisions, directions and rulings are under constant and vigilant scrutiny by an active rational public.”<sup>186</sup> This requires conceptualizing court decisions within a broader framework of publicity, democracy, deliberation, and community. The Periclean court has the advantage of deemphasizing adjudicators as mini-sovereigns, the absence of which makes the Herculean perspective so vulnerable to Schmitt’s decisionism. Decisionism is no longer a problem if one thinks of court decisions as cooperative practices sensitive to democratic influence, criticism, and judgment, even if such democratic “inputs” are only indirect.

It is now necessary to leave interpretivism behind, and explore what a Periclean perspective of adjudication looks like. To some extent, this means democratizing the court

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<sup>186</sup> Simone Chambers, “It is Not in Heaven! Adjudicating Hard Cases,” in *Multiculturalism and Law: A Critical Debate*, ed., Omid A. Payrow Shabani, (Cardiff: University of Wales Press, 2007), 115-125, 125.

without democratizing the court in a way that delegates court sovereignty to a public of legal subjects in only normative, non-positive terms. The solution lies neither in constitutional revision nor in formal procedures of democratization; rather, the solution lies in normative democratic practices. Such an approach is indeed "Herculean" in its own right because it requires reconfiguring a variety of concepts and the relationships between them, provoking questions such as: What is the relationship between a "public" and the judicial institution? What kind of "input" is required from such a public when courts decide "hard cases?" How must courts be sensitive to such inputs? And finally, what is the relationship between the judicial institution and democracy? Though these questions are Herculean in difficulty, they are "Periclean" in scope. Such questions ultimately require reconceptualizing what court decisions are, and who is responsible for their content. Ultimately, there is a subtle question of sovereignty underneath this new approach. By taking a democratic, plural approach, the old sovereign question of "who decides" now becomes "who doesn't decide?" Who is excluded from such decisions?

Habermas' theory of law and democracy provides a fresh and comprehensive starting point to answer some of the above questions. In Habermas' view, because law is the only mechanism that can establish "relations of mutual recognition" in post-traditional societies, the only way to practice and expand such relations of recognition is through the "practice of argumentation" that idealizes and respects others' perspectives.<sup>187</sup> The need to fulfill this requirement means adapting an adjudicative theory to an "open society of interpreters of the constitution."<sup>188</sup> The problem of solipsism in Dworkin's theory can perhaps be solved by what Habermas calls a "proceduralist" paradigm, which recognizes and idealizes the "cooperative

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<sup>187</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans., William Rehg, (Cambridge: MIT Press, 1998), 223.

<sup>188</sup> *Ibid.*

procedure of theory formation.”<sup>189</sup> Without forgetting Dworkin's important and paradigm-shifting work on law and adjudication, it is now time to move on to new "post-positive" pastures.

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<sup>189</sup> Ibid., 225-226 (my emphasis).



### Chapter 3: Jürgen Habermas: Adjudicating between Law and Democracy

Jürgen Habermas' contribution to a theory of adjudication is complex because it fits within a lifetime of work spanning a wide range of topics, including language, communication, moral theory, systems theory, law, and democracy, to name only a few. Over the past twenty years, Habermas has become arguably most well-known for his thoughts on the relationship between law and democracy. Yet, perhaps as a byproduct of that attention, his thoughts on adjudication were relatively marginalized and, as a consequence, are less well known. So far, no one has explicated Habermas' views on adjudication in a way that cohesively situates them within his wider work on law and democracy. In this chapter, I develop Habermas' view of adjudication within the broader context of his *Lebenswerk*.

As suggested at the end of chapter two, Habermas breaks from Dworkin's theory of adjudication in a significant way. Recalling Dworkin's "right answer" thesis, Habermas keeps this idea but replaces the solipsism of Hercules with something more cooperative.<sup>190</sup> Rather than locating legal ideals in an "ideal personality of a judge," Habermas sources the rationality of adjudication in a theory of discourse, that is, in practices of argumentation.<sup>191</sup>

One problem Habermas wants to solve through discourse theory is the legitimization problem associated with judicial institutions and their decisions. Even though courts do have procedures of justification that are backed by time-tested traditions and expert opinion, the problem is that, if isolated too much from public reach, their authority is equated with a professional class that has a "self-legitimizing code of professional ethics."<sup>192</sup> Habermas wants

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<sup>190</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans., William Rehg, (Cambridge: MIT Press, 1998), 226.

<sup>191</sup> *Ibid.*, 223.

<sup>192</sup> *Ibid.*, 224f.

to escape this “circle” of self-legitimation by including standards of justification that extend outside the circle. For Habermas, legal interpretation means referring to a larger “*theory of legal argumentation* [grounded in] procedural principles.”<sup>193</sup> In conjunction with such procedures of argumentation, he idealizes constitutional adjudication to be indirectly linked to an “open society of interpreters...,” something much more open than the closed circuits of an isolated court.<sup>194</sup>

In the adjudicative context, Habermas’ novel contribution to the post-positivist paradigm lies in the idealized practices and procedures regarding law’s application. Specifically, he provides a way to address legal indeterminacy, legal disagreement, and incongruities about the normative orientation of law in ways that go well beyond the confines of legal positivism. However, as a sociologist, Habermas understands the functionalist need for positive law. Indeed, there is space for “decisionism” in his thinking.<sup>195</sup> In any position of power within government administration, decisions need to be made in order to preserve the functioning of society. If predictable and timely decisions were not made by the judiciary, this functionalist requirement would be lost. As a philosopher, however, Habermas wants to neutralize the problematic tendencies of such functionalism by legitimizing judicial decisions accordingly. His approach does not privilege one over the other – administrative/instrumental reason over communicative reason – but it does attempt to reconcile them in normative yet explanatory ways.

Whereas Dworkin’s model cannot avoid making *strong* normative claims about the correctness of legal decisions, Habermas adopts a conception of adjudication that only makes

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<sup>193</sup> Ibid., 225 (original emphasis).

<sup>194</sup> Ibid., 223, citing Peter Häberle, *Die Verfassung des Pluralismus*, (Königstein: Athenäum, 1980), 79-105.

<sup>195</sup> This echoes Rehg, who writes: “Real procedures can foster discourse only up to a certain point, after which a decision is required.” For Rehg, procedures don’t eliminate decisionism, but do “[increase] the chances that the defeasibly better argument will sway at least a majority or a legal authority...,” William Rehg, *Cardozo Law Review* 17 (1995-6): 1147-1162, 1157 and 1160.

*weak* normative claims to correctness. By sourcing the correctness of a decision in the procedures of argumentation, Habermas can avoid making a metaphysical argument that commits him to an outcome-tailored critique. As such, procedures recommend only the form, not the content, of rational decision-making. Yet by emphasizing procedures, Habermas' model thus provides no guarantee that outcomes will be desirable. Unjust outcomes always loom on the horizon, no matter how just the procedures that precede them. Habermas' weak normative claim to correctness is thus corroborated by a claim to fallibility. A fallibility component is required given the fact that institutional limitations render ideal standards of argumentation only partially achievable.<sup>196</sup> In addition, discursive procedures are only part of the many procedures within courtrooms.<sup>197</sup> Despite the weak normativity Habermas adopts, it is not so weak that it has no effect on "steering" decisions in a desirable direction. A correct decision is a normative claim to rightness, which is only redeemable by intersubjective agreement.<sup>198</sup> Though it cannot guarantee correctness, procedures aim to produce correct decisions without doing so in a judicial-activist, moral renegade-type way.<sup>199</sup>

In my reading, with which Habermas would likely disagree, correctness and certainty imply one another. From the proceduralist perspective, it is misleading to treat the two as separate principles. Correctness and certainty both depend on the same rational, impartial

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<sup>196</sup> See *Ibid.*, 234. See also Robert Alexy, "Problems of Discourse Theory," *Crítica, Revista Hispanoamericana de Filosofía* 20, no. 58 (1988): 43-65, 47.

<sup>197</sup> As a general note, normative discursive procedures of this type are dissimilar to the many procedures within a court, which include: pre-trial hearings, pleadings, motions, evidence discovery, bringing the charge, arrest procedures, plea bargaining, direct examination, cross-examination, rebuttals, closing arguments, mistrials, jury deliberations, verdicts, motions after verdict, judgments, sentencing, and appeals.

<sup>198</sup> For a succinct definition of Habermas' use of the term "intersubjective" that most directly comes from Husserl's transcendental phenomenology, see David M. Rasmussen, "Jurisprudence and Validity," *Cardozo Law Review* 17 (1995-6): 1059-1082, 1064-5.

<sup>199</sup> Christopher Zurn misreads a quote by Habermas, incorrectly suggesting that he adopts an activist view of the Court. See Christopher Zurn, "Democracy and Constitutional Review," *Law and Philosophy* 21, no. 4/5 (2002): 467-542, 517*f*. For the Habermas quote, see Habermas, *Between Facts and Norms*, 279*f*.

procedures.<sup>200</sup> From the proceduralist perspective, to say that a court's decisions are highly unpredictable yet overwhelmingly correct would make its claims to correctness suspicious; its decisions would likely be motivated by political opinion, not loyalty to the law. Likewise, to say the certainty of legal decisions is grounded in wrong decisions is useless for a normative theory. Since rational procedures form the normative and functionalist core of adjudication, my focus will be on the general rationality of adjudication itself, which de-differentiates correctness and certainty.<sup>201</sup> De-differentiating them clears the analytic fog and creates space for thinking about adjudication in a more holistic, less piecemeal manner.

So what is the content of such procedures? Impartial procedures denote universality in some form, because anything less than a universal perspective is partial in some sense. So, there must be a kernel of universality within those procedures, which, as I develop below, manifests into a requirement of discursive openness. The rationality-as-universality thesis indeed only recommends counterfactual discursive procedures of application that serve to orient decisions in a normative way. However, impartial applications of law only make sense if there is also an impartial germ to law itself. Applying irrational laws rationally is unintelligible in terms of its normativity. So in addition to proper procedures, *law itself* must be conceptualized in a way that makes such procedures relevant in the first place.

This chapter is divided into five parts. I first disaggregate law into three parts and provide a brief outline of Habermas' conception of rights, and argue for treating rights as the most basic category of law. Furthermore, I argue that rational adjudication, at its core, is most fundamentally a practice of rights-adjudication. Next, I continue the theme of rights, developing

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<sup>200</sup> I use rational and impartial interchangeably

<sup>201</sup> To be sure, de-differentiating them requires assuming that law is to a large extent already rational. De-differentiation would not be advised in societies with severely unjust laws.

a brief debate about the status of rights and the consequences of such status-ascriptions in relation to adjudication. Here I argue that the rational application of law requires thinking about rights as deontological procedures. Next, I cover the “internal” component of adjudication via Klaus Günther’s discourse of application. After that, I cover the “external” component of adjudication, which discusses the judiciary’s dual relationship to democracy and the public sphere, respectively. Lastly, I conclude with a brief defense of Habermas’ adjudicative theory as an effort in ideal-type theory. Despite my sympathies, however, I criticize Habermas on the grounds that he provides an insufficient philosophical explanation for why a judiciary should follow the idealized procedures he reconstructs.

In sum, Habermas breaks from the foundationalism of Dworkin’s “law as integrity” without losing much in terms of normativity.<sup>202</sup> The upshot is that Habermas can explain and prescribe at the same time. In terms of post-positivism, Habermas’ model suggests that the justification of law is closely linked with its appropriate application, since the same discursive-procedural form guides both. Without conflating the justification and application of law, the post-positivist Habermasian framework takes this complexity as an essential division of labor within the concept of law itself.

## **Disaggregating Law: Rules, Values, and Rights**

Habermas’ conception of adjudication and his associated project of rationalizing law’s application rest on a trifurcated typology of law. The burden Habermas assigns to law to stabilize the tensions between system and lifeworld requires a conceptual sensitivity to law’s

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<sup>202</sup> The most basic criticism of the procedural approach is that it cannot prescribe its own procedures *without* some foundational principles. For detailed commentary on Dworkin’s “foundationalism” vs. Habermas’ proceduralism, see Frank Michelman, “Democracy and Positive Liberty,” *Boston Review*, October/November (1996), accessed June 10, 2016, <http://new.bostonreview.net/BR21.5/michelman.html#2>.

multidimensionality. Due to its multidimensionality, one must first disaggregate what Habermas means by “law” in a way that makes the topic of law’s “rational application” more focused and digestible. Below I outline what Habermas suggests as the three broad domains of law that, together, compose the raw material for all constitutional legal systems. The three sub-systems of law are: rules (action-coordination system), policies (value system), and rights (deontological-procedural system). In the end, I argue that the rational application of law is made possible only by conceiving rights as the primary substance of law itself.

## **Rules**

Rules are explicit directives that serve to stabilize behavior expectations. In addition, people obey rules for a variety of reasons (moral, political, pragmatic, fear of punishment, etc.). Like universal norms, they prescribe action that obligates “their addressees equally and without exception to satisfy generalized behavioral expectations.”<sup>203</sup> Yet, unlike universal norms such as moral norms, they are oriented towards expediency and functionality. Also unlike moral norms, their addressees are legal, not natural, persons. In addition, they aren’t “goals” that necessarily reflect values. A stop sign serves the pragmatic function of preventing accidents; it is not an outward symbol of a communal value. This is not to say that there isn’t indeed some grey area between rules and values. Tort law, for example, may reflect a community’s commitment to protecting citizens against the actions of irresponsible corporations. But, by and large, rules serve functional and expedient purposes that provide instruction for arranging our activities and relations in civil society.

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<sup>203</sup> Habermas, *Between Facts and Norms*, 255

## Policies

In addition to the thousands of rules that coordinate our daily lives, all legal systems are also to some degree an expression of a concrete ethical community. Recalling Dworkin's concept of policy, there are significant aspects of law that reflect cultural, historical, and sociological norms that are specific to the life-form of a particular community. For example, tax policies reflect a community's commitment to specific values regarding the proper distribution of wealth, or its commitment to either social justice or economic liberalism. Foreign policies reflect a community's choice to intervene or stay neutral in conflict, which may reflect more abstract values about intervention and neutrality in general. Education policies may reflect a society's self-image in terms of what material should be covered and its appropriation of national history, as well as its commitments to equality of opportunity. The values of a legal system surely exist for Dworkin, but they are "trumped" by rights. Habermas continues this line of thinking, but develops it in significant ways.

According to Habermas, values within law are marked by a few major traits.<sup>204</sup> Values are not deontological obligations that must be followed, but only recommendations, goals, or preferences. Due to their non-obligatory status, values have a "graduated coding," implying that the relation between values can be ordered akin to a hierarchy; some values are worth pursuing more than others and therefore "...they compete for priority from case to case."<sup>205</sup> By extension of their ordinal status, the "bindingness" of values cannot be universal. The binding character of the action they prescribe is relative to the degree one adopts the value itself, making the value only "relatively binding" depending on who finds it preferable.<sup>206</sup> The upshot is that regardless

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<sup>204</sup> Ibid., 255.

<sup>205</sup> Ibid.

<sup>206</sup> Ibid., 256.

if there is consensus on a system of values, which is often quite difficult in plural societies, there is still the problem of ordering those values. As such, values require a kind of double consensus: one for their justification, and another for their internal ordering. Lastly, values are ends to be obtained, not a means to something more important or abstract, and therefore are teleological by nature.<sup>207</sup> As opposed to deontological norms, values aren't absolute commands because they cannot pass a universal test of validity.

The teleological content of values links up with Habermas' caricatured reading of Rousseau's republicanism and its exploitation of popular sensibility towards "the good."<sup>208</sup> Habermas reads Rousseau as suggesting a system of law based in values, the natural outgrowth of private autonomy (individual rights) yielding to the associative demands of public autonomy (popular sovereignty).<sup>209</sup> The problem is that Rousseau took republicanism too far and hence made "excessive ethical demands on the citizen."<sup>210</sup> Habermas is not saying that values have no place within modern legal systems, but he claims, like Dworkin, that values can only have a secondary status behind positive rights. As such, values can never serve as the rational, impartial basis of law – or adjudication for that matter – due to their necessarily partial "good for us" and not "good for all" character. In terms of Habermas' discourse theory, this domain of law is confined to ethical discourses concerned mainly with collective identity, communal aesthetic

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<sup>207</sup> One could bring up the counterclaim of religious views about the afterlife, or duties of honor and sacrifice to one's nation. In the former case, the "value" of suicide bombings, one might say, isn't a good in and of itself; there is a higher purpose to the act that is a means to something desirable in the afterlife. In the latter case, sacrificing one's life in war is not considered a good in and of itself. The value of honor serves a higher cause, namely the preservation of a community or way of life. In response, my claim that values are ends does not deny *finite* regress of value-rankings. Due to the ranking of values, there will inevitably be some values that serve as a "means" to higher values. In the end, however, the finite regress is ended by a basic value that nevertheless is only relatively binding.

<sup>208</sup> See Habermas, *Between Facts and Norms*, 102. Rehg notes that Habermas's treatment of the republican and liberal views are "admittedly somewhat stylized for purposes of presentation." William Rehg, "Translator's Introduction," *Ibid.*, xxiv.

<sup>209</sup> *Ibid.*, 104.

<sup>210</sup> *Ibid.*, 102.



judgments, and representations of associative desires. As I develop below, the only remaining part of law that has the required “good for all” character is rights.

## **Rights**

Habermas’ notion of rights is complex to say the least. In his writings on legal rights, Habermas engages with a variety of traditions, histories, theories, and concepts to form his own synthetic assessment of the term. As such, to speak of Habermas’ notion of rights requires panning outwards over some larger themes within his work. My primary point of interest in this sub-section is to highlight Habermas’ effort to differentiate values from rights, and privilege the status of the latter over the former. As I will suggest, the originality of his theory of adjudication hangs on the separation he endorses between rights and values. Put briefly, the rationality of adjudicative practices depends on his reconstruction of rights as rational legal objects. Only by articulating the rational character of rights can he clear the way for the rational application of law.

Compared to rules and values that take specific positive forms in law, rights constitute the most fundamental part of law. Whereas rules function to coordinate behavior, and values function to express and represent ethical goals and preferences, rights are what Habermas calls “deontological,” which is to say, they are unconditional commands validated by their equally “good for all” form.<sup>211</sup> The most striking trait of the specific legal form of rights is that, unlike values, all rights have equal validity and thus cannot be placed within an ordinal ranking system; they are binary-coded as legal/illegal.<sup>212</sup> The “specific legal character” of rights makes them

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<sup>211</sup> Ibid., 256, 204.

<sup>212</sup> “The difference between the principles model and the values model is evident by the fact that only the former preserves the binary code of “legal/illegal” as its point of reference—a court presents the general legal norms from which it derives a singular judgment as reasons that are supposed to justify its ruling on the case.” Jürgen Habermas,

obligatory norms of action in the same way moral norms are, so ordering them in a hierarchy would mistake their obligatory character for a non-obligatory value preference.<sup>213</sup>

The modern understanding of rights is also a product of what Habermas calls our post-conventional situation. By post-conventional, Habermas means modernity is marked not by the homogeneity of a pre-political agreement, but by plurality and difference, which fundamentally separates it from “conventional” or pre-modern notions of community. Our post-conventional situation also gave rise to a new form of “post-metaphysical” reason that Habermas locates in the pragmatics of language.<sup>214</sup>

Since we no longer have a single metaphysical foundation for agreement in our post-conventional horizon, the only legitimate ground for justifying law is subjects’ rational agreement to it under conditions of freedom and equality.<sup>215</sup> Put differently, the plurality of our post-conventional situation denies any single metaphysical foundational, i.e., reference to a particular “otherworldly” source of validity that exists outside of human practice, such as a sacred deity or natural law, so practices of justification themselves pick up the slack and become the basis for Habermas’ post-metaphysical basis of rights.<sup>216</sup> The post-metaphysical approach locates normativity from *within* human practices, i.e., in justifying our actions to others;

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“Reply to Symposium Participants, Benjamin N. Cardozo School of Law,” *Cardozo Law Review* 17 (1995-6): 1477-1557, 1531.

<sup>213</sup> Habermas, *Between Facts and Norms*, 256.

<sup>214</sup> Habermas’ interest in the pragmatics of language is part of the “linguistic turn” that sought to locate a concept of reason as the intersubjective property of communication itself. See Jürgen Habermas, *Postmetaphysical Thinking: Philosophical Essays*, trans., William Mark Hohengarten, (Cambridge: MIT Press, 1992). See also Garry M. Brodsky, review of Jürgen Habermas, *Postmetaphysical Thinking*, *American Journal of Sociology* 99, no. 2 (1993): 508-510.

<sup>215</sup> Habermas claims that agreement supplants the shared “transcendental preunderstanding” of Kantian metaphysics. See Jürgen Habermas, “On the Cognitive Content of Morality,” trans. Ciaran Cronin, *Proceedings of the Aristotelian Society*, New Series 96 (1996): 335-358, 346f.

<sup>216</sup> Maeve Cooke, “Salvaging and Secularizing the Semantic Contents of Religion: The Limitations of Habermas’s Postmetaphysical Proposal,” *International Journal for Philosophy of Religion* 60, no. 1/3 (2006): 187-207, 188.

Habermas calls it an “innerwordly transcendence.”<sup>217</sup> The justification of rights has an impartial “point of reference beyond settled legal traditions,” and thus transcends local standards of justification, which retain a core of *universality* though are not themselves *universal*.<sup>218</sup>

However, the claim to universality is weak because it only prescribes universal procedures of justification (e.g., free and open debate among equals), not substantive outcomes.<sup>219</sup> For this reason, Habermas cannot guarantee desirable outcomes from his proceduralist approach because all decisions and norms retain perpetual conditionality; no norm is exempt from being tossed back into the kettle of debate. So Habermas’ framework indeed provides a way to criticize norms, but only on the basis of the procedures that stand behind the norm and not on any substantive grounds independent of such procedures.

Segueing into the relationship between morals and rights, Habermas describes the relationship in a differentiated yet entangled way. Rights have the universal and unconditional form of morality, but are qualitatively different because, unlike morals, at least in the Kantian sense, rights are learned standards of behavior, tested discursively among others.<sup>220</sup> The impartiality of moral discourse requires a speaker to take “...a perspective freed of all egocentrism or ethnocentrism,” which parallels the unconditionality of rights, but doesn’t equate or reduce one to the other.<sup>221</sup> Indeed, the positive aspect of rights introduces political and

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<sup>217</sup> Habermas, *Between Facts and Norms*, 5. For how this conception of reason was predated by John Dewey’s pragmatism, see Daniel Gaus, “Rational Reconstruction as a Method of Political Theory between Social Critique and Empirical Political Science,” *Constellations* 20, no. 4 (2013): 553-570, 554-556.

<sup>218</sup> Habermas, *Between Facts and Norms*, 209-210. Alexy criticizes the universality claim, cautioning that for legal norms to have “absolute binding character in the universalistic sense” would erase their specific legal status, and convert them into moral norms. Robert Alexy, “Jürgen Habermas’s Theory of Legal Discourse,” *Cardozo Law Review* 17 (1995-6): 1027-1034, 1029.

<sup>219</sup> The purpose of procedures is thus to “enhance the capacity of the judge...to distinguish between good and bad reason...” Erik Eriksen, “Democratic or jurist made law? On the claim to correctness,” *ARENA* working paper (2004), accessed August 8, 2016, [http://www.arena.uio.no/publications/working-papers2004/papers/04\\_07.xml](http://www.arena.uio.no/publications/working-papers2004/papers/04_07.xml).

<sup>220</sup> As a consequence, Habermas’ moral principle (U) is derivative of the more foundational discourse principle (D).

<sup>221</sup> Habermas, *Between Facts and Norms*, 97.

coercive components that make possible opinion- and will-formation, enforced by the state, which are foreign to non-positated moral norms.<sup>222</sup> Unlike Kant, Habermas does not subordinate law to morality, even though he states that “law has a reference to morality inscribed within it” and therefore must not violate it.<sup>223</sup> Also unlike Kant, Habermas does not advance an ontological thesis of free will as the agent that generates positive rights; rather, the validity of rights originates from the “communicative constitution” of their legal authors, who “acquire a sense of freedom” in the act of legal intervention.<sup>224</sup> In Habermas’ view, rights have only an ancestral relationship to moral norms, as if rights have replaced morality in generational succession. Put this way, the relationship between morality and law is at best “complementary” or, perhaps even more accurately stated, atavistic.<sup>225</sup>

By way of a method he calls “rational reconstruction,”<sup>226</sup> Habermas also wants to explain in a social-scientific way how equality and freedom became materialized in legal rights. He suggests that the post-metaphysical conception of reason arose simultaneously with learned practices of critical self-reflection. Given that the old foundation of pre-modern ethical identities

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<sup>222</sup> Ibid., 104.

<sup>223</sup> Ibid., 106, 120; also 155, “Their limited sphere of validity notwithstanding, legal norms, too, claim to *be in accord* with moral norms, that is, not to violate them.” On 156 Habermas claims legal norms “harmonize” with moral norms.

<sup>224</sup> Klaus Günther, “Communicative Freedom, Communicative Power, and Jurisgenesis,” *Cardozo Law Review* 17 (1995-6): 1035-1058, 1047.

<sup>225</sup> Habermas does have a conception of non-positive rights, though he is careful to not refer to them as morals. His writing on non-positive rights is only in reference to the general *form* legal rights should take, which then must be concretized in more specific forms. He suggests that even such non-positive “abstract rights” derive from his discourse principle (D) and not metaphysics. See Habermas, *Between Facts and Norms*, 122f; p. 107 for principle (D).

<sup>226</sup> Rational reconstruction is both a historical-interpretive perspective as well as a social-scientific method. As a historical-hermeneutic perspective, the approach explicitly idealizes implicit presuppositions of existing practices, and provides a lens through which to interpret history (Habermas uses a discursive lens). As a social-scientific method, he uses the discursive lens to explain what he views as the evolution of society and law. For an overall account of Habermas’ rational reconstruction, see Gaus, “Rational Reconstruction as a Method of Political Theory between Social Critique and Empirical Political Science,” 560. For commentary on Habermas’ *legal* reconstruction, see Bernhard Peters, “On reconstructive legal and political theory,” *Philosophy & Social Criticism* 20, no. 4 (1994): 101-134. See also Simone Chambers, *Reasonable Democracy: Jürgen Habermas and the Politics of Discourse*, (Ithaca: Cornell University Press, 1996).

has been confronted with critical practices of justification, we “children of modernity” are now required to justify our practices, values, and norms of action to others. Whereas in pre-modern times, political solidarity enjoyed a non-deliberated foundation, modern political solidarity is only legitimated through justification presupposing universal inclusivity. In a circular fashion, the historic rise of rights secured the equal legal status of citizens, but at the same time these rights were constituted by norms of justification that relied on the same equal legal status. With the pragmatics of language as the practice that propels history along its progressive trajectory, this manifestation is what Habermas calls the “rationalization of the lifeworld.” Habermas writes:

In the train of developments I interpret as the rationalization of the lifeworld, this clamp sprang open. As the first step, cultural traditions and processes of socialization came under the pressure of reflection, so that actors themselves gradually made them into topics of discussion. To the extent that this occurred, received practices and interpretations of ethical life were reduced to mere conventions and differentiated from conscientious decisions that passed through the filter of reflection and independent judgment.<sup>227</sup>

In Habermas’ use of the term, the rationalization of the lifeworld is essentially a thesis about cultural and social evolution, though not dialectical in a Hegelian way,<sup>228</sup> that eventually materialized in a specifically modern form of positive law. As such, the modern system of rights became a positive expression of post-metaphysical reason, validated through practices of justification among free and equal participants.

In sum, the deontological character of rights forms the basis of the legal system because it has the highest status in argumentation. Whereas Dworkin asserted rights as the foundation of

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<sup>227</sup> Habermas, *Between Facts and Norms*, 95.

<sup>228</sup> Hegel’s dialectic was both necessary and terminal. By contrast, Habermas denies the *necessity* of learning processes, and also denies that such learned processes will have a final end point. Instead, he claims that learning processes are indeed fallible, i.e., we can certainly go backwards (e.g., WWII), and that the learning process is never-ending, i.e., even if there was an endpoint, we can’t claim to know what it is or looks like.

law without arguing for it, Habermas' approach provides discursive grounds for rights as the basis of constitutional legal systems. Only by understanding the post-metaphysical substance of rights do they acquire their privileged argumentation status as deontological commands: "...norms and values take on *different roles in the logic of argumentation*."<sup>229</sup> As such, rights have argumentative priority over policies and rules, and therefore form the nucleus of constitutional legal systems. The authority of rights thus rests not on non-positive moral principles that stand behind law, but by their claim to impartial agreement redeemed through ongoing discourse. The upshot of this analysis in the context of adjudication is that to speak of the "rational application of law" requires narrowing our focus to the "rational application of rights," since it lies at the foot of constitutional legal systems: rights have a "radiating effect on the entire legal system..."<sup>230</sup>

## **The Primacy of Rights as Deontological Legal Objects**

This section is guided by a normative qualification of adjudication: the impartiality of rights must be met by impartiality of application procedures. From a normative point of view, this qualification is required because rationality implies impartiality, and so only by preserving that impartiality from start to finish can rational adjudication make any sense. Otherwise, we are left with two perspectives that lack normative saturation: the partial application of impartial rights, or the impartial application of partial, value-laden rights. Both are contaminated, so to speak, by partiality in one way or another. To parse out the primacy of rights in adjudication, I tailor the rest of this chapter to the U.S. Supreme Court.

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<sup>229</sup> Habermas, *Between Facts and Norms*, 257, (original emphasis).

<sup>230</sup> Robert Alexy, "Legal Certainty and Correctness," *Ratio Juris* 28, no. 4 (2015): 441-451, 449.

So what is at stake if we understand rights-as-values? Most legal realists or communitarians would criticize Habermas' ethics-transcending notion of rights.<sup>231</sup> Habermas must address these concerns. I will address the competing rights-as-values thesis, which claims that rights aren't deontological norms, but values through and through.<sup>232</sup> In the context of rationalizing law's application, the status and nature of legal rights have significant consequences.

The rational application of rights is weakened if one views rights as teleological values and not deontological commands. Since values are akin to non-cognitive preferences, the rights-as-values thesis reintroduces the problem of decisionism that plagued Dworkin's theory, albeit in a new form.<sup>233</sup> There are three problems with the rights-as-values thesis.

1.) If rights have the teleological character of values, this requires a judge to adopt a sovereign perspective on law's value orientation, and, by extension, make decisions regarding the self-understanding of the community at large. Habermas writes:

By assuming it should strive to realize substantive values pre-given in constitutional law, the constitutional court is transformed into an authoritarian agency.<sup>234</sup>

Such a perspective not only contradicts the requirement that the Court give legal justifications for its decisions, but also betrays the boundary between it and the legislature by assuming a representative function. The Court necessarily takes on duties with which it is not legally endowed. The rights-as-values thesis is a problem for democratic legitimacy because "...legal

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<sup>231</sup> Frank Michelman also criticizes Habermas, but from a republican viewpoint. See Frank I. Michelman, "Family Quarrel," *Cardozo Law Review* 17 (1995-6): 1163-1177.

<sup>232</sup> In addition to Habermas, John Hart Ely criticizes the rights-as-values thesis, which I will return to below. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, (Cambridge: Harvard University Press, 1980).

<sup>233</sup> To be sure, Dworkin didn't view positive rights as contingent communal values, but instead as metaphysical deontological principles.

<sup>234</sup> Habermas, *Between Facts and Norms*, 258.

discourses would assume the role of paternalist proxy discourses for a political-ethical self-understanding taken over from the citizens.”<sup>235</sup> Put differently, legal discourse would be subsumed, at least in hard cases, by ethical discourses that have no constitutional basis. Allowing ethical and legal reasons to have equal status in constitutional cases creates a second problem regarding the false necessity of treating different rights differently.

2.) If the legal system as a whole were a system of values, legal rights within it would be ordered against one another, denying their equal command status. In other words, the rights-as-values thesis presupposes that a court hierarchize rights when deciding hard cases. In cases where two parties claim a legal right that competes with the opposing claim, the Court must assign different value or weight to one right over another. The problem, of course, is that there exists no legal justification for ranking one right over another in a categorical way, so the judge must step “outside the law” and ultimately rely on ethical-political justifications. The rights-as-values thesis implies a ranking system within the system of rights itself, which is to say that some rights have a more justification than others.<sup>236</sup> If this is true, then the Court would need to

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<sup>235</sup> Jürgen Habermas, “Reply to Symposium Participants, Benjamin N. Cardozo School of Law,” 1539.

<sup>236</sup> The closest theorist to take this position seriously is Robert Alexy, who writes: “. . .the just depends on the good.” Robert Alexy, “The Special Case Thesis,” *Ratio Juris* 12, no. 4 (1999): 374-384, 379.

Alexy uses various terms like weighing, balancing, and optimization to refer to what happens when norms compete with one another. Ultimately, he suggests that all non-positive principles, including the tension between legal correctness and legal certainty, must be weighed against one another in rational discourse in order to discern a right answer. For Alexy, who is a discursive proceduralist, correct answers can be obtained only through ideal procedures of argumentation, which, as he acknowledges, can only be partially realized. For example, Alexy writes that principles are meant to be “optimized” or achieved to the greatest degree possible. As such, he introduces a “Law of Balancing,” which states: “The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.” See Robert Alexy, “Constitutional Rights and Proportionality,” *Revus* 22 (2014): 51-65, 54. Alexy suggests that when principles or rights compete with one another, the claim to correctness is contingent upon a type of Pareto optimality. This, however, implies norms compete for authority according to the quantity of importance assigned to them, which is problematic because it requires conceptualizing the legal *system* as a product of iterated cost-benefit analyses, reducing his discourse-theoretic to an efficiency-theoretic. Alexy suggests that any court must assign value to rights, create a hierarchy of importance, and ultimately try to optimize the most valuable principle “. . .to the greatest extent possible given the legal and factual possibilities.” *Ibid.*, 52. For Alexy’s claim that legal argumentation is a special case of general practical discourse, see Alexy, “The Special Case Thesis;” also Robert Alexy, *A Theory of Legal Argumentation:*



decide which rights had priority over others, which is essentially a sovereign decision-making power that Habermas wants to avoid granting to the Court.

3.) By implying an ordering of rights, the rights-as-values thesis ultimately relinquishes the privileged argumentative status of rights, eliminating the discursive firewall that separates them from value-laden policies. The result is that rights lose their “trump” status, and legally denude minorities of the legal protections required to guard them against collective goals. By forfeiting the “trump” status of rights over collective goals, the Court jettisons its counter-majoritarian ethos. To avoid the three problems above, one must conceptualize rights as deontological procedures.

John Hart Ely is perhaps the most explicit critic of the rights-as-values thesis, arguing instead for a rights-as-procedures thesis. He argues that in the context of the United States, the Constitution and the establishment of rights was “...overwhelmingly, dedicated to concerns of process and structure and not to the identification and preservation of specific substantive values.”<sup>237</sup> As suggested, rights are thus not “ends” to be achieved, but function as a “means” to secure just governing institutions and practices.

From a social-scientific perspective, Ely suggests the longevity of constitutional amendments is a function of their procedural form, such that values “frozen in time” tend to be overturned. This of course does not mean that, historically, legislators haven’t attempted to smuggle values into the Constitution. As for the few examples where substantive values were included in the Constitution, the two primary examples are the legalization of slavery<sup>238</sup> and the

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*The Theory of Rational Discourse as Theory of Legal Justification*, trans., Ruth Adler and Neil MacCormick, (New York: Oxford University Press, 1989), 292f.

<sup>237</sup> Ely, *Democracy and Distrust: A Theory of Judicial Review*, 92.

<sup>238</sup> Article 1, Section 2 distinguishes “free Persons” from those “bound to Service.”

18<sup>th</sup> amendment on Prohibition. Both were consequently overturned by the 13<sup>th</sup> and 21<sup>st</sup> amendments, respectively.<sup>239</sup> Indeed, if the Second Amendment is also a substantive value, though one that hasn't been overturned. However, by and large, especially after the 14<sup>th</sup> Amendment, amendments to the Constitution have been procedural in form.

As opposed to being aesthetic values, rights serve to fulfill “the achievement of a political process open to all on an equal basis and a consequent enforcement of a representative’s duty of equal concern and respect to minorities and majorities alike.”<sup>240</sup> As suggested, Ely views the general strategy and logic of the Constitution as one where values are rooted out in favor of generic procedures that secure fairness in the political process as a whole, mitigating the threat of majority or minority political manipulation. For this reason, Ely writes: “What has distinguished [the U.S. Constitution], and indeed the United States itself, has been a process of government, not a governing ideology.”<sup>241</sup> Citing Oregon Supreme Court Justice Hans Linde, this implies that any legitimate constitution must “prescribe[s] legitimate processes, not legitimate outcomes.”<sup>242</sup> The normative orientation of the Constitution is to prevent any group from having free access to insert its own values into law that “choke off” “channels of political change” by “voice or vote” in one way or another.<sup>243</sup> The core purpose of the Constitution is thus to guarantee political fairness through procedural rights. The Constitution as an aesthetic, symbolic, or cultural

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<sup>239</sup> See Ely, *Democracy and Distrust*, 94-101, notably 100.

<sup>240</sup> *Ibid.*, 99.

<sup>241</sup> *Ibid.*, 101.

<sup>242</sup> *Ibid.*, citing Justice Linde, “Due Process of Lawmaking,” *Nebraska Law Review* 55 (1975).

<sup>243</sup> *Ibid.*, 103.

representation is subordinate to its procedural rationality, which as its primary agent secures its legitimacy, efficacy, and longevity.<sup>244</sup>

From the above remarks, it is clear Ely views rights not as legal objects that are good in and of themselves, but, instead, as a means to preserve representative democracy. Since rights serve democracy, Ely indirectly places the principle of democracy over and above the principle of right. Though Ely's rights-as-procedures thesis establishes the impartial basis of rights, this view of rights is problematic for Habermas. The unidirectional relationship between rights and democracy that Ely sketches conceals the mutual dependency and "co-originality" of human rights and popular sovereignty.<sup>245</sup> Because Habermas' notion of democracy requires citizens to recognize each other as free and equal participants in public opinion- and will-formation, democracy depends on positive rights, backed by the state, to guarantee freedom and equality in a coercive way. Simultaneously, however, the post-metaphysical nature of rights can only presuppose validity when based on rational consensus obtainable through democratic opinion- and will-formation.<sup>246</sup> Given Habermas' discourse-theoretic approach, rights and democracy don't compete; they presuppose each other. Habermas writes:

...because the democratic principle cannot be implemented except in the form of law, both principles must be realized *uno actu*.<sup>247</sup>

Whereas Ely draws the relationship between rights and democracy in linear fashion, Habermas draws it as a circle and thus escapes the challenge of defending one principle over the other. Despite its linearity, Ely's rights-as-procedures thesis provides the impartial raw material

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<sup>244</sup> This is not to deny, however, that such symbolic components are not also necessary. Grimm is convincing that the symbolic effect is necessary, even though not sufficient in my view. See Dieter Grimm, "Integration by Constitution," *International Journal of Constitutional Law* 3, no. 2-3 (2005): 193-208.

<sup>245</sup> Ely, *Democracy and Distrust*, 94.

<sup>246</sup> For a more detailed analysis of the "interdependence of autonomy and rights" in Habermas' thought, see Kevin Olson, *Reflexive Democracy: Political Equality and the Welfare State*, (Cambridge: The MIT Press, 2006), 101-106.

<sup>247</sup> Habermas, *Between Facts and Norms*, 94.

on which Habermas' notion of rational adjudication depends. Only by establishing the rational, impartial basis of rights is it worthwhile to speak of rational, impartial procedures of adjudication.

In conclusion, there are two points worth reemphasizing. First, the deontological character of rights means that all rights have equal status. The consequence of this is that justices cannot be required to act in an autonomous manner by ordering such rights in a sovereign way. As such, it takes the burden off justices to interpret and decide cases as if they were deputies to a vacant democracy. Second, the procedural nature of rights establishes an internal link between law and democracy. Ely's thesis corroborates the non-teleological status of rights by emphasizing their generic procedural qualities. Their impartiality rests in their procedural form, which makes rational adjudication possible. The link between law and democracy, as I argue below, reverberates notably in Habermas' adjudicative theory.

Below I develop what I call Habermas' "internal-external" model of adjudication in regards to the U.S. Supreme Court. The "internal" component derives from Klaus Günther's discourse theory of legal application that occurs within the Court. The procedural nature of rights implies that rational adjudication must also be procedure-based. However, due to Habermas' conception of rights as tied to democracy – on equal footing – the internal component can only be achieved with two additional "external" inputs. The two external inputs are represented by the Court's two external relationships between it and 1.) the principle of democracy, and 2.) the public sphere. In order to retain the impartiality of rights, the Court must adjudicate in a way that is both legal and legitimate as implied by the tension between its "internal" and "external" discursive-procedural components. The internal-external tension in Habermas' model is what I refer to colloquially as adjudicating between law and democracy. In

sum, Habermasian adjudication requires situating the legality and legitimacy of judicial decisions within a wider context of rights and democracy.

## **The “Internal” Component of Adjudication**

The gap between legislative and judicial institutions reflects a gap between discourses of legal justification and discourses of legal application. Both discourses are reason-giving practices, but the form and content of those reasons differ somewhat significantly. Klaus Günther’s insight is that a norm’s justification and application belong to two separate discourses. Below, I develop a reading of Günther’s application discourse and its relevance to Habermas’ overall theory of adjudication.

On a daily basis, we are confronted with conflicts that force us to make judgments about the application of norms. Putting aside legal norms momentarily, there are hundreds of norms we must “adjudicate” every day. To begin with an example, assume that a woman named Janice is attending a potluck breakfast party at her work, to which she promised to bring a central item: fresh coffee.<sup>248</sup> Yet, when she arrives at the coffee shop, the line is unusually long – so long that by the time she buys the coffee, the potluck will be over. If she waits in line, she will renege on her commitment to her colleagues. Now, assume she notices a break in the line, and she has a momentary chance to cut in. Janice is now caught in an application dilemma: she must decide whether to keep her promise to her colleagues or keep her commitment to rules of social courtesy. In this situation, the justifications for each norm are of no help because both norms, in Janice’s mind, are equally valid. This dilemma illustrates the striking difference between the justification and application of a norm, and thus requires separating a norm’s “validity and

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<sup>248</sup> This is inspired by Günther’s example which also involves keeping one’s promises. See Klaus Günther, “Normative Conception of Coherence and Discursive Theory,” *Ratio Juris* 2, no. 2 (1989): 155-66, 157.

situational appropriateness.”<sup>249</sup> What should Janice do? Günther’s application-framework provides an answer.

Janice’s situation reveals the inescapable problem of norm-indeterminacy. Even though Janice can justify each norm with ease, her “inability to anticipate future experiences” causes a tension between the norms’ validity and appropriateness.<sup>250</sup> Unfortunately, Janice can never have full, anticipatory knowledge of a norm’s applicability not because she isn’t bright, but because of the “structural ignorance” contained within all norms. Full knowledge of all applications of a norm presupposes a perfect norm, one that can account for the infinite number of hypothetical situations to which it can be applied.<sup>251</sup>

Despite Janice’s structural ignorance of a norm’s infinite possible applications, this does not imply that norms have no “normal” applications. All valid norms, to at least some degree, are associated with normal or intended applications. For example, freedom of speech is a norm that, when created in the U.S., had the specific purpose to protect controversial political or religious viewpoints. When the amendment was made, the legislators likely anticipated at least some applications. But certainly the framers didn’t anticipate the norm being applied to a high school student who wears a black armband in protest against the Vietnam War, or a student who makes a MySpace profile ridiculing her school principle.<sup>252</sup> Notwithstanding the legislator’s structural ignorance of future situations, these cases were also unprecedented; there were no prior cases that were reasonably similar, making them “hard cases.” In other words, despite their

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<sup>249</sup> Klaus Günther, *The Sense of Appropriateness: Application Discourses in Morality and Law*, trans., John Farrell, (Albany: State University of New York, 1993), 69. See also Torben Hviid Nielsen and Jürgen Habermas, “Jürgen Habermas: Morality, Society and Ethics: An Interview with Torben Hviid Nielsen,” *Acta Sociologica* 33, no. 2 (1990): 93-114, 97.

<sup>250</sup> Günther, *The Sense of Appropriateness*, 273.

<sup>251</sup> *Ibid.*, 40.

<sup>252</sup> See respectively, *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969), and *J.S. v. Blue Mountain School District*, No. 08-4138 (3rd Circuit, 2011).

anticipated applications, there is always a large remainder of normative indeterminacy inevitably left over.

Some radical hermeneutical approaches view the above reflections as a sign of the hollowness of norms themselves.<sup>253</sup> From this perspective, the validity of a norm is reducible to its application, such that the justification of a norm cannot be separated from its specific mediation in an empirical situation.<sup>254</sup> But such a fatalistic conclusion is unnecessary, Günther suggests. Indeterminacy doesn't require abandoning the separation between justification and application, nor does it suggest norms are empty signifiers until applied somewhere. All it implies is the need for rational and impartial procedures of application. Günther writes: "...indeterminacy is not a problem of norm structure; it is simply a circumscription of the procedure of impartial application."<sup>255</sup> As such, indeterminacy obliges subjects to enter into procedures of argumentation in order to determine the appropriateness of a norm to a situation.<sup>256</sup> Put this way, Günther wants to rationalize the application of norms by doing away with a concept of judgment.<sup>257</sup> Given Günther's thoughts, Janice feels relieved. She need not make a

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<sup>253</sup> In a less radical way, Robert Alexy is also skeptical. He suggests that anytime a norm comes into contact with a concrete community and history, the act of applying law is also an act of justifying a law, which "forbids contrasting discourses of application from discourses of justification." As such, the application of norms needs to be "substantiated in a discourse of justification." Robert Alexy, "Justification and Application of Norms," *Ratio Juris* 6, no. 2 (1993): 157-170, 169. In response, see Klaus Günther, "Critical Remarks on Robert Alexy's 'Special Case Thesis,'" *Ratio Juris* 6, no. 2 (1993): 143-56. For commentary, see Peng-Hsiang Wang, "Coherence and Revision - Critical Remarks on the Günther-Alexy-Debate," in *Logic Argumentation and Interpretation*, ed. Josep Aguiló-Regla, (Franz Steiner Verlag, 2007), accessed August 8, 2016, <http://idv.sinica.edu.tw/philaw/>. For a developed thesis regarding the dialectic between practices of legal application and justification, see Victor Peterson, "Creativity in Application Discourses," *Constellations* 22, no. 2 (2015): 218-232.

<sup>254</sup> Günther, *The Sense of Appropriateness*, 274. Günther reads this as implied by Karl Engisch. In my view, Gadamer also advances this thesis in Hans-Georg Gadamer, *Truth and Method*, trans., Joel Weinsheimer and Donald G. Marshall, (New York: Continuum International Publishing Group, 2004).

<sup>255</sup> Günther, *The Sense of Appropriateness*, 274

<sup>256</sup> Ibid.

<sup>257</sup> Ibid., 10.

decision based solely on her own conflicted conscience. Instead, the solution is for her to engage with others in a discourse about the relative appropriateness of the two competing norms.

Whereas the discursive validity of a norm depends on its conformity to the agreement of all affected, its appropriateness concerns “...*whether* and *how* the rule ought to be followed in a particular situation in view of all the particular circumstances.”<sup>258</sup> Like general practical discourses that are concerned with the impartial justifications of norms, application discourses are governed by an ideal of impartial interpretation of a situation, and thus impose a condition of universality on the discourse. The condition of universality makes appropriateness a function of all affected persons being included as equal participants in offering interpretations of the situation. Since impartiality implies universality -- because anything less than universal will always be partial in some sense -- the normative thrust of Günther’s argument relies on a counterfactual ideal of general inclusivity. In other words, all individuals who are affected by the application of the norm must “receive due regard” in order to presume full consideration of “all the particular features of a situation.”<sup>259</sup> Günther writes:

Now, the requirement of impartiality in the applicative sense means nothing other than that these different interpretations of a situation must be thematized because we should orient our actions according to a norm that we may consider not only valid, but, with justification, to be appropriate as well. It is the process where, in a situation, we debate these interpretations, compare competing and conflicting interests and normative expectations in order to form that norm which we can claim to be the appropriate one in view of the particular circumstances of the individual case.<sup>260</sup>

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<sup>258</sup> Ibid., 38 (original emphasis).

<sup>259</sup> Ibid., 270-1.

<sup>260</sup> Ibid., 39.



The above quote recommends that there be no arbitrary restrictions on the parameters of debate concerning the interpretation of a situation.<sup>261</sup> Implied by this condition is a notion of equality. Günther reconstructs Dworkin's principle of equality to have procedural form.<sup>262</sup> The discursive component of impartiality implies testing arguments against a wider audience, which can only happen *in practice among others*.

Janice now at least has a plan of action. As suggested by Günther's framework, she must speak with both her colleagues and the others in line for assistance. So, assume she decides to make a public announcement in the coffee shop, explaining her dilemma to her fellow coffee patrons, but to no avail. Everyone reacts with contempt at her audacious request to cut in line. She also telephones her colleagues at work, advising them of the situation. Her colleagues urge her to cut in line, claiming that since she made a promise, she must accept the ridicule she may receive from others in line. Unfortunately, discourse didn't help Janice find the "right answer" she was looking for. Perhaps the problem is that the discourse in which she engaged was not impartial; each party was thinking about their own interests in a strategic way.

To reiterate, these procedures of decision-making regarding the application of a norm cannot guarantee a correct outcome. However, this does not mean that Janice and her interlocutors will avoid debating substantive reasons. The rationality of Janice's decision stems from the procedures of argumentation, which may include thematizing some values over others in order to avoid arbitrarily privileging of one point of view over another.<sup>263</sup> After carefully

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<sup>261</sup> Peterson is correct to note that situational relevancy and norm-appropriateness are "two sides of the same coin." Victor Peterson, "Moral Application Discourses," Review of *The Sense of Appropriateness* by Klaus Günther, *Philosophy & Social Criticism* 22, no. 1 (1996): 115-124, 119. From my own survey, Peterson is the only American scholar to devote significant attention to Günther's work.

<sup>262</sup> See Günther, *The Sense of Appropriateness*, 282.

<sup>263</sup> This echoes Peters, who writes: "From the standpoint of the participants this means that they can trust their own judgments more if they have tested them in critical discussion, if no viewpoint was excluded, if everybody was

debating this issue with numerous friends on the phone, she decides to not cut in line for a simple reason: one should not violate a norm in order to fulfill the requirements of another. From a Dworkinian perspective, this decision is correct because it coheres to a higher, more abstract principle of integrity. However, from the proceduralist perspective, the “correctness” comes not from the decision itself, but how the decision came to be. In other words, by hypothetically including all perspectives of the situation into her reasoning, Janice’s decision can be deemed rational, independent of the actual content of her decision. By deferring to an application discourse, Janice was not required to rank one principle over another categorically, but only “situationally,” such that in situations like hers, public courtesy takes precedence over personal promises of that kind. Impartial application creates the conditions for, but does not guarantee, rational and impartial outcomes, so Janice can only be temporarily convinced her decision is correct. This means reformulating Dworkin’s “right answer” thesis. A “right answer” must presuppose “right procedures” from which the outcomes are only temporary. In sum, Günther suggests the normative yet clumsy grammatical expression: the “temporary, procedure-contingent right answer” thesis. As such, Janice’s decision is only “correct” for as long as it not again thematized in debate.

It is now necessary to leave Janice’s moral dilemma behind in order to bring into focus the relevance of these reflections on the Court. Though Janice’s moral dilemma is analogous to a legal dilemma a judge may face involving two rights competing with one another, the difference between morals and law is significant.<sup>264</sup> Unlike a judge, Janice had no access to a large history of precedent to guide her decision, or something akin to a legal paradigm for help

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given a voice and a hearing, and so on. But in the end it must still be the substance of the arguments that provide a basis for rational judgments.” Bernhard Peters, “On reconstructive legal and political theory,” 116.

<sup>264</sup> For Habermas’ thoughts on the difference, see Habermas, “Reply to Symposium Participants, Benjamin N. Cardozo School of Law,” 1538.

interpreting the situation,<sup>265</sup> or access to structured procedures of argumentation to reduce the indeterminacy of the norms. To conclude this subsection on the internal component of rational adjudication, I will briefly touch on Günther's intersubjective reconstruction of Dworkin's concepts of solidarity and integrity.

In order for the judiciary to deliver its promise of impartiality, the community at large must be conceptualized in discursive terms. With this in place, legal coherency and social solidarity actually refer to one another. The integrity of law must be met with the integrity of a community. Only by hypothetically including all affected citizens in the abstract debates regarding the application of rights can the "coherency" of law have rational grounding. Otherwise, coherency is an empty, formal criterion that could have non-desirable consequences; a wicked legal system could nevertheless be coherently wicked. By counterfactually including all available perspectives in this process, coherency can achieve rationality. Rather than, as Dworkin does, starting from a foundation of moral equality to do this that in turn creates a

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<sup>265</sup> Part of the reconstructive approach involves applying norms "as if" a coherent system of norms currently exists. In other words, we apply norms "as if" there was only one norm appropriate to a situation, an approach clearly reminiscent of Dworkin's "right answer" thesis. In Günther's reconstructive approach, coherency serves more as a practical ideal, something presupposed by our grammatical usages of "appropriate" and "inappropriate." Though Günther keeps coherency as a reconstructive ideal, he writes: "in reality we only have 'paradigms...,'" which are only incomplete and vague orderings of norms connected to a community's concrete history. Klaus Günther, "Normative Content of Coherence," *Ratio Juris* 2, no.2 (1989): 155-166, 163. Günther speaks of paradigms as an aid to practical reason in deciding cases, since they "determine what features are normatively relevant in a situation..." Günther, *The Sense of Appropriateness*, 245. Put differently, paradigms help reduce the indeterminacy of law by providing "more or less standardized" ways of interpreting law. Rather than asking judges to exhaustively review a case that only Dworkin's Hercules is capable of doing, real judges use paradigms to help overcome indeterminacy by having an already pre-determined set of relevant normative criteria. Habermas uses Günther's paradigm approach, but wants to open it up to "discursively regulated competition" so as not to transform such paradigms into hardened ideologies. Habermas, *Between Facts and Norms*, 223-4. So long as they are open to discursive competition, the paradigm approach "removes suspicion of background understandings" by calling for a practice of self-reflexivity about such background understandings. Although a community's self-reflexivity towards its own norms can never be completely impartial, discursive argumentation, for Habermas, is the normative practice that can best achieve it, albeit never *fully*. Ibid., p. 224. Paradigms, however, are vague constellations of norms – principles, rules, policies, precedents, and values – heading along a trajectory inside an indefinite communal cosmos. If paradigms are more abstract concepts than the norms they encompass, then it remains unclear how they help reduce the indeterminacy of rights when they themselves are amorphously indistinct. Baxter echoes this sentiment: "[Paradigms] are far too abstract to provide guidance in concrete cases." Hugh Baxter, *Habermas: The Discourse Theory of Law and Democracy*, (Stanford: Stanford Law Books, 2011), 113.

coherent system of positive equality, this model starts with open, inclusive communicative practices that make the application of rights more communal than Dworkin's Herculean model. Such inclusivity warrants a degree of impartiality, which in turn grounds equality in fair procedures of application. The emphasis on procedure does not imply, of course, that the outcomes are irrelevant. Indeed, the inclusivity component works within an already-established historical trajectory of rights, "learned rights," so to speak, that prevents such openness from digressing into cavalier vanguardism, i.e., an "anything goes" kind of discourse. Legal history has authority on what kinds of reasons are allowed in legal discourse. What differs in the discursive-proceduralist model is that legal history doesn't exhaust the kinds of reasons allowed. One might say that the procedures Günther proposes introduce a degree of reflexivity that loosens the grip of history on legal decisions, though still relies on it for authority. As such, the condition of universality, which is warranted by the universality inherent in rights, meets historical narrative in a way that causes a normative tension in legal reasoning. That tension preserves the authority of precedents while also "testing" them in an ongoing process of open discussion. In sum, the legitimacy of law doesn't completely break free from judicial discretion and highly technical judicial discourse, but does stretch its tentacles into the open arena of the public sphere.

Günther also suggests that Dworkin's principle of integrity is presupposed in a "principle for appropriateness argumentation."<sup>266</sup> In other words, appropriateness requires abandoning a single principle – equality – to cohere the whole legal system together. Judges must not treat cases or legal situations by reference to one grand principle of equality, but, rather, should situate cases in a "coherent set of principles" thematized through ongoing discourse.<sup>267</sup> This emphasizes

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<sup>266</sup> Günther, *The Sense of Appropriateness*, 283.

<sup>267</sup> *Ibid.*, 284.

the non-foundational aspect of Günther's thinking that is required for a more discursively open model of adjudication. In Günther's usage, he is not conceiving a theory of rights that come out of the appropriate application of norms. Appropriateness is a claim to correctness presupposed by anyone who asserts that a particular legal decision is wrong or right; appropriate and inappropriate are the equivalents to valid and invalid in a justification discourse. The concept of appropriateness thus serves to solve a problem of applying indeterminate norms without making the larger claim that one has a right to such rational application. A critic might say this model ultimately relies on a "right to an impartial decision," but such a right does not serve any substantive or foundational purpose, unlike Dworkin's equality; if anything, it merely provides a generic reason for why rational application is desirable in the first place. I will return to this general theme in the next chapter concerning Rainer Forst.

In closing, one final remark about the status of deontological rights is warranted. In an application discourse that reflects the same impartiality embedded in legal rights themselves, the relations between the norms do not change. Lefebvre is thus wrong to claim that the meaning of norms does not change, but the relations between them do change.<sup>268</sup> The former implies the latter. As binary-coded norms, rights retain their status as legal rights which are coequal with all other rights, regardless of their appropriateness to specific situations. Only the relation between a norm and a situation changes in an application discourse, not the relations between norms themselves. Otherwise, we would revert back to the rights-as-values thesis and its vulnerability to the specter of Schmitt.

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<sup>268</sup> Alexandre Lefebvre, "Habermas and Deleuze on Law and Adjudication," *Law Critique* 17 (2006): 389-414, 405.

## The “External” Component of Adjudication

With the internal component of rational adjudication secured through Günther’s application discourse, it is now necessary to explore the external half on which it indirectly relies. Put briefly, in order for the internal discursive procedures to be fulfilled, particularly its requirement of openness, rational adjudication must be met with external inputs from civil society. The Court’s claim to appropriateness, and, by extension, its proceduralist claim to correctness, implies that the lifeworld must meet it “halfway.”<sup>269</sup> As such, the internal-external components create a dynamic relationship between the Court and civil society. The Court secures rights to enable democracy, yet it depends on democracy to make correct decisions about the same rights that enable it. In order to meet its own judicial responsibilities, the Court thus requires having what I call a “custodial” relationship to democracy, which doesn’t entail “democratizing” the Court. Rather, in order for the Court to secure its own judicial responsibilities oriented towards adjudicating rights, it must indirectly rely on open communication with the public sphere. Put somewhat differently, in order for rights to be applied in a rational way, such that the impartiality of rights is preserved by impartial procedures of application, they presuppose an indirect link to democracy.

However, this “custodial” duty to democracy doesn’t place democracy above the law, for which Ely can be criticized, but instead places them in their proper co-original place. Thus, the Court must consciously attempt to preserve the openness of the public sphere through the elaboration and mobilization of rights that make democracy possible.<sup>270</sup> Habermas writes: “Such a *procedural understanding of the constitution* places the problem of legitimating constitutional

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<sup>269</sup> See Habermas, *Between Facts and Norms*, 358.

<sup>270</sup> *Ibid.*, 368.

review in the context of a theory of democracy.”<sup>271</sup> As he suggests, the custodial relationship does not prescribe that the Court watch over the constitution as its guardian, nor should the Court be a stand-in for a vacated people. What seems clear is that Habermas wants to keep the “firewall”<sup>272</sup> that separates the Court from civil society, maintaining the Court’s adjudicating autonomy, yet he also wants to “...ensure that the ‘sluice-gates’ through which public opinion gets channeled into the legally structured strong public sphere remain unobstructed.”<sup>273</sup>

Both are necessary. The Court must internally debate and decide hard cases using its own procedural-judgment about the law, but it also must be kept “under the critical gaze of a robust legal public sphere.”<sup>274</sup> Only under such a gaze is it possible to understand what Habermas means by the phrase “community of constitutional interpreters.”<sup>275</sup>

Although in Habermas’ framework the principle of democracy is intimately connected to his concept of the public sphere, I structure the remainder of this sub-chapter by parsing out an important difference in the context of the Court. Put briefly, the discursive picture illustrated above presupposes that the Court has a commitment to democracy and an obligation to be sensitive to the public sphere, which are different analytic concepts. The former concerns a.) how the Court interprets the principle of democracy itself; the latter concerns b.) the public’s influence on the Court. I will begin first with the principle of democracy.

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<sup>271</sup> Ibid., 264.

<sup>272</sup> I borrow this term from Simone Chambers.

<sup>273</sup> Christopher Zurn, *Deliberative Democracy and the Institutions of Judicial Review*, (New York: Cambridge University Press, 2007), 242. Though the language of “sluices” is his own, Habermas’ conception of civil society (weak public sphere) as something demarcated from the state (formal public sphere) comes largely from Jean L. Cohen and Andrew Arato, *Civil Society and Political Theory*, (Cambridge: MIT Press, 1992). For his specific remarks on Habermas’ view of civil society, see Andrew Arato, “Reflexive Law, Civil Society, and Negative Rights,” *Cardozo Law Review* 17 (1995-6): 785-789, 787.

<sup>274</sup> Habermas, *Between Facts and Norms*, 280.

<sup>275</sup> Ibid.

## a.) The Court vis-à-vis the Principle of Democracy

The custodial perspective of the Court maintains that decisions about democracy must be justified with reasons that preserve the procedures of democracy, not substantive preferences about how it must be optimized. If the Court attempts to “calibrate democracy in the vain search for an optimum solution” among competing interests, or appoints itself as the principal interpreter of the principle of democracy, the Court relinquishes its ability to provide procedural justifications based on rights.<sup>276</sup> This is problematic because its custodial role that rests on preserving the procedural basis of rights is transformed into something much more value-based, and, hence, sovereign. In other words, the Court must not dictate specific terms about democracy’s most favorable arrangement. At best, all it can do is preserve and mobilize the large procedural contours already established in the Constitution. Below is an example of a case in the U.S. Supreme Court that illustrates the tension between the Court and the implied claims regarding its custodianship to democracy.

Recently in *Evenwel v. Abbott*, the Court was faced with a case that challenged the meaning of the “one person, one vote” principle established in a sequence of rulings during the 1960s. The debate concerned whether state legislative districts in Texas should be apportioned based on the total population of a district or on the number of eligible voters within a district. Challengers argued that because there were more registered voters in rural areas than in urban, votes cast in rural areas had less representation than in urban areas, and they filed a lawsuit in contestation. The political consequence of basing the “one person, one vote” clause on eligible voters rather than total population was that it would deny representation to hundreds of thousands of residents, often minorities, living in the urban areas, many of whom were not

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<sup>276</sup> *Evenwel v. Abbott*, 578 U. S. 15 (2016) (Thomas, concurring).



eligible to vote (those who are undocumented, do not have citizenship, or are children). In addition, changing it as such would contradict historical interpretations of the 14<sup>th</sup> Amendment.

Ruling in favor of the Respondent, Justice Ginsburg remarks:

Nonvoters have an important stake in many policy debates—children, their parents, even their grandparents, for example, have a stake in a strong public-education system—and in receiving constituent services, such as help navigating public-benefits bureaucracies. By ensuring that each representative is subject to requests and suggestions from the same number of constituents, total population apportionment promotes equitable and effective representation.<sup>277</sup>

Interpreting her comments, Erwin Chemerinsky writes:

The court's decision is based on a basic principle of democracy: Everyone -- adults and children, voters and nonvoters, citizens and noncitizens -- deserves representation.<sup>278</sup>

Though it seems that the Court stood up for democracy in heroic fashion, Ginsburg's reasoning in the opinion rests almost exclusively on constitutional history, prior decisions, and established practice. It wasn't a decision laced with democratic rhetoric. Rather, it was a legal and historical argument about the established understanding of the Constitution's "plain objective" to procedural equality: "...equal representation for *equal numbers of people*" is the "fundamental goal for the House of Representatives."<sup>279</sup> As such, the decision was controversial not because of the actual decision, which was unanimous, but because it reflects how the Court views its own custodial relationship to the principle of democracy.

In one of two concurring opinions, Justice Thomas agreed that the precedents and constitutional history suggested a clear decision. His reservations stem from the Court's meddling with what he calls "experiments" of democracy that the "Constitution reserves for the

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<sup>277</sup> *Evenwel v. Abbott*, 578 U. S. 18-19 (2016). The court's decision was unanimous (8-0, with Scalia's seat still empty).

<sup>278</sup> Erwin Chemerinsky, "How Supreme Court Stood up for Democracy for Minorities," *Discors*, accessed April 5, 2016, <https://www.discors.com/opinions/4259-how-supreme-court-stood-up-for-democracy-for-minorities>.

<sup>279</sup> *Evenwel v. Abbott*, 578 U. S. 12 (2016), citing *Wesberry v. Sanders* 376 U.S. 18 (1964).

people.”<sup>280</sup> Put crudely, the optimal interpretation of the “one person, one vote” is essentially a political-democratic question, not a legal one. In Thomas’ view, though precedent is clear, the Court has no Constitutional basis to rule on the actual workings of democracy, i.e., whether the clause pertains to eligible voters or natural persons. For Thomas, this is essentially a value-judgment that Court has “arrogated to the Judiciary,” enabling itself to impose the “correct way to design a republican government.”<sup>281</sup>

The above example illustrates two implicit theses about the Court’s relation to the principle of democracy. In Ginsburg’s analysis, the Court indirectly sought to uphold the principle of fair and equal representation, which had the effect of protecting minorities from being left out of the political process. In this way, one might say the decision preserves the openness of the public sphere by enfranchising minority groups’ access to formal channels of decision-making. Under this interpretation, the Court’s commitment to democracy was manifest, albeit coincidental with legal precedent and established practice.

On the other hand, Thomas’ concurrence illustrates the difficulties involved with giving legal reasons about the specifics of democratic procedures, i.e., debates regarding their optimal arrangement. From Thomas’ view, the Court has historically overstepped its role by offering value-judgments about the workings of democracy, as evidenced by incorrect but nevertheless established precedents.<sup>282</sup>

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<sup>280</sup> *Evenwel v. Abbott*, 578 U. S. 14 (2016) (Thomas, J., concurring).

<sup>281</sup> *Ibid.*, 16.

<sup>282</sup> As a rejoinder to Justice Thomas, however, one might argue that if democratic procedures are used to legitimate democratic procedures, it would lead to a circular and self-referential “bootstrapping problem.” Without judicial intervention to ensure democratic procedures are fair and just, i.e., they do not trespass on the rights of minorities, the same forms of exclusion and inequality can be reproduced in democratic outcomes if present from the start. For a solution to this problem, see Kevin Olson, “Paradoxes of Constitutional Democracy,” *American Journal of Political Science* 51, no. 2 (2007): 330-343.

The custodial image of the Court I have drawn can thus only recommend so much. It is important that the Court not neglect how its decisions affect democracy, but it is also vital that the Court not impose its own conception of democracy onto the public. From the proceduralist standpoint, what the Court as a custodian to democracy means in practice must ultimately be left to public and courtroom debates. The indeterminate meaning of what the “custodial” image of the Court is, is indeed part of the same process of legal application in general. The same discursive procedures for applying law also apply to the Court’s self-understanding, involving the same internal and external components. From the discursive perspective, like the rights it adjudicates, the custodial responsibility of the Court itself must necessarily remain indeterminate and “open textured.”

## **b.) The Court vis-à-vis the Public Sphere**

Returning to what Habermas suggests by the phrase “community of constitutional interpreters,” it is now necessary to explore the second external component in some detail, namely, the relationship between the Court and the public sphere. Recall that Habermas suggests the lifeworld must meet formal institutions “halfway;” the court must justify itself not only to its inner circle of legal technicians, but also to the wider public, a “forum of citizens.”<sup>283</sup> However, upon close inspection, his comments provoke more questions than answers. It is not exactly clear what Habermas means by his cooperative model of adjudication. Is the cooperative model only an idealization of existing adjudication practices? If so, then like his theory of communicative action, is his idealization of adjudication grounded in the presuppositions that constitute the practice itself?<sup>284</sup> If so, Habermas needs to provide a more robust reconstruction

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<sup>283</sup> Habermas, “Reply to Symposium Participants, Benjamin N. Cardozo School of Law,” 1529.

<sup>284</sup> Habermas writes regarding communicative action: “Although idealizations only play a *methodological* role here, they do have a *fundamentum in re*, specifically in the presuppositions of rationality that undergird the very practice

regarding the implied logic of the act of adjudicating. What is clear, however, is his claim that “even a discourse-theoretic understanding of adjudication does not entail a demand to ‘democratize’ the courts.”<sup>285</sup> If so, then what does it entail?

Without doing a philosophical reconstruction of adjudication from the ground up, all one can do is look at current empirical practices to support the idealizations Habermas puts forth. One institutionalized way the Court engages with the public sphere is through briefs submitted by *amici curiae* (friends of the Court). Amicus briefs provide unsolicited information to the Court, informing the Court of perspectives and interests that are under-represented or unrepresented by the two opposing parties. The end result, in theory, is to help the Court have a more complete understanding of a case situation, which aids it in applying law impartially.<sup>286</sup> These briefs do have a formal influence on the Court’s decisions as they are sometimes cited in Court opinions.

However, there are also informal *de facto* ways *amici curiae* possibly influence the Court. In what she calls *ex parte* blogging, Rachel Lee claims that there is significant reason to believe that legal blogs influence Court opinions. At the very least, legal clerks and Justices are likely to come across such blogs while deliberating a decision on high-profile cases, which, for Lee, introduces ethical questions about Court prejudice.<sup>287</sup> Regardless of their informal status, *amici curiae* remain on the peripheries of the public sphere, given their highly specialized language. Are there other ways that laypeople can influence Court decisions? Since the internal

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of reaching mutual understanding.” In my view, this seems to be the same methodology he is using in his writing on adjudication. Ibid.

<sup>285</sup> Ibid.

<sup>286</sup> There are many legal organizations that submit amicus briefs, which represent certain group interests. The American Civil Liberties Union and The Landmark Legal Foundation are two examples.

<sup>287</sup> Rachel C. Lee, “Ex Parte Blogging: The Legal Ethics of Supreme Court Advocacy in the Internet Era,” *Stanford Law Review* 61, no. 6 (2009): 1535-1571.

procedures of the Court must be met by external discussions within the public sphere, we must keep looking for something more than *amici curiae* can provide.

In terms of public opinion, there is considerable agreement among social scientists about its indirect influence on the Court's decisions. The debate within the empirical literature is not on whether or not the Court is influenced by public opinion, but why it is influenced, how it is influenced, and by which kinds of cases it is more or less affected.<sup>288</sup> Also debated is the effect of public opinion on the legitimacy of the Court as an institution.<sup>289</sup>

I do not have the space to provide an overview of the far-reaching literature on these empirical topics, but one theme is worth criticizing. Public opinion polls are treated as more or less the primary way the Court gauges the general political environment in civil society.<sup>290</sup>

Given Habermas' criticism of public opinion polls, it is not clear what role, if any, they would have in a rational adjudicative framework. For Habermas, survey polls and public opinion-formation are two separate processes. The former is a statistical aggregate of isolated

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<sup>288</sup> For how public opinion is thought to *constrain*, but not direct Court decisions, see Barry Friedman, "The Will of the People and the Process of Constitutional Change," *The George Washington Law Review* 78, no. 6 (2012): 1232-1254; Barry Friedman, *The Will Of The People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*, (New York: Farrar, Straus and Giroux, 2009). For how public opinion constrains Court decisions in "salient" vs. "non-salient" cases, see Christopher Casillas, Peter K. Enns, and Patrick C. Wohlfarth, "How Public Opinion Constrains the U.S. Supreme Court," *American Journal of Political Science* 55, no. 1 (2011): 74-88. For how the general political environment and court-curbing legislation affects Court opinions, see Tom Clark, *The Limits of Judicial Independence*, (New York: Cambridge University Press, 2011).

<sup>289</sup> In Chemerinsky's view, the institutional history of the Court provides a buffer of stability for its decisions, even if unpopular. See Erwin Chemerinsky, "The Supreme Court, Public Opinion, and the Role of the Academic Commentator," *South Texas Law Review* 40 (1999): 943-956, 947.

<sup>290</sup> See Or Bassok, "The Supreme Court's New Source of Legitimacy," *University of Pennsylvania Journal of Constitutional Law* 16 (2013): 153-198, 157 and 197ff. Bassok makes a controversial claim that since the 1930s, the Court's legitimacy has become less based on its ability to proffer "correct" legal decisions, and more based on public support. On p. 198, he writes: "The Court's sociological legitimacy became its guiding star." This hypothesis rests on the premise that there exist no "correct answers" to hard cases. There is, however, evidence that the Court has included public opinion polls in its reasoning, *Atkins v. Virginia*, 536 U. S. 12 (2002). On the correlation between judicial outcomes and public opinion, see Benjamin J. Roesch, "Crowd Control: The Majoritarian Court and the Reflection of Public Opinion in Doctrine," *Suffolk University Law Review* 39 (2006): 379-423. See also, Michael Giles, Bethany Blackstone, and Richard L. Vining, Jr., "The Supreme Court in American Democracy: Unraveling the Linkages between Public Opinion and Judicial Decision Making," *The Journal of Politics* 70, no. 2 (2008): 293-306.

individuals; the latter arises from “focused public debate.”<sup>291</sup> Habermas understands public opinion in a normative sense. Public opinion is constructed by individuals who engage in larger public debates, weigh competing arguments, and take positions. It is something achieved by a mobilized public sphere. Survey polls do not reflect this aspect of achievement in their data; they are mute about the quality of debate that stand behind public polls.<sup>292</sup> As such, opinion polls often only provide a distorted view of social opinion. But without opinion polls, what heuristic is left for the Court to capture public opinion? Certainly Habermas would not trust the Court to adopt a sovereign attitude and claim interpretive authority over popular opinion. The idealizations Habermas imagines can only go so far empirically. Given this impasse, the phrase a “community of constitutional interpreters” remains highly idealized. If we are to understand this phrase by something more than the requirement that Justices should simply read newspapers, or subscribe to alternative news sources, Habermas’ desire to include the public in the Court’s decisions is heavily limited by formal institutional walls that block the sluices he envisages.

### **Back to Principles: A Right to Justification?**

My primary argument in this chapter is that the Court must consult the external components of adjudication in order to fulfill its own internal procedures of argumentation. The ironic consequence of this is that the Court must consult democracy and the public sphere in order to do its own job, to adjudicate rights. Rather than arguing for a “democratization” of the Court, this model shows the internal presuppositions of Supreme Court adjudication to require democratic input on its own terms. Put another way, we need not engage in an institutional-reform debate that some proponents suggest; rather, we only need to look at the internal logic of

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<sup>291</sup> See Habermas, *Between Facts and Norms*, 336 and 362.

<sup>292</sup> *Ibid.*, 362.

adjudication to reveal the intimate and dynamic links between adjudication, civil society, democracy, and law that already exist. Habermas' purpose is thus not to reconcile democracy with the Court per se, but to preserve the rationality of rights, which can only be done within a judicial-democratic context.

But the above thesis also recommends something much broader. What is at stake in Habermas' proceduralist view of adjudication is much more than simply rationalizing legal application. The adjudicative model indeed fits in within a much larger normative goal of legal reflexivity. Kevin Olson describes what this means in crisp fashion:

...a legal system must attempt to ensure the conditions necessary for its own legitimacy. These are conditions that provide all citizens with equal opportunities to author the laws. A system of laws is legitimate when it is structured so that such conditions could in principle be met. The system need not be perfect; it need only contain procedural mechanisms for its own correction. Rather than expecting a perfect system, we only expect one that contains institutionalized and incremental means for its own improvement. Legitimacy here is rooted in processes and procedures rather than states of affairs or fixed conditions.<sup>293</sup>

Indeed, the proceduralist model of adjudication depicted above is reflexive in the way Olson describes. The institutionalized procedures facilitate ways for correcting past judicial decisions, while at the same time, places judicial decisions under the watchful gaze of a critical society. It is hard to imagine legal reflexivity from a Court that employs only its own judgment sealed off from all outside influence; it is even harder to imagine legal reflexivity from a Court without idealized practices to orient its decisions. Indeed, Dworkin's Hercules may be able to produce correct decisions, but he cannot be trusted with being reflexive in the way Habermas suggests is

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<sup>293</sup> Olson, *Reflexive Democracy*, 187.

required. Though it is only a small part of the overall project of a “reflexive democracy,” legal adjudication certainly has an important responsibility within it.

Yet, one cannot help but notice the highly idealized character of Habermas’ conception of adjudication, and how there inevitably remains many questions regarding what is institutionally possible. Indeed, the discrepancy between his discursive idealizations and judicial reality are manifest, but this ought not lead one to the unfair conclusion that Habermas’ contributions are insignificant. On the contrary, what Habermas has done is draw out what we already expect the Court do, and follow that strain of thinking into the ideal realm. In colloquial terms, we expect the Court to: uphold rights, to protect minorities, to apply and not “make” law, to make impartial decisions with its ears open to diverse perspectives, to respect the boundary between itself and the legislature, to not isolate itself from the political environment within civil society, to understand that its rulings can affect democracy in significant ways, etc. None of these expectations are especially controversial. Certainly, however, the inevitable gaps between adjudicative idealizations and actual practices still require further research to close. The point is to not mistake those gaps, albeit wider in some areas than others, as fundamental flaws in the theory. Mistaking the discrepancy between actual practice and ideal theory is akin to criticizing the discrepancy between a living anteatr and a textbook’s illustration of one as an ideal-specimen.

Although there is certainly room to criticize the gap between theory and practice within Habermas’ judicial reconstruction, I prefer to criticize the value of his theory on its own terms. So let’s assume Habermas got it right; the gap between his adjudicative theory and actual practice is negligible because justices fully internalize the ideals of his reconstruction. The remaining problem is that Habermas has rendered the Court unable to decide in necessary



fashion like Dworkin's Hercules, a problem both for democracy and the Court as a branch of government, as suggested by the following questions.

How can his theory explain Court decisions that go against public reason? How can his theory explain or recommend a Court to interpret what public reason is? And, most trenchantly, how can the "fact" of decisionism be reconciled within his rational reconstruction? These questions are ultimately unanswerable in my reading of Habermas because the theory of adjudication he proposes is quite conservative. He seems to be so skeptical of judicial sovereignty -- and the decisionism that accompanies it -- that as a byproduct, the Court has lost its necessary critical and democratic-corrective functions. For example, on what theoretical basis ought the Court reject or eschew public opinion? Certainly there are times where the public is wrong, and as the only non-elected branch, the Court ought to act in accordance with its own legal judgment. But on a principled-basis, what is the normative hierarchy between legality, legitimacy, and justice? At various times, one of these three principles will inevitably take precedent over the other, but Habermas' scheme recommends little in terms of their normative ordering. Habermas has no account of morality outside public deliberation, and his account of legality is a complicated mixture of functional need and democratically legitimated norms. Without separating these concepts more concretely into three non-reconcilable domains, Habermas' reconstruction is difficult to operationalize in practice, and challenging to use as a tool of criticism and/or explanation.

In sum, we might say that Habermas's conception of a "Periclean" Court successfully solved the specter of Schmitt in Dworkin's Hercules. But as a result of reconstructing adjudication in discursive-theoretic terms, it also took away the Court's ability to make decisions that are legally necessary but illegitimate, or decisions that are illegal but moral. In other words,

by eliminating decisionism from a Court's internal perspective, it creates the impression that the Court should be unsuspecting of democracy and public deliberation. If the Court should indeed be suspicious of democracy, as is already implied by non-elected justices, it is unclear in Habermas' model how such suspicion ought to be operationalized. In my view, his discourse theory never adequately addressed the problem of power and how it skews deliberation along certain narratives of exclusion. The preconditions of universal discourse do help explain the telos of modernity as a process of formal expansion of rights, but only if one understands those narratives as such – progress, openness, equality, etc. – as not defined by who they exclude. All public deliberations privilege some voices over others, and sociologically speaking, those exclusions are usually systemic. For Habermas' faith in the universality of discourse to have normative purchase, the Court must act in ways that are sensitive to that exclusion. Otherwise, the discourse-theoretic conception of adjudication he proposes simply replicates ongoing exclusionary narratives that the Court is meant to correct. Though the Court can never solve the problem of inequality and exclusion from the bench, it can make decisions that contribute to their rejection. As such, a sort of normative decisionism is necessary even within a theory of deliberative democracy, although not the sort proffered by Dworkin's Hercules. What is needed is a theory of adjudication that understands judicial decisionism as part of its normative register, yet still holds onto a conception of the Court as being both responsible for and receptive to democracy and the public sphere generally. In my view, judicial decisionism only implies a rightful suspicion of democracy and public reason, not a negation of them.

In the next chapter, I trace a middle ground between Dworkin and Habermas by relying on Rainer Forst's theory of justification. As I will argue there, his theory suggests a conception of the Court that is normatively decisionistic yet has robust discursive character.

## Chapter 4: Rainer Forst: Adjudication as Justification

Habermas' rational reconstruction of adjudication that I presented in chapter 3 suggested an alternative to the monological model of Dworkin's Hercules. By grounding "correct" decisions in procedures rather than substantive principles, it obviated some of the problems of decisionism by reframing the question of "who decides?" as "who doesn't decide?" The benefit of Habermas' approach was that it no longer relied on a singular judge or court to interpret and decide cases in isolation from larger moral and political currents within civil society. To do so, Habermas' approach attempted to reconcile democracy and judicial decision-making, which, in theory, precluded the likelihood of a judiciary exercising sovereign authority. So, Habermas relieved liberals of some of their Schmittian anxieties by rooting out the decayed tooth of decisionism, and filled that cavity anew with rational procedures.

But as the anesthetic of rational reconstruction wore off, the celebrations became short lived. Due to its exclusive reliance on proceduralism and a discourse theory of application, the absence of decisionism created a void in the judiciary, rendering it unable to act against the status quo in times of need. By theorizing-out all available remnants of decisionism from the Court, what is leftover is a weak and conservative branch of government that is overly reliant on public reason. It lacks its own moral-legal compass to reject "public reason" when such reason is a façade of majority will. As it stands, Habermas' approach gives the Court no reason to be suspicious of public reason, and as a consequence, gives the Court no theoretical tools for distinguishing ideological domination from rational agreement. Dworkin's Hercules *can* do this, but only in a paternalistic and non-democratic way. Is there a third alternative?

What is needed is a way to reconcile the moral foundationalism of Dworkin's Hercules with the discursive-democratic framework of Habermas' rational reconstruction. To accomplish this, I turn to Rainer Forst's theory of justification. As developed below, Forst's thought carefully navigates between strong moral foundationalism (Dworkin) and weak amoral proceduralism (Habermas). My core claim, which I develop below, is that Forst can provide a rational, proceduralist account of the judiciary that can nevertheless act decisively in cases of moral injustice. If my account is correct, Forst can both restore the liberal faith in norm-proceduralism while also satisfying Schmittian "realists" who are suspicious of it.

What this chapter attempts to dismantle is the supposed antithesis between liberal proceduralism and Schmittian decisionism. A liberal conception of the Court implies decisionism in order for it to act in the ways citizens expect it to. The task is thus to reconcile the two without resorting to a benevolent yet autocratic figure like a Leviathan. As such, the Court must be dependent on public reason, but in a context-sensitive way that allows for decisive action against moral injustice. Including decisionism in a normative conception of the Court, however, heightens the need for public scrutiny over its decisions; indeed, it raises the stakes. But anxieties about what can go wrong, in my view, are no reason to limit ourselves to "safe" liberal theories that disallow for aberrations. The latent perils of decisionism are met with potential for the problems it might solve.

As a general note to the reader, this chapter is highly interpretive of Forst's work. Forst has not written much (or, in fact, anything) on many of the topics relevant to this dissertation. In my survey of the secondary literature on Forst, commentators are more often puzzled than relieved by his work because his highly abstract theory of justification is difficult to operationalize in practice. As such, this chapter attempts to operationalize his thought in more

concrete ways. As with any endeavor of this sort, I've taken interpretive liberties in some areas more than others in order to make concrete claims regarding their political and legal implications. The end result, I hope, is a contribution to Forst's work as well as a new perspective on adjudication.

This chapter is divided into five parts. First, I differentiate Forst's thought from Habermas'. Here I argue that rather than embarking on a research path that is wholly different from Habermas', Forst's work complements it. Although disagreements between the two remain – and are potentially trenchant in some areas more than others -- Forst takes up some of the thorny problems and questions that Habermas' theory is unable to address and answer. In addition, given the many criticisms of Forst's work so far, juxtaposing him against Habermas helps clarify Forst's own place within the Frankfurt School. Second, I develop and unpack Forst's moral theory of justification. This section forms the philosophical basis for his political claims. Third, I expand on his moral theory by drawing out the political ramifications of a moral constructivism. Fourth, I sketch five implications of how his moral and political theory can contribute to a theory of adjudication. Lastly, I expand on those five implications in more concrete ways. Here I develop a dialogue between three fictitious judges, Hercules, Pericles, and Pyrrho, who represent different adjudicative strategies as promoted by Dworkin, Habermas, and Forst, respectively. Here I bring together all three thinkers in one place, and ultimately argue that Forst provides us with the most critical and coherent adjudicative strategy.

In sum, Forst provides a moral and political foundation that gives us judge Pyrrho, who is conscious of how power can make the application of law unequal. Acting on such consciousness, Pyrrho can address such non-positive inequality by returning to Schmitt's decisionism, yet guided by normative considerations on which liberalism depends.

## Situating Forst vis-à-vis Habermas

Excluding *Contexts of Justice* published in English in 2002, the major translations and writings in English by Rainer Forst have all appeared since 2011.<sup>294</sup> Especially since this time, Forst's work has attracted the attention of many Anglo-speaking universities, and with that attention has come much criticism. His work has been criticized for being utopian,<sup>295</sup> lacking democratic input,<sup>296</sup> having latent class-bias,<sup>297</sup> being power-blind,<sup>298</sup> foundationalist,<sup>299</sup> archaically Platonic, and excessively Kantian.<sup>300</sup> Although I am sympathetic to these criticisms, they are less persuasive once Forst's work is situated as a continuation of many of the themes developed by his dissertation advisor, Jürgen Habermas. Although Forst's work is actually located within in a much larger intellectual constellation – that of Immanuel Kant, John Rawls, Axel Honneth, and Charles Larmore, to name only a few – positioning his work against Habermas' discourse theory provides a necessary starting point to later explore the interesting

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<sup>294</sup> Forst writes in both English and his native German. A brief overview of Forst's book publications is as follows: *Contexts of Justice: Political Philosophy beyond Liberalism and Communitarianism*, trans., John M. M. Farrell, (Los Angeles: University of California Press, 2002) (*Kontexte der Gerechtigkeit*, 1994); *The Right to Justification: Elements of a Constructivist Theory of Justice*, trans., Jeffrey Flynn, (New York: Columbia University Press, 2012) (*Recht auf Rechtfertigung*, 2007); *Justification and Critique: Towards a Critical Theory of Politics*, trans., Ciaran Cronin, (Malden: Polity Press, 2014) (*Kritik der Rechtfertigungsverhältnisse*, 2011); *Toleration in Conflict: Past and Present*, trans., Ciaran Cronin, (New York: Cambridge University Press, 2013) (*Toleranz im Konflikt: Geschichte, Gehalt und Gegenwart eines umstrittenen Begriffs*, 2003); Wendy Brown and Rainer Forst, *The Power of Tolerance: A Debate*, eds. Luca Di Blasi and Christoph F.E. Holzhey, (New York: Columbia University Press, 2014); Rainer Forst et al., *Justice, Democracy and the Right to Justification: Rainer Forst in Dialogue*, (New York: Bloomsbury, 2014).

<sup>295</sup> Leah Ypi, "Two pictures of Nowhere," *Philosophy and Social Criticism* 41, no. 3 (2015): 219-223.

<sup>296</sup> Simone Chambers, "Democracy and critique: Comments on Rainer Forst's *Justification and Critique: Towards a Critical Theory of Politics*," *Philosophy and Social Criticism* 41, no. 3 (2015): 213-217.

<sup>297</sup> Kevin Olson, "Complexities of Political Discourse: Class, Power and the Linguistic Turn," in Rainer Forst, *Justice, Democracy and the Right to Justification: Rainer Forst in Dialogue*, (New York: Bloomsbury Academic, 2014), 87-102.

<sup>298</sup> Amy Allen, *The End of Progress: Decolonizing the Normative Foundations of Critical Theory*, (New York: Columbia University Press, 2016).

<sup>299</sup> Stephen White, "Does Critical Theory need strong foundations?," *Philosophy and Social Criticism* 41, no. 3 (2015): 207-211.

<sup>300</sup> Seyla Benhabib, "The Uses and Abuses of Kantian Rigorism. On Rainer Forst's Moral and Political Philosophy," *Political Theory* 43, no. 6 (2015), 777-792.

differences between Forstian and Habermasian theories of adjudication. So what is Forst doing that is new?

First, Forst claims that his theory fills a gap within Habermas' discourse theory. He seeks to address a question that Habermas' theory always struggled to answer: Why engage in dialogue or discourse?<sup>301</sup> In Habermas' theory, intersubjective obligations arise in and through discourse, such that valid norms are only binding after they have achieved consensus in rational discourse. Communicative reason creates "discursively justified norms."<sup>302</sup> But why engage in such discourse in the first place? In the most abstract sense, if intersubjective obligations arise in and through discourse, there can be no normative obligations prior, implying that there is no fundamental duty – beyond those that come from discourse itself – to participate in discourse in the first place. In Forst's words, there is a gap between the "weak" motivating force to engage in discourse and the "strong" obligatory force to follow norms established therein.<sup>303</sup> Even if one accepts Habermas' formal-pragmatic thesis regarding the structure of communication, those pragmatic features offer no explanatory power to explain why one should engage in dialogue, especially if one is better off staying outside of it for strategic reasons. In order to provide a solution, Forst turns to the classical concept of practical reason and an updated, discursive variation of Kant's categorical imperative. Forst writes:

For [Habermas'] approach sees practical reason as no longer being the source of moral norms or duties, as communicative reason only implies the rational principles and criteria that are required to arrive at discursively justified norms. This opens up a lacuna between the strong morally binding force of moral norms

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<sup>301</sup> Habermas distinguishes communication/dialogue from discourse, claiming the latter is motivated primarily by disagreement. This distinction is not important for my purposes, so I use them interchangeably.

<sup>302</sup> Rainer Forst, "The Right to Justification: Moral and Political, Transcendental and Historical," *Political Theory* 43, no. 6 (2015): 822- 837, 823.

<sup>303</sup> *Ibid.*, 823.

generated in and through discourse and the weak binding force of the principles of communicative rationality, or in short, the discourse principle.<sup>304</sup>

Put differently, the obligatory character of norms is contingent on only the “weak binding force” to actually enter into discourse in the first place. Forst addresses this problem by turning back to Kant’s categorical imperative to provide an obligatory moral duty to engage in discourse, i.e., to theorize a duty for one’s actions, *before* any discourse actually begins as a requirement of practical reason. He writes:

In my view, Habermas’s version of discourse ethics would amount to Kantianism without a categorical imperative if there were no prior moral duty to engage in proper justificatory discourse thinking.<sup>305</sup>

In his reconstruction of Kant, the categorical imperative not only obliges obedience to moral maxims, but it also “...posit[s] a moral duty to use the categorical imperative to figure out what the right thing to do is.”<sup>306</sup> In Forst’s view, this amounts to a categorical moral duty to engage in discourse, which, in his terminology, is a duty of justification when one’s action affects another. Put differently, his reconstruction of the categorical imperative amounts to a “right to justification” that is both generally and reciprocally valid.<sup>307</sup> In addition, Forst puts an intersubjective twist on Kant’s categorical imperative, claiming that moral duty is owed not to moral law *per se*, but to others recognized as “reason-deserving, reason-requiring, reason-giving, and thus at the same time vulnerable, finite beings.”<sup>308</sup> In other words, the categorical imperative

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<sup>304</sup> Ibid.

<sup>305</sup> Ibid.

<sup>306</sup> I inverted the original quote by Jeffrey Flynn, which started as follows: “[Kant] *does not* posit a moral duty...” (my emphasis). Flynn disagrees with Forst’s reading of Kant on this subject. Jeffrey Flynn, “On the Nature and Status of the Right to Justification,” *Political Theory* 43, no. 6 (2015): 793-804. For Forst’s reply, see “The Right to Justification: Moral and Political, Transcendental and Historical,” 824.

<sup>307</sup> “*Reciprocity* means that no one may refuse the particular demands of others that one raises for oneself (reciprocity of content), and that no one may simply assume that others have the same values and interests as oneself or make recourse to ‘higher truths’ that are not shared (reciprocity of reasons. *Generality* means that reasons for generally valid basic norms must be shareable by all those affected.” Forst, *The Right to Justification*, 6.

<sup>308</sup> Forst “The Right to Justification,” 825.



must be motivated out of one's *recognition* of others' dignity, not out of one's *cognition* of one's own rational capabilities. He writes: "My Kantianism is intersubjective and guided by respect for the *other*...as a 'concrete other.'"<sup>309</sup>

At its base, the right to justification is a moral right anterior to discourse, or to put it another way, a moral right that constitutes discursive procedures. By interpreting Kant in this way, Forst is able to answer "why engage in discourse?" and "why justify?" by first answering the more fundamental question "why be moral?"

Given the autonomy of morality that Forst ascribes to the concept, there can be no external motivation for morality; moral actions can only derive from internal moral motivations, or a desire to act morally. Otherwise, as Forst claims, we are limited to reconstructing a "moral language game" and must look for non-moral reasons why someone would enter discourse.<sup>310</sup> Here Forst provides a moral justification for why those in positions of power, who would otherwise personally benefit from not engaging in discourse, should justify their actions through discourse.<sup>311</sup>

Put tersely, Forst maintains that practical reason not only compels us to follow justified norms, it also compels us to enter into practical discourse when our actions affect another. The focus on actions and not merely norms illustrates Forst's shift away from communicative reason, advanced by Habermas and Karl-Otto Apel, back to Kant's notion of practical reason. Though norms are the domain of discourse, actions are the domain of morality and justification. By incorporating the obligatory justifications of actions into his normative register, it provides Forst with the ability to reach behind discourse theory and establish a foundation on which it rests.

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<sup>309</sup> Ibid., (original emphasis).

<sup>310</sup> Ibid., 823.

<sup>311</sup> For one place Habermas engages with the issue of power, see Jürgen Habermas, "Some Questions Concerning the Theory of Power: Foucault Again," in *The Philosophical Discourse of Modernity*, trans., Frederick G. Lawrence, Intro., Thomas McCarthy, (Cambridge: MIT Press, 1990).

The moral right to justification, as a pre-discursive right, sets into motion the discursive procedures that both protect individual autonomy by guarding it against social harms in the liberal sense, and also express individual autonomy as a right to self-determination, a point I will return to below.

## **Moral Constructivism and the Right to Justification**

Though I have already broached some of the major themes in Forst's work by situating them against Habermas' discourse theory, these themes and concepts are worth developing in more detail given their centrality to his overall moral and political constructivism. It is necessary to first introduce Forst's basic terms. What does Forst mean by a "constructivist" theory of justice?

The term "constructivism" or "Kantian constructivism" is a methodological approach coined by John Rawls,<sup>312</sup> and is often juxtaposed with the "reconstructivism" or "rational reconstruction" utilized by Jürgen Habermas.<sup>313</sup> The differences between the two methodologies are not agreed upon in any comprehensive way, so I differentiate the two crudely as follows.<sup>314</sup>

Constructivism is a philosophical method that relies on a notion of practical reason, which provides agents access or "insight" into objectively valid moral, legal, or political

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<sup>312</sup> See John Rawls, "A Kantian Constructivism in Moral Theory," *The Journal of Philosophy* 77, no. 9 (1980): 515-572.

<sup>313</sup> See chapter 3 of this dissertation for Habermas' rational reconstruction of rights.

<sup>314</sup> I have found discrepancies between how these terms are used. For various literature on this subject, see Jürgen Habermas, "Reconstruction and Interpretation in the Social Sciences," in *Moral Consciousness and Communicative Action*, trans., Christian Lenhardt and Shierry Weber Nicholsen, intro., Thomas McCarthy, (Cambridge, MIT Press, 1990); Thomas McCarthy, "Kantian Constructivism and Reconstructivism: Rawls and Habermas in Dialogue," *Ethics* 105, no. 1 (1994); Kevin Olson, "Complexities of Political Discourse," 100; Michael Buckley, "Constructivism," *Encyclopedia of Global Justice*, accessed August 8, 2016, <http://www.iep.utm.edu/poli-con/>; Bernhard Peters, "On reconstructive legal and political theory," *Philosophy & Social Criticism* 20, no. 4 (1994): 101-134.

principles.<sup>315</sup> Those principles then make it possible to “construct” procedures from which standards of judgment can be deemed reasonable or rational. As such, political constructivism means devising procedures of justice based on principles of justice that are in accordance with more fundamental moral procedures and principles, respectively. So, a constructivist approach begins with some basic moral insight, and then “constructs” political procedures and principles outwards. What some find problematic about this approach, however, is that it can be interpreted as resting on a metaphysical foundation that arbitrarily privileges some principle over others (e.g., law over democracy, individuality over community, equality over autonomy, etc.) Another common criticism is that its foundationalism cannot criticize itself (i.e., it is non-reflexive and tautological) and so it suspiciously resembles an observer-oriented, paternalistic approach whereby the philosopher “knows best.” This sort of colonial rationality has been criticized by recent developments in critical race theory, post-colonial studies, and studies on gender and sexuality. In response, a constructivist would argue that without a universal moral perspective, one cannot make strong normative criticisms of injustices happening within society, reducing injustice to mere relative injustice.

Reconstructivism begins not with a principle-moral base, but by “reconstructing” an existing practice with the normative ideals the practice tacitly presupposes. Those tacit presuppositions are practical “idealizations,” i.e., what agents ideally strive for even if they don’t succeed. As a normative approach, it makes criticisms based on the gap between what agents presuppose a practice to ideally accomplish, and the reality of what it actually has accomplished. This approach relies heavily on interpreting the aims and inherent logic of human practices from

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<sup>315</sup> Forst uses the phrase “moral insight” as the “‘immediate’ awareness of the moral law,” and is careful to distinguish it from moral realism. Reason’s fallibility makes it impossible to devise “‘ultimate’ and unquestionably certain grounds in procedures of moral justification.” See Forst, *The Right to Justification*, 36, 52 (citing Kant, *Critique of Practical Reason*, 27), and 39.

the perspective of the agents participating within them. Defenders of this method praise its ability to make normative judgments about political action from the participant's own perspective, i.e., whether or not the action is in accordance with what the participant presupposes. The upshot is that the theorist is relieved of assigning moral or political principles from above, and, instead, interprets such principles from the agent's own self-understandings. The problem, however, is that by being confined to the participant's perspective, a theorist cannot criticize practices from a non-participant perspective. As such, reconstructivism can lead to a kind of interpretive conservatism because it lacks objective criteria often necessary to produce radical criticism. One might say this approach allows for more social-scientific empiricism, but at the cost of theorizing ideal theory.<sup>316</sup>

Forst explicitly aligns himself with the constructivist approach, but “reconstructs” constructivism in a way that places a heavy emphasis on principles derived from practice, not metaphysics: “It is a *practical, not a metaphysical*, constructivism.”<sup>317</sup> Forst suggests that we need not accept moral realism, “[ontologize] regulative ideas,” or commit ourselves to producing a “world of norms” in order to ground a constructivist theory of justice.<sup>318</sup> Rather, following Kant, he suggests that the validity of regulative ideas rests not on their ontology, but on their ability to serve our practical purposes, namely, living and acting freely. Forst has received rightful criticism on this point: How is a pre-discursive right to justification grounded in practice when it precedes practices of justification themselves? In other words, on what basis is the “right to justification” rightful?

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<sup>316</sup> The discrepancy between constructivism and reconstructivism is partially drawn from Olson, “Complexities of Political Discourse,” 100.

<sup>317</sup> Forst, *The Right to Justification*, 50 (original emphasis).

<sup>318</sup> *Ibid.*

In order to ground his “right to justification,” Forst relies somewhat on an anthropological account of what it means to be human, i.e., humans as creatures of justification. In various places, he claims justification is a primary part of human nature, claiming that as “justificatory beings,”<sup>319</sup> we have a “foundationalist insight”<sup>320</sup> into justification as our “second nature” that marks us as “rational animals.”<sup>321</sup> In other places, he suggests justification is something we “learn to recognize” only after being “properly socialized.”<sup>322</sup> Noting the difficulty in reconciling these two claims, it seems that Forst makes a definite claim about human nature, yet also claims that the right to justification is a historical and sociological achievement developed over time.<sup>323</sup> Habermas and Honneth relied on the latter claim, suggesting the “genesis of modernity” ushered in novel ideas of freedom and interpersonal recognition arising from various political achievements, namely the French and American Revolutions.<sup>324</sup> Yet, by turning back to Kant and the classical concept of practical reason, Forst makes the much stronger claim that moral autonomy – and the corresponding right to justification – runs deeper than a historical contingency, yet not so deep that it is a metaphysical, natural law.<sup>325</sup> He writes that the right to justification is a “...basic concept of practical reason...a practice of moral and political autonomy...”<sup>326</sup> The only way to reconcile the human nature claim with the historical claim, in my reading, is to say that the right to justification is a modern achievement about what it means

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<sup>319</sup> Ibid., 1.

<sup>320</sup> Ibid., 77.

<sup>321</sup> Ibid., 38 and 61.

<sup>322</sup> Ibid., 61.

<sup>323</sup> For his historical argument concerning about the right to justification, see Forst, *Toleration in Conflict*.

<sup>324</sup> Forst, *The Right to Justification*, 74.

<sup>325</sup> He calls his position “metaphysically innocent” (*metaphysisch unschuldig*) (my translation), Rainer Forst, “Gerechtigkeit ist ein Ständiger Prozess,” interview with Tobias Hürter and Thomas Vašek, *Huhe Luft Magazin*, 2013, 66, accessed July 28, 2016, [http://www.hoheluft-magazin.de/wp-content/uploads/2013/07/HL0413\\_Interview.pdf](http://www.hoheluft-magazin.de/wp-content/uploads/2013/07/HL0413_Interview.pdf).

<sup>326</sup> Rainer Forst, “The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach,” *Ethics* 120, no. 4 (2010): 711-740, 712. For Forst’s historical reconstruction of the moral basis of rights, see 717-719.

to be human. Indeed, this is quite different from Habermas' post-metaphysical reading of history that made no claims about humans per se, instead focusing on the norms created between them.

The right to justification is thus a moral right that preserves the dignity of the moral person. By placing primary emphasis on human dignity, moral duty is motivated by one's recognition of another as a person worthy of that dignity, not by norms or maxims per se.<sup>327</sup> As noted above, the motivation behind Kant's categorical imperative is derived from the unconditional and rational basis of a maxim as dictated by practical reason. By contrast, Forst's reconstruction of Kant is based on a "respect for persons," not a "respect for the law."<sup>328</sup> So what difference does it make? The difference rests not in the effect, i.e., people acting morally, but in the motivation behind acting as such. Like Habermas' intersubjective appropriation of Kantian monological rationality, Forst grounds Kantian rationality in a cognition and recognition of others as human beings and moral persons, respectively. The consequence of this is that the motivation to recognize one's duty to act morally originates not from the cognition of moral law, but from the recognition of others as equally autonomous and vulnerable creatures. Such recognition is thus not dictated by reason in an *a priori* fashion, but rather, is a learned insight that has *ex posteriori* form. The emphasis on "respect for persons" requires being socialized into making moral choices, something that can only be learned with the experiential awareness of human suffering. Perhaps Forst implicitly relies on a Rousseauian notion of human perfectibility, which speaks to the moral potential in people and the need for its cultivation through education and habituation, when he writes: "Morality is indeed a reciprocal *accomplishment*."<sup>329</sup>

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<sup>327</sup> Forst, *The Right to Justification*, 58.

<sup>328</sup> *Ibid.*

<sup>329</sup> *Ibid.*, 61 (my emphasis).

Despite his experiential and anthro-centric constructivist interpretation of Kant, Forst remains faithful to Kant's original insight regarding the autonomy of morality. The autonomy of morality means, first, that there is no higher authority than morality itself.<sup>330</sup> As such, no action that contradicts morality is valid. Second, the autonomy of morality requires that there can be no external motivation to morality; the motivation to act morally can only come from the desire to act morally.<sup>331</sup> In terms of recognizing others as moral persons and acting towards them accordingly, those actions must only be motivated by the willful recognition of others as moral person combined with the willful desire to treat them accordingly. The right to justification is thus a highly vulnerable right, one that is constantly threatened by non-moral strategic action, non-recognition, domination, and/or violence. How is his moral theory useful if it is so vulnerable to instrumental political action? In order to address this question, one must first address the connection between his moral constructivism and his political constructivism, which I turn to below.

### **Political Constructivism and the Right to Justification**

Without conflating the moral and political, Forst claims his moral constructivist framework is the "normative core" of his political theory. He writes that whereas moral constructivism recommends the "...basic legal, political, and social structure of justice that is reciprocally and generally nonrejectable,"<sup>332</sup> political constructivism is the "...democratic justification of the concrete legal, political, and social relations among citizens."<sup>333</sup> The difference seems to be that the former outlines the basic structure of justification of political

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<sup>330</sup> Ibid., 32.

<sup>331</sup> Ibid., 32-3.

<sup>332</sup> Ibid., 175.

<sup>333</sup> Ibid.

order, while the latter leaves space open for democratic contestation about the political content within that order. Forst writes: "...a constitution is both a result of a moral construction of a just basic structure and the groundwork for the political construction of a just political and social order."<sup>334</sup>

In narrower terms, the moral right to justification "...grants persons a moral veto against unjustified actions or norms," laying the groundwork for a political theory oriented around contestation and dissent whereby citizens internalize these moral rights and express them politically by saying "no!" to unacceptable justifications.<sup>335</sup> In other words, the moral foundation recommends a conception of politics whereby citizens exercise their moral right to justification by challenging the validity of justifications in an on-going fashion. The moral and the political are not opposing concepts that compete for deontological vs. teleological space; rather, they are both entailed in Forst's concept of justification. Justification is both a moral right and a political instrument as noted by the concept "noumenal power."<sup>336</sup>

First, noumenal power is the "power of justification" and its ability to affect another who would otherwise act differently.<sup>337</sup> He writes: "Power is the art of binding others through reasons; it is the core phenomenon of normativity."<sup>338</sup> Second, noumenal power is a "neutral" concept that exists in a continuum of forms, such that justifications can depend on a wide range of reasons, from ideological to emancipatory.<sup>339</sup> Third, it exists without "regard to its positive or

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<sup>334</sup> Ibid., 182.

<sup>335</sup> Ibid., 67. Stephen White also interprets Forst's political theory as a theory of contestation and dissent. See White, "Does Critical Theory need strong foundations?"

<sup>336</sup> Rainer Forst, "Noumenal Power," *The Journal of Political Philosophy* 23, no. 2 (2015): 1-17. See also Amy Allen, Rainer Forst & Mark Haugaard, "Power and reason, justice and domination: a conversation," *Journal of Political Power* 7, no. 1 (2014): 7-33.

<sup>337</sup> Rainer Forst, "Noumenal Power," 2 and 5.

<sup>338</sup> Rainer Forst, *Justification and Critique: Towards a Critical Theory of Politics*, 11.

<sup>339</sup> Forst, "Noumenal Power," 5. Forst is careful to distinguish power from other closely related concepts. Similar to how Arendt distinguished power from strength, force, authority and violence, Forst separates power from rule,



negative evaluation,” such that it isn’t necessarily “reflexively constructed.”<sup>340</sup> Lastly, noumenal power is connected to topics of justice as a good in and of itself: in Forst’s scheme, the goal of justice is not the equal distribution of goods, but the just distribution of “justificatory power” in society.<sup>341</sup>

Broadly speaking, noumenal power is a descriptive concept used to explain existing social relations. It is also a normative concept that prescribes the justificatory conditions of justice and injustice. Finally, it is a critical concept used for a.) “*exposing unjustifiable social relations*,” b.) revealing “*false (potentially ideological) justifications of asymmetrical social relations...*,” c.) uncovering how categories of class, gender, race, etc. create “traditions of exclusion,” and d.) diagnosing the failures of existing social and political structures in order to “unveil” and ultimately “change unjustifiable social relations.”<sup>342</sup>

To begin with its normative part, there are two aspects of injustice tied to justification. One is more fundamental than the other. First-order injustice occurs when one is affected by an action but the agent delivers a “justification” that is unacceptable by the recipient.<sup>343</sup> Colloquially, we might say the agent didn’t justify his action, but only gave an excuse to the recipient to appease him/her. Second order injustice, which is more damaging than the first, occurs when one is “sealed off” from the practices that determine what count as good or bad

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domination, coercion, and violence (his notion of violence as the anti-thesis of power is consistent with Arendt’s). *Power* is the ability to influence action via reasons; *rule (Herrschaft)* is the political power over social order via governing institutions; *domination (Beherrschung)* is the systematic, asymmetrical relations of justification; *coercion (Zwang)* occurs when certain persons are excluded from the public space of reasons for ideological reasons; and violence (*Gewalt*) is the antithesis of power, when the discursive-noumenal force of power is replaced by physical force. Forst, *Justification and Critique*, 10. For Forst’s criticism of Arendt, see Forst, “Noumenal Power” 4 and Forst, *Justification and Critique*, 175.

<sup>340</sup> Forst, “Noumenal Power,” 5 and 2.

<sup>341</sup> Forst, *Justification and Critique*, 11-12.

<sup>342</sup> *Ibid.*, 120 (original emphasis).

<sup>343</sup> For a theoretical differentiation between justification and excuse as used in criminal law literature, see George P. Fletcher, “The Right and the Reasonable,” *Harvard Law Review* 98, no. 5 (1985): 949-982, 954-957.

justifications in the context of a particular practice. For example, I might not only dislike your justification, but also find myself in a position where I am unable or disallowed to challenge it. In broader social terms, the latter form of injustice occurs when one group – that is subordinated to another based on race, gender, sexuality, language, culture, religion, etc. – is excluded from participating in the “narratives of justification” that support political institutions. I will return to this point below. In sum, both injustices violate a person’s dignity. But whereas first order injustice violates a person’s right as a “*recipient*” of justice, second order injustice violates one’s autonomy as an “*agent*” of justice.<sup>344</sup>

Second order injustice essentially renders individuals “invisible” by excluding them from decision-making processes that decide justification criteria.<sup>345</sup> Far from being a moral foundationalist with no account of democracy, Forst’s conception of justice requires democratic inclusion in order to fulfill his requirements of human dignity. If one thinks of the entire social structure as something in need of consistent and sustained criticism regarding its validity, a right to justification is too passive to make any critical noise; citizens as social agents must also be entitled to a right to “codetermine” the criteria of such justifications, and by extension, “codetermine the social structure” itself.<sup>346</sup> As such, the [passive] right to justification implies an [active] “right to democracy.”<sup>347</sup> In the political realm, the right to justification is transformed from a mere moral right to a political right of participation, the right to be not ignored in the justifications of political, legal, and economic institutions. The moral right to justification is grounded in a conception of the moral person, one who is a “reason-giving and reason-deserving

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<sup>344</sup> Paraphrased from: “This dignity is violated when individuals are regarded merely as recipients of redistributive measures and not as independent agents of justice.” Forst, *Justification and Critique*, 35.

<sup>345</sup> *Ibid.*, 22 and 124. On the notion of “invisibility” Forst cites Axel Honneth, *Unsichtbarkeit: Stationen einer Theorie der Intersubjektivität*, (Frankfurt am Main: Suhrkamp, 2003).

<sup>346</sup> Forst, *Justification and Critique*, 64. Forst cites the Levellers to give this historical meaning, 64n.83.

<sup>347</sup> Forst, “The Justification of Human Rights,” 730.

being.”<sup>348</sup> Yet, this right to justification is then “socially secured” by a political right to democracy that is an “...undeniable right to full membership in a society,” which not only protects one’s dignity from unjustified actions, but also enables one’s autonomy of self-determination.<sup>349</sup> Forst calls this the double-reflexivity of rights.<sup>350</sup> Whereas Habermas conceptualized the relation between rights and democracy as being harmonized by the legal form itself, Forst claims the right to justification is “the *only* source for the justification both of basic human rights and of procedures of democratic self-government.”<sup>351</sup> In his rendition of Habermas’ co-originality thesis, the right to justification socially secures individuals as both “*recipients*” and “*agents*” of justice;<sup>352</sup> or to put it in Dworkin’s words, secures not just “equal treatment” of individuals but also their “treatment *as equals*.”<sup>353</sup>

The radical critique that Forst advances is the idea of reciprocal and general justification. But unlike in purely moral matters, politics is a messy place, and it is doubtful that any justification for a political decision, action, or institution can ever meet this standard. Nevertheless, the reciprocity and generality criteria are meant to “test the boundaries” of existing narratives of justification, exposing their ideological and arbitrary character, and replacing them with more inclusive justifications.<sup>354</sup> Indeed, while consensus and agreement are important to his political constructivism, the normative core of his theory first and foremost implies a right to say “no!” to unjustified power, rather than trying to find agreement and consensus within those

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<sup>348</sup> *Ibid.*, 722.

<sup>349</sup> *Ibid.*, 737 and 730. Forst writes: “Thus, human rights not only protect the autonomy and agency of person; they also give political expressionism to their autonomy.” Forst, *Justification and Critique*, 39.

<sup>350</sup> Forst, “The Justification of Human Rights,” 737.

<sup>351</sup> Forst, *The Right to Justification*, 115.

<sup>352</sup> Forst, *Justification and Critique*, 121.

<sup>353</sup> For accuracy, Dworkin uses the term “treatment as an equal.” Ronald Dworkin, *Taking Rights Seriously*, (Cambridge: Harvard University Press, 1978), 273 and chapter 2 of this dissertation (my emphasis).

<sup>354</sup> See Rainer Forst, “A critical theory of politics: Grounds, method, and aims. Reply to Simone Chambers, Stephen White and Lea Ypi,” *Philosophy and Social Criticism* 41, no. 3 (2015), 225-234, 228.

structures. The moral right to justification thus transforms into the political practice of no-saying.

Deriving from the requirement of reciprocity and generality, no-saying is ultimately the major reflexive component of Forst's political constructivism. But who is doing the no-saying? And to whom are they saying "no!"? These questions are left open within Forst's thought. In my view, all no-saying, whether derived from citizens or actors within sub-systems, is directed towards what I call "narratives of justification" that form the noumenal-power base of all political, economic, and social institutions. Since citizens are only partially equipped to enact change in non-democratic institutions, e.g., the judiciary that has no formal democratic inputs, we must understand the "who" of no-saying as also occurring within subsystems themselves in order for subsystems and civil society to meet each other "halfway." I am not arguing that citizens play no role; rather, since their role is limited by institutions with no formal inputs, their ability to challenge complex and multifarious narratives of justification is limited. From a normative standpoint, we must exploit the reflexive components within formal institutions themselves, even those that are commonly referred to as functionalist, self-referential, or autopoietic.<sup>355</sup> In the context of adjudication, this means placing some normative responsibility on judges themselves.

Forst suggests that a social system is held together by a structure of justification, an "...ensemble of practices of justification."<sup>356</sup> These subsystems include: the legal system, the administrative/bureaucratic system, medicine/healthcare, the market economy, the education

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<sup>355</sup> Gunther Teubner understands the self-referentiality of autopoietic systems not as closed systems, but as dependent upon outside influence, and thus open and reflexive. See Gunther Teubner, "Autopoiesis in Law and Society: A Rejoinder to Blankenburg," *Law & Society Review* 18, no. 2 (1984): 291-301. See also Gunther Teubner, "Self-subversive Justice: Contingency or Transcendence Formula of Law?," *The Modern Law Review* 72, no.1 (2009): 1-23.

<sup>356</sup> Forst, *Justification and Critique*, 5.

system, formal government agencies, etc. All of these have their own “narratives of justification,” which revolve around various core ideas: justice and equality (legal system); efficiency (administration); bodily and mental health (medicine); prosperity and private property (market economy); opportunity and socialization (education); order and accountability (executive agencies), etc. Though this list isn’t exhaustive, this is what Forst seems to suggest by the phrase, the “...entire structure of an order of justification,” which includes degrees of arbitrariness as allowed by his concept of noumenal power.<sup>357</sup> Similar to his language of “contexts of justice,” from the sociological point of view, one can analogously name these narrative processes “contexts of justification” or “contexts of narration” to highlight the micro-histories of each subsystem.

No-saying means ultimately saying “no!” not only to individual political or legal decisions, but to the narratives that validate those decisions. It is a much more abstract notion of no-saying that criticizes the ideological base of many sub-systems, their arbitrary assumptions, the groups left out of their historical narratives, and the parochial values that benefit some groups more than others. Those narratives are what contain the “noumenal power” Forst speaks of, and should be interpreted as the primary objects of political contestation. Otherwise, a theory of no-saying will only address the symptoms of the cause, not the narratives as the cause itself. I will return to this topic in a discussion of race and law in the last section.

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<sup>357</sup> Ibid., 108.

## **Five Adjudicative Implications of Forst's Constructivism**

As suggested above, Forst's theory of justification is comprehensive and broad. On its face, it is not explicitly helpful in understanding adjudication or law in any specific or concrete way. Yet, now that his theory has been laid out in some detail, it is much easier to explicate some ramifications of his thought on adjudication and law that otherwise would remain hidden. Below are five implications of what his thought can contribute to a post-positive conception of law and adjudication.

1.) Adjudication is fundamentally a practice of justifying legal interpretations and decisions to legal subjects. The normative basis of its justificatory practices, however, is not internal within law itself, but come from moral rights and duties. As a consequence, legal justifications for judicial decisions cannot be completely cut off from a deeper moral responsibility to give "correct" answers. The consequences of judges having moral responsibilities, rather than merely institutional responsibilities, is that they have stronger motivations to disrupt the status quo and break precedent or strike down laws that are legal but unjust.

2.) Legal constructivism maintains that legal rights are "socially secured" moral rights to say "no!" to false justifications. More importantly, citizens are entitled to a right to participate in what the criteria for "justification" means within the judicial context. This is much more radical than Habermas' model. It interprets citizens to have a moral right not only to influence, but to be active justificatory participants in discourses of application. Though this right needs to be recognized by judges, which is indeed a high normative standard, it does explain why judges, for non-instrumental reasons, are sometimes open to the public. Furthermore, this conception of rights diverts some of the judiciary's responsibility towards the law to a responsibility towards

justification. Like Forst's interpretation of Kant's "respect for the law" to mean, first and foremost, "respect for people," adjudicators cannot orient their legal decisions only toward respect for the law. "Correct" decisions must always orient themselves also towards respect for persons.

3.) The procedures of legal justification must approximate reciprocity and generality. As a consequence, when a court engages in Klaus Günther's application discourse,<sup>358</sup> it must be extra sensitive to those who are invisible in the public sphere. Forst's Kantian rendition of universality places heavier emphasis on listening to those who are silenced, seeing those who are made invisible, and giving special attention to the dignity of those who are marginalized. In more concrete terms, the Court must not only consult civil society, but make an active effort to consult "subaltern counterpublics."<sup>359</sup> By extension, the criteria of a "good" justification especially depend on its justifiability to minority groups, those most often left out of justification narratives. In the sociological realm, reciprocal and general justification is best operationalized as the *disproportionate attention of legal justification to subaltern groups*.

4.) Reciprocity and generality also requires that a judiciary temper its confidence in formal rights. Given that reciprocity and generality are moral ideals, which when translated into legal concepts obtain a critical function to challenge justifications of power, a court must always be skeptical of its own interpretive and decisive achievements. As such, the judiciary must be equally skeptical of dominant narratives regarding the expansion of formal rights. Reciprocity and generality require the judiciary to adopt a special sensitivity to legal counter-narratives, which expose the contradiction of applying "equal rights" unequally.

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<sup>358</sup> See Klaus Günther, *The Sense of Appropriateness: Application Discourses in Morality and Law*, trans., John Farrell, (Albany: State University of New York Press, 1993).

<sup>359</sup> I borrow this term from Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy," *Social Text*, no. 25/26 (1990): 56-80.

5.) The judiciary's own "narrative of justification" must be open to contestation from critical citizens within civil society. Put differently, narratives about what the judiciary is, its duties and obligations, the nature of the law it applies, etc. must not be "sealed off" from wider public scrutiny. This is a more radical claim than merely criticizing a court's particular decisions in isolation from one another. Indeed, as a corrective measure, those narratives must be disproportionately inclusive to those who are implicitly denied recognition as agents of the law who are, at the same time, disproportionately treated as primarily subjects of its criminal application.

Though it may seem that a Forstian conception of adjudication implies judicial activism that places morality above the law, such a criticism is mistaken. The real difference between the Forstian and Habermasian conceptions of adjudication is the former's particular sensitivity to engaging in discourse with segments of the population that are denied their justificatory dignity. Habermas' conception of an "open" judiciary left it up to the Court itself to decide, partially arbitrarily, which issues were worth addressing in its docket. Forst's model of adjudication is much more critically-oriented than the rational yet status-quo reliant Habermasian model.

In what follows, I reconstruct the above five implications in order to provide a third perspective on adjudication that runs between Dworkin and Habermas. What has been missing so far in my presentation of a "post-positivist" approach is an account of power and exclusion. What is the judiciary's responsibilities to minority groups, to politically "invisible" democratic citizens, to members of subaltern counterpublics who are *de jure* included in the system of rights, but *de facto* excluded from the "victory" of formal rights within a constitutional democracy? Moreover, how ought the judiciary react, absorb, filter, or respond to subaltern groups that contest status quo justifications based on criteria of judicial impartiality that implicitly exclude



those same subaltern groups? Lastly, what if the basic narrative of justification that upholds the judiciary itself, that is, the impartial judge symbolized by Hans Gieng's *Gerechtigkeitsbrunnen* (1543) statue of *Iustitia* who can only secure justice by being blindfolded, contradicts law's moral or rational application because the same blindfold prevents her from seeing *de facto* injustice? Forst's constellation of concepts can help us answer these questions with which Dworkin and Habermas struggled. To address these questions in detail, I focus my discussion below on race and racial injustice in America.

### **“Stand aside Hercules, Pericles: There's a new Judge in Town”**

Forst's ideas are situated between Dworkin and Habermas in an interesting way. To illustrate the differences between Forst, Dworkin, and Habermas, I juxtapose three conceptions of adjudication symbolized by three fictitious judges: Dworkin's Hercules, Habermas' Pericles,<sup>360</sup> and the new judge in town, embodied by Forst's discursive-constructivism, Pyrrho.<sup>361</sup> As I argue below, Pyrrho is the judge most capable of addressing the gap between *de jure* and *de facto* justice; he has the most comprehensive self-understanding of justification; and he is the most competent judge to address the problems of injustice that stem from justifications of power. Before presenting Pyrrho's adjudicative scheme, I will briefly summarize Hercules' and Pericles' adjudicative positions in order to situate Pyrrho's own position between them more clearly.

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<sup>360</sup> I use the term Pericles for rhetorical purposes only to represent the ideas presented in chapter three. Habermas would reject personifying his adjudicative scheme in a single subject since it would distract from his intersubjective approach. I borrow the idea of a “Periclean” court from Simone Chambers, see Simone Chambers, “It is Not in Heaven! Adjudicating Hard Cases,” in *Multiculturalism and Law: A Critical Debate*, Omid A. Payrow Shabani (ed.), (Cardiff: University of Wales Press, 2007), 115-125. See also chapter 2 of this dissertation.

<sup>361</sup> For lack of a better figure, I use Pyrrho to demonstrate a constantly self-reflective and skeptical image of legal adjudication. Pyrrho was a founder of Greek skepticism who lived from c. 360 BC – c. 270 BC, accessed July 28, 2016, <http://www.iep.utm.edu/pyrrho/>.

Given Dworkin's own constructivist approach, Hercules has a conception of legal rights grounded in moral principle. Indeed, Hercules imposes on himself a moral duty to justify his legal decisions with reasons that reconcile law and the moral principle of equality. But despite his strong moral convictions, Hercules is a "loner" who speaks with nobody and adjudicates in isolation.<sup>362</sup> His only justification of a "right answer" is a metaphysical world of ideas that stands behind and in the law. Though his answers may be correct *in abstracto*, so long as "correct" means upholding the moral form of law, he, like *Iustitia*, is blinded by the *de jure* equality of law. To put it bluntly, Hercules is so narrowly focused on the integrity of law, it blinds him to the unequal effects of his decisions. By why? Perhaps Hercules is adjudicating from a position of white privilege and is unaware of his white confidence in the system of rights; perhaps his preoccupation with integrity blinds him from the racial injustice that not only prevails, but goes unnoticed because of his preoccupation with integrity. Hercules thinks he is reconciling law with moral principle, but he is acting complicit to the racial contract<sup>363</sup> by perpetuating white triumphant narratives of formal equality. Perhaps Hercules is white, and although he thinks of himself as serving all legal subjects, the consequences of his noble feats are felt unequally. Despite his good intentions, Hercules is not conscious of his own racial bias.<sup>364</sup> He is a white decision-maker.<sup>365</sup> He is not confronted with the non-white experience of law as an institution of white privilege that is unequally applied to non-whites even though that system of rights has the

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<sup>362</sup> See Frank Michelman, "The Supreme Court 1985 Term," *Harvard Law Review* 100, no. 4 (1986-1987), 4-77, 76.

<sup>363</sup> This term comes from Charles W. Mills, *The Racial Contract*, (Ithaca: Cornell University Press, 1997).

<sup>364</sup> For an excellent article on the cultural meanings of law and its relation to unconscious racism, see Charles Lawrence III, "Unconscious Racism Revisited: Reflections on the Impact and Origins of 'The Id, the Ego, and Equal Protection,'" *Connecticut Law Review* 40, no. 4 (2008): 931- 977.

<sup>365</sup> Barbara Flagg writes: "I define white decisionmaking expansively, to include any instance in which whites play a significant role in formulating operative norms, rules, or criteria of decision, even if they are administered by blacks. Of course, at the margins, determining whether decisionmaking is 'white' may appear a tricky task. However, given the reality of white supremacy and the pervasiveness of the transparency phenomenon, false negatives are more worrisome than false positives." Barbara J. Flagg, "'Was Blind, but Now I See:' White Race Consciousness and the Requirement of Discriminatory Intent," *Michigan Law Review* 91, no. 5 (1993): 953-1017, 957.

character of formal universality. But perhaps we can't blame Hercules too much; after all, he is a "loner" who doesn't get outside much, scarcely engaging with the general public, let alone with subaltern communities whose stories, experiences, and counter-narratives are left out of mainstream social consciousness. Nevertheless, we can't excuse the problems Hercules created due to his ignorance of their consequences.

Would Pericles, who is under constant surveillance and critical scrutiny by the larger public, do better? Yes and no. In Habermas' scheme, Pericles cannot avoid being confronted with movements like "Black Lives Matter," statistics about the disparity and disproportionality of incarcerated minorities, or the alarming growth of ubiquitous adages such as "driving while black," "New Jim Crow," or "stop shooting us." Because Pericles knows that rational adjudication presupposes a certain sensitivity to the public sphere and the principle of democracy, Pericles simultaneously interprets law and social problems. As such, Pericles is much more aware and reflective of his actions' consequences compared to Hercules' myopia. So unlike Hercules, Pericles voluntarily adjudicates in front of a social mirror, a mirror that invites him to confront the consequences of his own decisions. But in the end, Pericles' motivation to act against injustice is based on the weak force of rational motivation, such that he tries to act in response to the normative presuppositions of what he interprets about the act of adjudication itself. What is at stake besides cognitive dissonance if Pericles acts against rational standards, even those he gave himself? Furthermore, given that Habermas' model is not especially sensitive to counter-hegemonic political movements,<sup>366</sup> which may not rely on the calm and

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<sup>366</sup> Kevin Olson makes this criticism against Forst's notion of justification, although I think it has more purchase against Habermas' rationalist discourse theory. "Justification" only implies a specific form of recognition mediated through reason-giving, and is much broader than the intellectual form of reason-giving that exists within academic culture. Compared to Habermas discourse theory, I think Forst's notion of justification allows for a much wider conception of political action because it can include political rhetoric and symbolism within its political register,

collected rationalist language of argumentation he proposes, the following question arises: which social problems ought Pericles give his primary attention? Ultimately, Pericles falls into a similar problem as Hercules; interpreting social movements within civil society is something wholly different from deciding on which ones to accept into the docket and how to best resolve them. Though Pericles has discursive skills and gets outside more than Hercules, he must still ultimately make a decision, which ultimately, cannot escape the problem of sovereignty outlined by Schmitt.

Habermas' discursive scheme can thus only go so far; the Schmittian "decisionism" that plagued Hercules' interpretive solipsism comes back in new form. After interpreting countless protests by minorities contesting the racial inequality of law's application, Pericles must decide whether that issue is worth adjudicating (assuming a case is brought to the Court). Connected to such decisionism, or perhaps part of its cause, is Pericles' lack of moral duty to give disproportionate attention to those who are excluded from justification narratives within formal law. In the end, Pericles has his own problems, namely, he is a "democratic" judge who lacks objective moral instruction to recognize, address, and resolve moral injustices. He can rely on no objective moral foundation to identify social injustice that enables him to hierarchize his legal docket. As such, Pericles is aware of the racial injustices caused by a legal system that privileges whites, but his motivations that stem from his rational reconstruction are too weak to compete with it. To do something about it, to consciously act against Mills' racial contract, is always a moral choice. Awareness of an injustice is a necessary but insufficient condition for recognizing and correcting that injustice, especially if one is indifferent to or benefits from the status quo. Recognizing and correcting moral injustice can only be motivated by a moral choice to do so.

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which only awkwardly fit within a rationalist-discursive conception. See Olson, "Complexities of Political Discourse."

So whereas Hercules is naïve yet morally self-righteous, Pericles is informed and aware of his privileged position, but lacks the moral duties to sufficiently work against it. Ideally, one wishes Pericles could retain his dialogical character while adopting the strength of Hercules' moral principles of human dignity, equality, and respect. But, as it stands, Pericles' ability to address racial inequality is paralyzed by his amoral yet rational reconstructivism.<sup>367</sup>

The third Judge, Pyrrho, has his own conception of adjudication that can escape some of the problems suggested by the above two approaches. Pyrrho has three main characteristics. First, he is generally a skeptic, and especially so of politically dominant narratives of justification. He knows that the normative power of justification comes from general and reciprocal reasons, but is well aware that prevailing justifications can also be products of domination and ideology. He believes in no legal “truths” or justifications thereof; the only “truth” he believes in is the moral right to justification.

Second, Pyrrho, like Hercules, is a moral constructivist. He is guided by the moral principle of reciprocal and general justification, which he views as the “normative core” of his adjudicative practices. By extension, he views legal rights as positivizations of the moral right to general and reciprocal justification. In addition, legal rights provide not only legal protections against majority will – a legal right to say “no!” – but also socially secure participation in the justification narratives of such rights. As such, Pyrrho interprets legal rights as continually in need of evolution; static narratives of rights are always suspect.

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<sup>367</sup> For the role of morality plays in Habermas' discourse theory, see Jürgen Habermas, *Justification and Application: Remarks of Discourse Ethics*, trans., Ciaran P. Cronin, (Cambridge: MIT Press, 1993); for his engagement with Lawrence Kohlberg's theory of moral development, see also Jürgen Habermas, *Moral Consciousness and Communicative Action*, 116-194.

Third, Pyrrho, like Pericles, adjudicates in a discursive manner. He regularly consults civil society and “tests” his decisions against general currents thereof; he knows that in addition to applying the law faithfully, his decisions have repercussions on democracy itself. Like Pericles, but for different reasons, Pyrrho knows that the “correctness” of his decisions depend on an intersubjective orientation towards the general public. He is far too humble and fallible to adjudicate his “correct” decisions in solitude; indeed, the criteria of reciprocity and generality require intersubjective procedures of adjudication. So, like Pericles, he looks for discursive help in the public sphere.

For Pyrrho, however, his moral constructivism compels him to do more than Pericles. His moralism combined with his skepticism of the “integrity” of law compel him to have unequal duties of justification towards sectors of society. The ideal of reciprocity and generality cause Pyrrho to justify his decisions most directly to those who, as he sees it, are politically invisible. He has a duty to give reciprocal and general justifications, which can only be accomplished by consciously seeking out justifications by individuals and groups who are left out of dominant narratives. Pyrrho knows that a legal justification for a decision is a moral right, and so he interprets his own adjudicative duty as also a moral duty. In addition, since the unequal application of law fails any reciprocal and general justification for such inequality, Pyrrho has a moral duty to correct such inequality. But what exactly is entailed by this moral duty? What ought Pyrrho actually do?

Pyrrho’s adjudicative strategy is one that employs “tiers of scrutiny” or “tiers of justification,” which is to say that some justifications are owed to some more than others. Rather than interpreting Forst’s notion of justification in the Kantian “flat” sense, Forst’s work is best interpreted to mean separating and dissecting who is owed what, to what amount, and at what

times. For Forst's theory to do the critical work he wants it to do, we need to think about the context-specific nature of justification, and how power relations change the dynamics of justification discourse. Tiers of justification imply a relativity of justification, such that one's right to justification is always relative to one's power status (in legal, social, political, racial, economic, or other terms). There are degrees of entitlement of a right to justification; everyone is entitled, but depending on the context, the threshold of entitlement differs.

Given that Pyrrho is reflective of the racial biases in law, he knows that the *de jure* equality of law does not translate into *de facto* equality of its application. For example, Pyrrho is skeptical of the recent decision in *Berghuis v. Thompkins* that requires a criminal suspect, somewhat ironically, to verbally invoke his right to remain silent.<sup>368</sup> The Court ruled that invoking one's Miranda rights non-verbally is not constitutionally protected. Pyrrho dislikes this decision because although it is a benign victory for police, the consequences are unequally felt between white and non-white communities. In a context where, proportionally speaking, many more non-whites are stopped and arrested by police than whites, this decision owes a higher level of justification to non-whites than whites because the *effect* of the decision on the former is much higher than the latter. In other words, in Pyrrho's view, this decision is easier to defend to whites than non-whites given that whites are much less likely to encounter its abuse.

Pyrrho is especially vexed by *Washington v. Davis*.<sup>369</sup> The Court ruled in this case that "strict scrutiny" does not apply to a policy solely on the basis of its discriminatory effect; rather, it applies primarily on the basis of its discriminatory intent. In other words, "strict scrutiny" only applies to policies that have discriminatory effects so long as petitioners can also prove the

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<sup>368</sup> *Berghuis v. Thompkins*, 560 U.S. 370 (2010). This case was an interpretation of *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>369</sup> *Washington v. Davis*, 426 U.S. 229 (1976).

policy has discriminatory intent. This decision is wrong for Pyrrho because it puts a disproportionate burden of justification on victims of discrimination, i.e., non-whites. The burden of proof is on non-whites to demonstrate both discriminatory effects and intent of a policy, latter of which is much harder to prove. More abstractly, the decision is easier to justify to those who are not historically discriminated against compared to those who are. In *de jure* terms, this decision applies to everyone, equally. But in terms of its *de facto* application, the decision is disproportionately felt by those who face subtle and systematic discrimination, i.e., non-white Americans. The latter *de facto* aspect of adjudication is, for Pyrrho, a violation not of law's own normative presuppositions, but of law's moral commitments to protecting individuals' right to justification. This decision gave no special consideration to the counter-narratives that expose its internal racial prejudice, and instead relied on the dominant *de jure* equality narrative of justification, a narrative of white privilege.

Instead of relying on *de jure* narratives, Pyrrho prefers deciding based on a principle of “tiered justification.” *Those disproportionately affected by a decision are disproportionately entitled to its justification, especially under facially neutral criteria.*<sup>370</sup> This is a derivation of what Flagg calls the “transparency-conscious disparate impact rule:”

That is, the rule contemplates heightened judicial scrutiny only when facially neutral criteria formulated or deployed by white governmental decisionmakers operate to disadvantage nonwhites. *It is not symmetrical*; heightened scrutiny is not appropriate when black governmental decisionmakers formulate and apply facially neutral criteria that negatively impact whites.<sup>371</sup>

As suggested by tiered justifications, legal justifications must always reach beyond their specific case. Every justification must be justifiable in the context of larger schemes of

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<sup>370</sup> This is a variation of John Rawls' difference principle, oriented not towards not the redistribution of opportunity, but the redistribution of justificatory power.

<sup>371</sup> Flagg, “Was Blind, but Now I see,” 1006ff (my emphasis).



discrimination. In criminal cases, a judge must justify his decisions within a larger context of injustice, e.g., convicting a member of a marginalized group of a crime must be backed up with a justification why it isn't arbitrary or a continuation of larger discriminatory schemes of injustice. This implies a requirement of heightened scrutiny for minorities. This isn't an unchained normative requirement; tiers of scrutiny (e.g., rational basis, intermediate scrutiny, strict scrutiny) already play out in constitutional law regarding government policies that have racial criteria. But they are unable to address the subtle and more pernicious forms of power because they rely on formal criteria. My proposal continues this socialization of justification in a new direction.<sup>372</sup> Tiers of justification allow judges to confront injustices resulting from non-positive sources, including those narratives of justification that are complicit in racial domination.

In metaphorical terms, Pyrrho can only properly secure justice by taking off *Iustitia's* blindfold, and applying the law in a context-sensitive way.<sup>373</sup> Indeed, Pyrrho resuscitates the waned "gravitational pull of race" that occupied the Warren Court, yet interprets that racial "pull" in 21<sup>st</sup> century form.<sup>374</sup> Given the new form of racial injustice as exposed in law's application, he continues the Warren Court's fight for equality in non-positive ways. Though one might "accuse" Pyrrho of favoring equality over autonomy, this is mistaken. Consistent with

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<sup>372</sup> I mean this as a variation of a phrase "culture of justification" coined by Etienne Mureinik. He interpreted the end of apartheid in South Africa as a shift from a "culture of authority" to a "culture of justification." In a culture of justification, authority is not a justification. See Etienne Mureinik, "A Bridge to Where? Introducing the Interim Bill of Rights," *South Africa Journal on Human Rights* 31, no. 10 (1994): 31-48. See also Moshe Cohen-Eliya and Iddo Porat, "Proportionality and the Culture of Justification," *The American Journal of Comparative Law* 59, no. 2 (2011): 463-490, 474f.

<sup>373</sup> Pyrrho's moralism also serves instrumental purposes. In terms of the legal rhetoric of Court opinions, it is arguably important that unprecedented legal decisions be justified with moral rhetoric. Though tight-knitted legal reasoning will persuade the legal community of a decision's rightness, it arguably reduces its appeal and readability to the general public. Without the help of legal interpreters and commentators to help ordinary citizens understand the rightness of a decision, those jargon-filled legal arguments have less rhetorical impact. Erwin Chemerinsky writes: "I thus write as someone who agrees with the court's conclusion and reasoning. Yet, I also write as someone who wishes that the court had done more to appeal to the court that for now has the last word in California: the court of public opinion." Erwin Chemerinsky, "Foreword: Judicial Opinions as Public Rhetoric," *California Law Review* 97, no. 6 (2009): 1763-1784, 1784.

<sup>374</sup> See Burt Neuborne, "The Gravitational Pull of Race on the Warren Court," *The Supreme Court Review* 2010, no. 1 (2011): 59-102.

Forst's claim that the "right to justification" preserves an individual's right to be a *recipient* and *agent* of justice, equality and autonomy are entangled in the same normative concept.

But how does Pyrrho decide in a normative way whose voice is left out of narratives of justification? Given that Pyrrho isn't an actual judge, but represents a singular image of a plural judiciary full of diverse judges, what kind of procedures allow him to make normative decisions about who is the recipient of injustice, and by extension, who deserves disproportionate justification?

At this point, it is worth bringing Carl Schmitt back into the discussion with the following rhetorical questions: Can decisionism be also normative? Isn't it important to preserve some sovereignty within the Court so it can make controversial, yet morally correct decisions? Don't we expect the Court to act in morally "decisive" ways when acting otherwise would produce or re-produce unjust forms of domination? Don't liberal democracies occasionally depend on judicial decisionism when ongoing deliberation only further systematically excludes minority voices? Maybe Schmitt was right, but in all the wrong places. Maybe liberal deliberation about narratives of justification requires judicial decisionism when such deliberation exists on the basis of exclusion? Deliberation loses its normative value if it is deliberation only among a subset of the population; in such cases, democracy needs the Court to correct this, albeit in careful and highly delicate ways.

Pyrrho can indeed act against the status quo in the way decisionism is defined. He has a certain disposition oriented towards correcting legal injustice that we saw Pericles lacking. Yet, his hyper-awareness of discriminatory narratives of justification combined with a moral duty to diligently act against them can produce a wide variation of results. At best, it recommends a

Court preserve the moral integrity of law as a balance against majority will; at worst, it creates the conditions for a militant Court that defends law against its hostile enemies, enemies which it decides for itself.<sup>375</sup> Given what is at stake, Pyrrho can do enormous good, but he needs to be watched. Unlike Hercules who the general public trust whole-heartedly, Pyrrho cannot be blindly trusted. Like Pericles, Pyrrho must have a dynamic relationship with civil society. But unlike Pericles, Pyrrho must be diligently watched so that his constructivism doesn't devolve into a judicially passive Reign of Terror.<sup>376</sup>

Pyrrho's adjudicative strategy suggests that Carl Schmitt's decisionism is not necessarily antithetical to liberal democratic judiciaries. Indeed, all three judges – Hercules, Pericles, and Pyrrho – must make sovereign decisions as part of their normative self-understanding. The real issue is how adjudicative procedures and civil society-inputs are part of that decisionism. Sovereign decisions are needed as a counter-balance in times of systematic injustice or social discrimination. For judicial “decisionism” to retain its normativity, we must think about it not as always being tempered or “confronted” by liberal procedures, legal rules, or civil society; rather, those procedures, rules, and inputs from civil society must be conceptualized as part of such decisionism. As such, the tension between decisionism and legal norms must be retained, not resolved.

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<sup>375</sup> Karl Jasper's student, Dolf Sternberger used *Verfassungspatriotismus* to depict a type of “friendship” or caretaker role citizens had towards the new German constitution who hoped to guard it against any remaining remnants of fascism. See Jan-Werner Müller, “On the Origins of Constitutional Patriotism,” *Contemporary Political Theory* 5, (2006), 278-296, 281-4. For a more comprehensive development of the concept placed in its historical and intellectual context, see Jan-Werner Müller, *Constitutional Patriotism*, (Princeton: Princeton University Press, 2007).

<sup>376</sup> It is entirely possible that Pyrrho thinks white privilege is not only false, but that reverse racism is much more rampant. This possibility underscores the risk in Pyrrho's adjudicative strategy.

## Conclusion

In this dissertation I have developed an account of legal validity that is sourced in law's application. Against Hans Kelsen's concept of legal validity that is self-referential – i.e., the validity of legal norms derived from second-order procedural norms, and so on – a “post-positivist” conception of law looks to the various practices of law's application. From this perspective, legal validity cannot be sourced from law itself because laws cannot prescribe their own application. As such, what is missing from Hans Kelsen's account of legal validity is a conception of adjudicative validity, or a theory of law's valid application. Skeptics of this approach declare that all efforts to develop a paradigm of legal validity about law's application are in vain. The open texture of law and its inescapable indeterminacy make such “validity” always contingent and susceptible to unpredictable decisionism. But as chapter 1 suggested, indeterminacy is a fact of language and not something particularly unique to law. If legal indeterminacy makes adjudicative validity impossible, then we must also be highly suspicious of the ability of language to serve our communicative needs more generally. Although miscommunication happens every day between people who use language, this means not that communication is therefore impossible. Likewise, even if judges regularly misinterpret laws due to their open texture, this need not lead us to conclude adjudication is impossible, or that “correct” answers don't exist in hard cases. Unless one is willing to say that validity doesn't exist within communication itself, i.e., the meaning of a sentence or utterance is never determinable even in a fallible way, then one must concede that valid adjudication is theoretically plausible and realizable in practice.

As a consequence of sourcing legal validity in law's application, post-positivism problematizes -- though does not negate -- the autonomy and self-referential character of law that Hans Kelsen theorizes. Yet, by replacing self-referential norms with practices of legal adjudication, the post-positive approach begs the question about what guides valid applications of law. In chapters 2-4, I presented three alternative ways of thinking about law, all grounded in a non-positive normative base. Ronald Dworkin advances a constructivist thesis whereby the validity of law's application is judged against a non-positive principle of equality. Jürgen Habermas proposes a reconstructivist theory of adjudication whereby the validity of law's application is judged in light of a discourse theory that aspires to be impartial. Rainer Forst, like Dworkin, offers a constructivist thesis, but grounds the application of law in rights and duties of justification.

One might deduce from these conceptions three distinct normative bases of law respectively grounded in the principle of equality (Dworkin), norms of impartiality and rationality (Habermas), and rights and duties of justification (Forst). These all provide what one might call law's "normative scaffold," the core of my post-positive conception of legal validity. Whereas Hans Kelsen's "pure" theory of law hovers above all political, sociological, and moral concepts, my approach attempts to ground legal systems in those "impure" extra-legal concepts without negating positive law itself. Instead, by providing a normative scaffold for Kelsen's legal system, it does not negate law's self-referentiality, but does place that self-referentiality side-by-side with other normative values that compete with it. The validity of law is thus a complicated project that requires living with the tension between positive and non-positive norms. This theme was subtly present in each chapter, appearing as tensions adjudication must address: between the *is* and *ought* of law; between a right decision and a just decision; between a

substantively and procedurally correct decision; between a judiciary's legal and moral responsibilities; between a judge's responsibilities to law and legal subjects; between following or breaking precedent, etc. The "post" in post-positivism means keeping positivism's notion of self-referential legal validity, but introducing other normative inputs that compete with it without negating it in an on-going fashion. To negate it would be something akin to "anti-positivism," which would reduce law to either arbitrary decisionism or classical conceptions of natural or divine law. Post-positivism reduces law to neither of these.

The normative scaffolds described above also necessarily advance specific ideas about the nature of rights. Depending on how one conceptualizes rights, it will necessarily change, though not completely predict, how one theorizes adjudication. Put differently, the content of any adjudicative theory will depend on how one views the nature of rights, their justifications, their political and moral orientations, their relative weight within a legal system, their primacy or non-primacy vis-à-vis other rights, and their relations to non-positive norms and principles. Although Dworkin, Habermas, and Forst all share broad views about the nature of rights, their small differences create large divergences in their theories of adjudication. Indeed, they all conceive of rights as both legal protections and instruments of autonomy. For example, the basis of rights for Dworkin is to secure one's right to equal treatment and treatment as an equal; for Habermas, rights secure both private and public autonomy in co-original fashion; and for Forst, rights secure one's right to be a recipient and agent of justice. But their similarities stop there.

The differences between Hercules, Pericles, and Pyrrho's adjudicative strategies are complex and difficult to survey. But one way to do so is by looking at their different perspectives on rights and how those differences are arrayed within their respective adjudicative strategies.

Hercules' monological approach to adjudication is consistent with Dworkin's lack of a strong intersubjective and discursive understanding of rights. Since, in Hercules' understanding, rights are legitimated by the same principle of equality they are meant to secure, they are internally closed-off from needing further deliberation, i.e., justification. In Hercules' view, the debate about the justification of rights has already ended, and all that is leftover is the need for a judge with legendary interpretive skills to apply them in ways that present them in their "best light." Although I was highly critical of this approach because Dworkin wrongly conflated the act of interpretation with the act of making decisions about such interpretations, Dworkin's conception of rights was at least consistent with Hercules' adjudicative scheme.

Habermas' adjudicative approach, which I rhetorically symbolized by judge Pericles,<sup>377</sup> was discursive through and through. This is no coincidence given that his conception of rights is one that requires ongoing deliberation about the justification and application of such rights. Furthermore, given his emphasis on the deontological status of rights, a status that can only be redeemed through universal agreement, adjudicative practices themselves follow similar form: they adhere to open and inclusive practices of deciding how appropriate a law is to a situation, and how relevant a situation is to a law. As such, the rational application of rights depends on following procedures of argumentation implied by the discursive nature of rights themselves.

Forst's approach, symbolized by judge Pyrrho, adopted the discursive character of Habermas' approach, but channeled that discourse through tiers of justification. Given that Forst views legal rights as socially secured expressions of a moral right to justification, which not only protect individuals from harm, but require their inclusivity in narratives of justification, his adjudicative scheme derives from a moral right to say "no!" The adjudicative implication of this

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<sup>377</sup> This term comes not from Habermas himself, but from Simone Chambers. See chapter 2.

is a judge's duty to justify her decisions not to the law itself, but, first and foremost, to legal subjects in an asymmetrical manner. The Forstian conception of adjudication places the brunt of judicial responsibility on individuals subjected to the law, such that they must justify their decisions to subjects, not to the "law" or legal community itself. Given the tiered nature of this practice I advanced in chapter 4, not everyone deserves an *equal* right to justification, which is what chiefly separates his theory from Dworkin's. Those most affected by a decision are most entitled to its justification, as suggested by his reconstruction of Kantian duty towards others, not to the law per se.

Carl Schmitt has been in the background of this dissertation, popping up at various places in different contexts. As I attempted to show in chapter 4, Schmittian decisionism isn't necessarily antithetical to liberal or otherwise normative theories of adjudication. Indeed, decisionism plagued Dworkin's Hercules because Dworkin had no normative conception of decisionism, nor did he foresee the damage Hercules could do with his decisions. Dworkin's myopia allowed Hercules to adjudicate in private, a serious mistake, placing him out of view from the watchful eye of civil society.

Habermas' desire to excavate decisionism out of his otherwise rational theory of adjudication led to a conservative conception of the Court that was left unable to act decisively in times of crisis or systematic injustice. Though I don't think Habermas fully succeeded in extricating Schmitt from his adjudication – a project, I admit, he probably never completely committed himself to – Habermas certainly never embraced decisionism as a normative concept. Certainly one cannot blame Habermas for ignoring the value of decisionism given the imprint of National Socialism on German historical consciousness. But by removing decisionism from all



normative influence, Habermas' adjudicative theory achieved rationality at the high expense of having any critical purchase.

The Forstian conception of adjudication harnesses a normative theory of decisionism that lives in a perpetual tension within the overall liberal framework of law. Although Forst himself may well disagree with my reading of him – or perhaps flatly reject it – it seems to me that the emancipatory potential of his theory requires risking stability for justice. Indeed, liberalism is only antithetical to decisionism if one trusts that procedures can correct themselves. But since procedures about procedures lead to a problem of infinite regress, and since Kelsen's *Grundnorm* is a transcendental concept that cannot be consulted, applied, or known, it is a mistake to think of decisionism as antithetical to liberalism. Instead, liberalism requires acts of decisionism in order to guarantee that its principles are applied in the way it prescribes. Disturbing procedures, or correcting them when necessary, is always a decision that law cannot predict nor prescribe. Yet, without such decisionism, the soft cries of social movements and muffled voices of subaltern groups can never say “no!” loud enough for those in power to hear. What is needed, which his theory provides, is a theory of moral duty of those in power to seek out those voices and address them in asymmetrical fashion. Since procedures cannot correct themselves, decisionism is a requirement to fulfill the normative presuppositions the procedures are meant to achieve.

In times where the promise of democracy is upbraided by structural forces that compete to limit its possibilities, democratic theories – whether deliberative, radical, participatory, agonistic, etc. – must all concede that the fulfillment of that promise needs formal institutions to meet it halfway. To meet the promise halfway, actors within formal institutions must use their “justificatory capital” in ways that fill the remainder of what is leftover by democratic practices. In other words, we need an evolved concept of democracy that includes a complicated division

of labor between democratic and non-democratic, informal and formal institutions. Habermas' sociological theory does this to an extent, but he failed to appreciate the normative potential *within* formal institutions by instead focusing on their functionalist, sub-system behavior that can only be steered in a normative direction from the outside. A more complex notion of democracy relies on formal institutions, especially those that are non-democratic, to complete the critical tasks of democracy it cannot complete itself. The Forstian judge Pyrrho, in my view, is the only judge that can accomplish this. Of course, Pyrrho is a risky bet; relying on him to pick up the slack of democracy, to fix the legal procedures that subtly corrupt it, and to fulfill its legal-moral goals all raise a host of potentially serious problems. But with or without Pyrrho, democracy is already a highly vulnerable and unstable project. In my view, democracy cannot be solely responsible for democracy; that responsibility must be shared with non-democratic institutions. Certainly what Pyrrho provides is a way to recognize and break ideological narratives that form the immoral basis of all legal systems, i.e., how they systematically exclude one group or more for the benefit of another. Such a practice is necessary to sustain not only the validity of a legal system, but also the integrity of democracy, which in turn depends on applications of law that are *de facto* valid. This is a task neither the morally righteous Hercules, nor the conservatively-minded Pericles can accomplish. The more naïve and self-congratulatory a formal institution is about the victories of formal rights, the less likely it is to recognize the injustices contained within the structure of law itself. Pyrrho has both the discursive-democratic resources to recognize such *de facto* inequality, and also the skeptical character needed to perpetually question and criticize widely held narratives that justify a legal system as "valid."

The current landscape of political theory as a professionalized field of study has overlooked adjudication as an important topic of inquiry. Such a state of affairs is unfortunate

given how adjudication is vital to what it means to have laws, rights and actionable norms writ large. More curiously, critical theory has largely ignored adjudication as a practice relevant to political emancipation. From my perspective, democratic politics can only go so far in what it can accomplish in terms of critical activity. There is plenty of room for normative theorizing within formal institutions of government, and those especially in need of such theorizing are those that lack democratic input. This dissertation is one small contribution to a larger research paradigm that looks *within* formal institutions for solutions to questions that many contemporary democratic theories have no resources to answer.

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