Value and Truth
In the Legal Theory of Ronald Dworkin

Lynden Margaret Douglas

LLB (Melb), LLM (Public Law) (QUT)

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T. C. Beirne School of Law
ABSTRACT

Brian Leiter observes that Dworkin creates problems for his legal theorizing in maintaining on the one hand that moral values figure in the truth of propositions of law, at least in ‘hard cases’, but on the other that there are right answers to be found for those ‘hard cases’. Moreover, Leiter stresses that while Dworkin was aware of these concerns, his responses ‘have attracted little attention from philosophers or jurisprudents over the years’. Yet, Dworkin’s approach to the objectivity of moral (and, therefore, legal) truth is critical to drawing a distinction between his work and that of other constructive interpretive theorists. It is the very aspect that sets his work apart from many other philosophers who might be sympathetic to his interpretive views. It is the aim of this thesis to clarify and contextualize this important aspect of Dworkin’s theoretical outlook.

I propose that it is helpful to understanding Dworkin’s approach to objectivity and truth, and his theory as a whole, to situate his work within the canonical theories of David Hume and Immanuel Kant, but also I consider that it is equally helpful to situate Dworkin’s thinking on these matters, particularly his later thought, within the later theory of Ludwig Wittgenstein. Although Dworkin’s work is spattered with references to Wittgenstein, and although philosophers have noted the potential ‘quietism’ in Dworkin’s approach to metaphysics, few philosophers consider his work from a non-skeptical, Wittgensteinian perspective. This may be, in part, due to the general lack of enthusiasm in some philosophical circles for the work of Wittgenstein. However, Dworkin’s not infrequent references to Wittgenstein, as noted, would seem to indicate that Dworkin found inspiration from Wittgenstein’s texts. This thesis pursues the connections between Dworkin and Wittgenstein to illuminate the nature of Dworkin’s constructivist theory of truth.

This thesis also draws on Wittgenstein to explore the question of whether Dworkin’s theory is properly viewed as a form of naturalism. It might be argued that, in Law’s Empire, Dworkin outlines a form of constructive interpretation that lends itself to being understood as a naturalist methodological approach to legal theory. But, even if this is the case, an epistemological naturalism does not necessarily presuppose a commitment by Dworkin to a metaphysical naturalism. A number of authors, including Leiter and Michael Moore, have characterized Dworkin’s theory as a form of metaphysical non-naturalism. An alternative to this approach would

2 Ibid, 67.
be to consider that Dworkin’s theory is a form of ‘quietism’ (that is, that it prescinds from or
remains agnostic on metaphysical issues), an accusation that he responds to himself.

I propose instead, that if Dworkin’s theory of truth, read in its best light and in conjunction with his
theory of law as a matter of interpretation, can be considered in a Wittgensteinian context, and if
metaphysical naturalism can be divorced from a strict scientific approach to it, there is an argument
available for Dworkin’s theory to be considered as a form of metaphysical naturalism. That form of
naturalism would take as its foundation the very context of ‘humanity’ as a particular and
complicated ‘form of life’.
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This thesis is composed of my original work, and contains no material previously published or written by another person except where due reference has been made in the text. I have clearly stated the contribution by others to jointly-authored works that I have included in my thesis.

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There are no contributions to the thesis beyond those mentioned in the Acknowledgments below.

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Not applicable.
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Table of Contents

I Introduction .................................................................................................................................................. 11
   A Thesis Purpose ......................................................................................................................................... 12
   B Thesis Outline .......................................................................................................................................... 13

II The Influence of Hume and Kant ............................................................................................................ 16
   A The Truth of Propositions of Law ........................................................................................................... 16
   B Enlightenment Changes ......................................................................................................................... 18
   C Hume and Kant ...................................................................................................................................... 19
       1 Introduction ......................................................................................................................................... 19
       2 David Hume (1711-1776) .................................................................................................................. 21
       3 Immanuel Kant (1724-1804) .............................................................................................................. 35
       4 Kant’s Constructive Theory ................................................................................................................. 42
       5 Reason, Freedom and the Moral Law ................................................................................................. 50
       6 Conclusion .......................................................................................................................................... 57

III The Rights Thesis – The Role of Political Morality in the Law ......................................................... 59
   A Introduction .......................................................................................................................................... 59
   B Dworkin’s Conceptual Analysis ............................................................................................................ 59
       1 Analytical Philosophy .......................................................................................................................... 59
       2 Ordinary Language Analysis .............................................................................................................. 62
       3 Responding to Skeptics – The ‘No Right Answer’ Thesis ................................................................ 65
       4 Disconnecting Metaphysics ............................................................................................................... 67
   C The ‘Rights Thesis’ in ‘Hard Cases’ ...................................................................................................... 68
       1 Confusion or Synthesis .......................................................................................................................... 68
       2 Issues Arising from the Rights Thesis ................................................................................................. 70
       3 Law, the Individual and the State ....................................................................................................... 73
       4 ‘Rights as Trumps’ ............................................................................................................................. 82
   D Summary .............................................................................................................................................. 84

IV Dworkin’s Constructive Interpretation ................................................................................................. 87
   A Introduction .......................................................................................................................................... 87
   B Rawls’s Model of Constructivism ........................................................................................................ 88
   C O’Neill’s Model of Kantian Constructivism .......................................................................................... 89
       1 Three Juridical Metaphors .................................................................................................................. 91
   D Dworkin’s Model of Constructive Interpretation ................................................................................ 96
       1 Starting Point - the Contested Concept ............................................................................................ 98
       2 Dworkin’s Tribunal ............................................................................................................................. 100
Towards a Naturalist Reconstruction of Ronald Dworkin .................................................................. 146

A Introduction .......................................................................................................................... 146
  1 Linking Wittgenstein’s and Dworkin’s positions on Naturalism ........................................... 149
  2 Chapter Outline .............................................................................................................. 150

B Philosophy and Science ...................................................................................................... 151
  1 Distinguishing Philosophy from Science ........................................................................... 151
  2 Natural History ................................................................................................................ 152
  3 Language-Games and their Grammar ............................................................................. 154
  4 Lebensform – Getting from Grammar to Metaphysics .................................................... 156
  5 This Complicated Form of Life ........................................................................................ 157

C Wittgenstein, Kant and the Critical Connection ................................................................... 160
  1 Kant’s Critical Philosophy ................................................................................................ 160
  2 Naturalism and the Transcendental .................................................................................. 162
  3 The Transcendental and Critical Philosophy .................................................................... 165

D Summary ............................................................................................................................ 166

E Linking Wittgenstein’s Naturalism and Dworkin ............................................................... 168
  1 Some General Observations ............................................................................................ 168

F Conclusion ........................................................................................................................... 174

VII Conclusion ........................................................................................................................ 176
A Section One ........................................................................................................................... 176
B  Section Two ................................................................................................................................. 178
C  Section Three ............................................................................................................................ 183
VIII Reference List .......................................................................................................................... 186
CHAPTER ONE

I INTRODUCTION

In the latter third of the twentieth century, Ronald Dworkin made major contributions to the debates concerning both objectivity in legal decision-making and the place of morality within the law. His influence stretches, sometimes explicitly and sometimes implicitly, into the twentieth-first century beyond his death in 2013.1 Dworkin’s publications were prolific and extremely contentious. His work was particularly relevant in the US where, in 2007, one claim noted that his works were cited there more than any other philosopher in that country on a scale of four to one.2 In 2005, one publication of critiques of his work listed a bibliography of 160 published articles under 10 separate classifications.3 But it is, nevertheless, likely that these publications included far more critics of Dworkin than supporters.

Of particular relevance to this thesis is Dworkin’s initial impact on legal theory particularly as it relates to his early claim in Taking Rights Seriously4 that, at least in ‘hard cases’, moral considerations figure in the determination of the right answers to questions of law. This claim challenged the idea that the law and morality can be kept separate in the manner demanded by John Austin:

The existence of law is one thing, its merit and demerit is another.5

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Dworkin’s arguments can be said to have been particularly influential on the legal positivists witnessed by the division that has subsequently formed between some academic legal positivists: between so-called ‘exclusive’ and ‘inclusive’ legal positivists. However, equally important to Dworkin was to take issue with the skeptical position raised by the American Legal Realists who proposed that the by their very nature legal rules could not provide correct answers to the cases coming before them. At the same time, the influence of philosophical pragmatism on the American Legal Realists, as well as their suggestion that judges had a creative role to play in the formulation of the law as a part of their own policy-making or policy-implementing role were of particular concern to Dworkin.

A Thesis Purpose

Brian Leiter observes that Dworkin creates problems for his legal theorizing in maintaining on the one hand that moral values figure in the truth of propositions of law, at least in ‘hard cases’, but that on the other had that there are right answers to be found for those ‘hard cases’. Moreover, Leiter stresses that while Dworkin was aware of these concerns, his responses ‘have attracted little attention from philosophers or jurisprudents over the years’. Yet, Dworkin’s approach to the objectivity of moral truth is critical to drawing a distinction between his work and that of other constructive theorists. It is the aim of this thesis to clarify and contextualize this important aspect of Dworkin’s theoretical work.

It is helpful to understanding Dworkin’s approach to objectivity and truth, and to his theory as a whole, to situate it within the canonical works of David Hume and Immanuel Kant, but also I consider that it is equally helpful to include the theory of Ludwig Wittgenstein. Although Dworkin’s work is spattered with references to Wittgenstein, and although philosophers have

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6 As an example of the former, see, eg, Joseph Raz, Between Authority and Interpretation, (Oxford, 2009); as an example of the latter, see, eg, Jules L Coleman, The Practice of Principle: in Defence of a Pragmatist Approach to Legal Theory, (Oxford University Press, 2001).
7 Meyerson emphasises this aspect of American Legal Realism. See Denise Meyerson, Understanding Jurisprudence (Routledge Cavendish, 2007) 90.
11 Ibid 67.
noted the potential ‘quietism’ within Dworkin’s approach to metaphysics, few philosophers consider his work from a non-skeptical Wittgensteinian perspective. This may be, in part, due to the general lack of enthusiasm in some US philosophical circles for the work of Wittgenstein. However, Dworkin’s references, as noted, would seem to indicate that Dworkin found a kindred spirit within Wittgenstein’s texts.

I propose that in *Law’s Empire*, Dworkin outlines a form of constructive interpretation that might lend itself to being understood as a naturalist methodological approach to legal theory. But, even if this is the case, an epistemological naturalism does not necessarily presuppose a commitment by Dworkin to a metaphysical naturalism and Dworkin’s explanation of objectivity and truth does not necessarily connect well with the methodological arguments he utilises for his constructive theory of interpretation.

Leiter further, and importantly for legal theory, argues that from a metaphysical perspective Dworkin can be understood as a non-naturalist. An alternative to this approach would be to consider, that Dworkin’s is a form of ‘quietism’. I propose, instead, that if Dworkin’s work, read in its best light, can be considered in a Wittgensteinian context, and if metaphysical naturalism can be divorced from a strict scientific approach to it, that there is an argument available for Dworkin to be considered as a form of metaphysical naturalist. That form of naturalism would take as its foundation the very context of ‘humanity’ as a particular and complicated ‘form of life’.

**B Thesis Outline**

Summarising the works of David Hume, and particularly the extensive works of Immanuel Kant, while still doing justice to them is difficult and is unlikely to be complete. In chapter two, I try to provide a summary of the theories of those philosophers only insofar as they are relevant to Dworkin. On the one hand, Hume can be said to have contributed to a line of empirical philosophy that took British philosophers into a direction that helped to form the analytical school of philosophy of which legal positivism might be seen as a development alongside a utilitarian ethics.

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16 See below ch 6.
Kant, on the other hand, responded to what he saw as Hume’s skepticism, with a form of ‘transcendental idealism’ and a deontological ethical theory. On the European Continent, these theories inspired German Idealism, and a school of critical philosophy. In spite of an apparent incompatibility, parts of the philosophical ideas of both have in some important respects not only influenced Dworkin but also have been adopted into his own theory. Notwithstanding Hume’s influence on him, I suggest that Dworkin’s theory resonates with the ideas of Immanuel Kant, at least as they have been interpreted by him and other subsequent Kantian philosophers, to the extent that Dworkin might also be considered to be a Kantian philosopher.

Dworkin’s work was prolific and spans five decades. His writing addressed not only theoretical development of legal philosophy, but also included many published critical analyses of particularly relevant US political issues or US Supreme Court cases. My thesis is primarily concerned with the philosophical theory Dworkin applied to his critical analyses. I have chosen to examine his theories from what I see as a developmental perspective evident in his major theoretical contributions. I see those developments being evidenced in three major stages: his early work, his mature thesis, and his lasting concern with objectivity and truth in value that is the focus of his final detailed work, *Justice for Hedgehogs*.

In chapter three, I begin by asking just what it was about Dworkin’s early work that prompted so much criticism. I look briefly at the philosophical divide Dworkin found between British, Continental and US legal philosophy, and then examine in some detail Dworkin’s controversial exposition of law as ‘rights’ and his conclusion that doctrinal law and morality are thereby inextricably interconnected. I focus particularly here on his article ‘Hard Cases’, as published in *Taking Rights Seriously*, because it exemplifies Dworkin’s earliest attempt at identifying values as principles crucial to any doctrinal examination of the law.

I consider the second, and formative stage of Dworkin’s work to be most satisfactorily detailed in his treatise, *Law’s Empire*, where he brings together as a theory of law ideas developed over many previous well critiqued articles. In chapter four, I examine that theory of law as a form of

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constructive interpretation by comparing it with two alternative forms of Kantian constructivism, that of John Rawls and more particularly that of Onora O’Neill.

In spite of significant development and change occurring in Dworkin’s theory between his early contributions in *Taking Rights Seriously* and his mature theory in *Law’s Empire*, one important theme remains constant throughout all of his work and, I believe, sets it apart from other constructive theories, and that is his repudiation of value skepticism and value relativism expressed in the philosophical thesis that there is no right answer to questions of law and value. In chapter five, I examine Dworkin’s response to this thesis, often referred to as his ‘one right answer’ thesis, as he elaborated it in his last major publication, *Justice for Hedgehogs*.21

In chapter six, I extend my examination of relevant philosophical influences on Dworkin to include the later work of Ludwig Wittgenstein. I utilise an interesting, if controversial, interpretation of Wittgenstein’s work that argues Wittgenstein can be interpreted as expressing a form of metaphysical naturalism,22 to suggest that there are sufficient similarities evident in Dworkin’s work to suggest that a similar conclusion could be drawn with Dworkin also.

My final chapter provides a summary of the conclusions from each previous chapter with a particular focus on Dworkin’s theory of truth.

21 *Justice for Hedgehogs*, above n 18.
22 Paul Guyer, *Kant* (Routledge, 2006).
CHAPTER TWO

II  THE INFLUENCE OF HUME AND KANT

A  The Truth of Propositions of Law

Among the many jurisprudential issues that Dworkin raised in his early works that led to his almost instant jurisprudential fame, or perhaps infamy, were two particular threads: one was a positive thread that argued that moral values, at least in hard cases, figure in the truth of propositions of law; the second was a critical thread that took two different forms. Utilising his own initial characterisation of ‘law as rights’, Dworkin argued initially that HLA Hart’s conception of law as ‘rules’ was inadequate as a characterisation of the concept of law; secondly, he argued against one strand of American Legal Realism that there were answers to be found within the law even for hard cases. Against the other sociological strand of American Legal Realism, he argued that it had simply failed to produce meaningful results. Against both theories in general he argued that judges never had the kind of broad discretion that would permit judges to determine legal questions in accordance with their own personal ideals. In this respect, he addressed his early work to issues raised by charges of judicial activism.

Dworkin did not launch a similar attack on natural law theorists, but nor does his theory of rights appear to fall smoothly within the ideas of natural law that were current at the time. He did appear to reject one definition of natural law, when he said:

Natural law insists that what law is depends in some way on what the law should be. This seems metaphysical or at least vaguely religious. In any case it seems plainly wrong. … If the crude description of natural law I just gave is correct, that any theory which makes the content of law sometimes depend on the correct answer to some moral question is a natural law theory, then I am guilty of natural law.

He goes on to defend his theory of adjudication as supporting this ‘crude characterization’, and he calls his ‘picture’ of that theory ‘naturalism’. He says:

According to naturalism, judges should decide hard cases by interpreting the political structure of their community in the following, perhaps special way: by trying to find the best justification they can find, in

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2  Dworkin, Taking Rights Seriously, above n 1, 4.


principles of political morality, for the structure as a whole, from the most profound constitutional rules and arrangements to the details of, for example the private law of tort or contract.

Therefore, when he does direct himself to the ‘natural’ aspect of his theory it is to ‘naturalism’ and the theory of adjudication he describes is none other than that of his theory of interpretation where he likens judicial interpretation to the interpretation of a chain novel.\(^5\)

In one sense it might be said that the positive thread of Dworkin’s work reframed natural law claims about the presence of moral principles in the law and I will look more closely at how Dworkin undertook this claim in chapter three below.\(^6\) The second aspect of the first positive thread of Dworkin’s work, however, asks a question about what it is that makes propositions of law true. It was Dworkin’s framing of the question in this way that, I believe, takes the jurisprudential student out of a legal comfort zone of seeking definitions provided, and agreed to, by others and into the contentious subject matter of general philosophy. It is also the question that leads the student directly to the study of the work of Immanuel Kant.\(^7\)

Dworkin’s theoretical writing is deceptive in that he writes in a plain English idiom that belies the philosophical complexity underlying his theories and also does little to assist the jurisprudential student, who is likely to be unfamiliar with general philosophy, to place his theories among other similar philosophical theories. In spite of this reference to ‘naturalism’, Dworkin rarely uses philosophical phraseology, or jargon, and more generally dislikes ‘isms’.

Because of the obvious connection to Kant, as a starting point, I have selected to examine the Enlightenment theories of David Hume and Immanuel Kant, not because of the irrelevance of the work of Plato and Aristotle to Dworkin, but because of an obvious limitation of time and space.\(^8\) Kant provides a reasonable starting point for Dworkin, not only because the question he asks about the truth of propositions of law is Kant’s own question, but also because he frequently refers to Kant and was clearly influenced by John Rawls who saw himself as a Kantian Constructivist.\(^9\)

David Hume provides an important philosophical contrast to Kant and Kant saw himself, at least in part, as responding to Hume’ skepticism. Although both were intent on showing that the existence

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\(^5\) Ibid.
\(^6\) Below ch 3.
\(^9\) Below ch 4.
of God could not be deductively proved, they were subject to different influences and beliefs and took two opposing directions in finding their conclusions. Their opposing views are still apparent in the controversies that surrounded Dworkin’s initial work and are subsequently evidenced in the twentieth century revival of metaphysical concerns about the possibility of truth in value. Hume’s work takes on a special importance for the claims of science that have become so prevalent in current scientific approaches to naturalism, a theme I take up in chapter six below.

B Enlightenment Changes

Hume and Kant were both philosophers of the Enlightenment, a social period of enormous scientific and particularly technological advancement spanning roughly the 17th and 18th centuries. The period saw a huge upheaval for people generally as they moved from villages to cities and became caught up in an increasingly mechanistic, factory based, and above all innovative culture. But scientific mechanistic development brought with it further moral and political upheaval that challenged previously held religious beliefs and the absolutist rule of the monarchs. This challenge was particularly important for the Thomist version of natural law theory that had held sway for several centuries because it removed the religious authority on which its principles were based.10 The period might be said to have brought about a moral crisis, known, after Nietzsche, as the ‘God is dead’ so what now problem.11

From a philosophical perspective, the Enlightenment is a late 18th century movement in thought that placed rational human beings at the centre of moral authority, instead of traditional religious authority, on the basis that all rational beings humans could exercise free will at least to the extent that their intentional actions are carried out for a reason.12 As a result of this belief in ‘human rationality’, it was thought that all things about the world could be discovered: whether those things concerned the universe, or the mind, or what constituted good government. This was the period of the ‘metanarrative’ that gave rise to the idea that there is some sort of overriding principle or theory from which objective principles can be derived, what Lyotard would later refer to, as the ‘grand narrative’ of philosophy.13 These meta-theories attempted to explain all there was to the universe.

At the same time, due to the emphasis on human autonomy and free will, the period gave rise to the liberal democratic political ideals of liberty, equality and fraternity that provided a momentum for

12 Leiboff and Thomas, above n 10, 185.
13 Ibid 198.
violent revolutions that shook Europe and America. But even if these principles might take over where Thomist natural law left off, if God is dead, the question arises from where do these principles achieve their authority?

Enlightenment philosophy brought about various strongly opposed positions around that question. Scientific discoveries had placed scientific method, particularly the experimental method such as that espoused by Isaac Newton, to the forefront of all knowledge. On the other hand, following Descartes, ‘rationalists’ made the claim that all knowledge was brought about by the ‘mind’, leading not just to the split between mind and body, a metaphysical split between the realists and the idealists, but to two opposed schools of epistemological thought as to where the truth of propositions might lie – empiricism versus rationalism.

Although the philosophers of the Enlightenment might have been intent on finding ‘certainty’ and ‘univocity’, this is not what they achieved. In relation to philosophical issues to do with natural science and morality, philosophy, including, I believe, legal philosophy, seems to have become characterized by the opposite opinions held within it. One of these divisions is represented in the debate between rationalism and empiricism, another between skepticism and idealism, realism and anti-realism, and another between utilitarianism in morality and the deontological approach of Kant.

Some of the philosophical divisions that arose during this period that become evident in the various critical responses to Dworkin’s work can be seen to begin in the divergent works of Hume and Kant.

C Hume and Kant

1 Introduction

Both Hume and Kant were reacting to a rationalist philosophy that developed from different philosophical approaches dating back to the ancient Greeks. Rationalism as Hume understood it, had arisen particularly from the work of Rene Descartes (1596-1650) and was followed by Spinoza and Leibniz. Descartes proposed through his famous line ‘Cogito ergo sum’ (I am thinking, therefore I am – or I exist) and from other principles that he thought to be self-evident that God exists, and that the universe (which God created) consists of two kinds of substance: non-physical minds whose properties are their thoughts or conscious states; and matter which is incapable of

14 Ibid ch 7, 222-3.
15 Ibid 184.
16 Ibid 184-5.
thought or consciousness and whose defining property is its ‘extension’ (or three-dimensionality).\textsuperscript{17} Both Hume and Kant argued that from their rationalism and self-evident principles, these philosophers had speculated about the ultimate nature of reality to reach unsubstantiated conclusions about the existence of non-physical beings such as God and the soul.

Rationalists argued from this division of substance to conclusions about the physical state of nature. By dividing humans into these two separate substances of mind and matter, rationalists concluded that humans are a distinct kind of animal: the mind representing a ‘divine’ or rational part of humans and matter representing the animal part of humans. Rationalists thought that mind provided humans with a ‘rational’ faculty that allowed them, by contrast with other animals, to put reason over their other psychological faculties.\textsuperscript{18} Rationalists then utilized the power of this reason to argue for the existence of other non-material things, such as God and the soul.

Also influential on the two philosophers was the work of Isaac Newton (1642-1727) who might be said to be the founder of classical physics and the experimental method. Newton rejected the idea that one could understand physics, or nature, solely by deducing general conclusions from supposedly self-evident, a priori, premises or ‘hypotheses’, or the theoretical approach that moved from particular cases to general principles and from those general principles to even more general and abstract principles. He proposed instead that we ought to focus on hypotheses that could be tested by observation and experiment. Through this system Newton completely changed our understanding of natural phenomena.\textsuperscript{19}

Both Locke and Hume shared Newton’s belief in the need for experimental reasoning, and believed that this method was appropriate also for understanding human behaviour and the moral sciences. Although Hume may have misunderstood Newton’s intentions,\textsuperscript{20} Hume appeared to see in Newton’s experimental approach a positive, ‘anti-skeptical’ commitment to scientific investigation of the world. Newton was not proposing, like Francis Bacon and his followers, that his experimental method would ever arrive at ultimate truths about the world, but he was asserting that experiments must be given priority over mathematical proofs, and perhaps implicitly the rejection

\textsuperscript{19} Dicker, above n 17, 2.
of speculative first principles, which was an issue of importance to Hume.\textsuperscript{21} Buckle suggests that what Newton tried to achieve was ‘the progressive harmonizing and simplifying of our best explanatory principles for phenomena: it is what he means by ‘laws of nature’.\textsuperscript{22}

A third and important influence came from John Locke (1632-1704) who is considered to be the founder of British Empiricism. Locke is said to have begun an ‘epistemological’ turn in philosophical thought.\textsuperscript{23} He thought that before we can answer questions about the nature of reality and the existence of God, we needed to know more about the powers and limitations of the mind and what we can realistically hope to \textit{know} at all.\textsuperscript{24} Locke thought that what humans know best, or with certainty, are their own conscious states or ideas, on which everything else must be based and that these conscious states are based on humans’ sensual experiences. Locke conceded that humans could derive ideas from hallucinations or dreams, and thought that this required an explanation or theory. However, he denied the concept of ‘innate ideas’, that humans have concepts not acquired or extrapolated from experience.\textsuperscript{25}

Locke and Hume were both responding to these challenges and focused on what we can \textit{know} and the limitations on our knowledge.

2 \textit{David Hume (1711-1776)}

Hume had two other influences that complicate and cause some ambiguities in his work. The first, and most important of these from the perspective of this thesis, was philosophical skepticism and the second was Scottish Naturalism.\textsuperscript{26}

Skepticism dates back to ancient Greece and in its original form did not deal with ‘knowledge’ or concern itself with the existence of God. Ancient skepticism was concerned with \textit{beliefs}, the conditions under which those beliefs are true for us, and the effect of beliefs on human action. It was not until Augustine, that skepticism became more directly concerned with knowledge due to Augustine’s concern with the question of how we come to ‘know God’.\textsuperscript{27} If, as Buckle suggests, Hume was well aware of the ancient skeptical debate, then Hume’s approach to skepticism is

\begin{itemize}
  \item \textsuperscript{21} Buckle, above n 18, xxv-xxvi.
  \item \textsuperscript{22} Ibid xxvi.
  \item \textsuperscript{23} Dicker, above n 17, 2.
  \item \textsuperscript{24} Ibid.
  \item \textsuperscript{25} Ibid.
  \item \textsuperscript{26} For the influence of the Scottish Naturalists, see Mounce, above n 20.
\end{itemize}
clearly a complex topic that does not lead directly to a contemporary understanding of skepticism as a denial of the possibility of all knowledge with its implications.

Pyrrhonian skepticism is not without its interpretive debates. But it is said to have called into question the possibility of ‘knowledge’ by arguing that our senses are not reliable enough to distinguish ‘between truth and error, appearance and reality, well grounded belief and mere opinion’.28 Pyrrhonian skepticism can be explained in terms of skeptical investigation, suspension of judgment, the skeptic’s end, action, and language.29 The skeptic is a philosopher who encounters divergent beliefs, pursues them until finding that the arguments for each position are of equal weight and then gives up, suspending judgment until further arguments arise. The suspension of judgment, for the Pyrrhonian, leads to a ‘tranquility in matters of belief…, and moderate affection … in matters that are forced upon us’.30 The major problem for skeptics is to explain how they can be active at all without belief. Pyrrhonism is said to have concluded that skeptics are able to be active because nature provides them with perception to follow appearances, and thought; and necessary ‘affections’ compel the skeptic to go along with traditions and customs.31 Skeptics do technical things by learning skills, and speak without making assertions by making reports like a chronicler of what appears to him or her now.32 Although skepticism itself resembles a ‘dogmatic’ claim, the Pyrrhonian skeptic aims to live ‘undogmatically’ and without belief, but they acknowledge assenting to ‘ordinary’ beliefs when they act.33 Lastly, Pyrrhonians noticed the relation between skepticism and language.34

Having studied classical philosophy, Hume was likely to have been well aware of the ancient understanding of skepticism. He would have seen skepticism as being concerned with ‘epistemological doubt den[y]ing knowledge of a thing’s nature, but [seeking] to keep beliefs in place.’35 This understanding of Hume’s own skeptical approach does help to give his work a unification and consistency that might be lost in his individual arguments, while it also attempts to address the Cartesian rationalist issues.

Descartes was also concerned about the existence of things. He was not a skeptic, but he attempted to refute this metaphysical form of skepticism by first making out a case for it. He argued firstly, as

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28 Dicker, above n 17, 7.
29 Vogt, above n 27.
30 Ibid [4.4].
31 Ibid.
32 Ibid. The historian is the prime example of a person who uses this form of ‘narrative’ solution.
33 Ibid.
34 Ibid.
35 Buckle, above n 18, x n 1.
Locke noted, that humans can duplicate their perceptions in vivid dreams, and secondly in a lasting conundrum, he argued that perhaps all of our perceptions are caused in some other way than the one we think is responsible, for example either by God, or some other evil deceiver. How can we know how our perceptions are produced, since by hypothesis they would appear to us to be the same however they are produced? Descartes tried to solve this problem by arguing for a benevolent God.

Hume’s original idea was based around an empirical, rather than a rational approach to knowledge. He proposed that Newton’s scientific empiricism could be used to establish a ‘science’ of humans, and that after observation humans can be seen to be a product of their ‘senses’ or ‘passions’, rather than of reason, because of those more vivid impressions that he attributes to ideas of the imagination.

(a) Impressions and Ideas

Before embarking on Hume’s understanding of perceptions, it is also helpful at this point to acknowledge that both Hume and Descartes utilized an historical understanding of the working of the mind based on a theory of the ‘faculties’ of the mind. The idea behind ‘faculty psychology’ is that the mind can be divided into four main types of faculties: the senses, the memory, the imagination and the understanding. The first three of these involve ‘image processing’, also called ‘imagination’, which can be contrasted with the ‘understanding’ that deals with reasons. It is the latter that was sometimes argued to be an activity of the soul and potentially independent of bodily processes.

Hume took his basic thesis from Locke, holding that that we acquire all our ideas from experience, where ‘experience’ is taken as meaning both our sense perceptions and introspective awareness of our own states of mind. Hume uses three specific terms to set out this thesis: “perception”, “impression” and “idea”. Perceptions included any conscious state whatsoever, and Hume divided these into two classes impressions and ideas. ‘Impressions’ mean any experience, and he further divided impressions into two classes: sense experiences, such as visual and tactile, etc. which are ‘outward’ sentiments; and ‘inner’ or introspective experiences, such as joy, sadness, anger etc. which are inward sentiments, or sentiments of reflection. ‘Ideas’ include any conscious state other

36 Dicker, above n 17, 7-8
37 Ibid.
38 Buckle, above n 18, xxii.
39 Ibid xxii- xxiii.
40 Dicker, above n 17, 5.
41 Ibid.
than an impression, so they include concepts, and imaginings, and remembrances particularly in the form of images. Hume thought that impressions were ‘more lively’ than ideas. 42

Ideas are the real subject of our controversies and lie behind our problem in finding definitions. Hume sets out a basic principle, the principle of empiricism, of the relationship between impressions and ideas. His principle is that every idea is either derived from a corresponding impression, or composed of simpler ideas, each of which is derived from a corresponding impression.43 Here ‘derived from’ means ‘copied from’ and ‘corresponding’ means resembling.44

This principle of empiricism, or correspondence, is not without its own problems.45 When Hume finds an idea that does not derive from an impression, he concludes that there really is no idea. He does not consider that his principle might be false. Philosophers solve this problem for Hume by suggesting that he is really introducing the topic of meaning and Dicker suggests that Hume’s principle of empiricism can be recast as a principle of meaning:

If T is a general, classificatory, or descriptive term that supposedly has an idea, I, as its meaning, but there is no impression(s) from which I is derived, then T does not stand for any idea and is therefore meaningless.46

Hume compares ideas with impressions:

All ideas, especially abstract ones, are naturally faint and obscure: The mind has but a slender hold of them: They are apt to be confounded with other resembling ideas; and when we have often employed any term, thought without a distinct meaning, we are apt to imagine it has a determinate idea annexed to it. On the contrary, all impressions, that is, all sensations, either outward or inward, are strong and vivid: The limits between them are more exactly determined: Nor is it easy to fall into error or mistake with regard to them.

When we entertain, therefore, any suspicion that a philosophical term is employed without any meaning or idea (as is but too frequent), we need but enquire, from what impression is that supposed idea derived? And if it be impossible to assign any, this will serve to confirm our suspicion.47

Hume’s theory seems to be rather about how we learn or come about our ideas, rather than a theory of meaning.48 Recast, as Dicker suggests, as a theory of meaning the principle is about what it is for

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42 Ibid 8. Dicker notes that in discussing other topics, such as cause- and- effect, Hume tends not to keep his skepticism in mind.
43 EHU, above n 20, 16-18, [5-9].
44 Dicker, above n 17, 9.
45 Ibid 10; Ayer, above n 20, 32.
47 EHU, above n 20, 18.
48 This problem is consistent with the influence that the Scottish naturalists had on Hume, see Mounce, above n 20, 42-48.
a term to have meaning. Importantly, Hume applies his principle of empiricism to three particular terms central to his theory: ‘substance’, ‘self’ and ‘cause’.

(b) ‘Substance’ and ‘Self’

Applied to the notion of ‘substance’, Hume’s principle of empiricism answers the question: ‘what is a thing?’ For Hume there were two competing theories: firstly, bundle theory, favoured by some Empiricists, according to which a ‘thing’ is nothing other than a collection of co-existing properties existing together at a certain place and time; and secondly, ‘substance theory’ according to which a thing is composed of more than just properties, and includes an underlying substance to which all the properties belong and in which they are said to inhere.

According to Descartes there were two types of substance: matter or material substance whose properties are shape, size and solidity, and mind or mental substance whose only properties are conscious states. This view is called ‘substance dualism’, Cartesian dualism, or dualism. According to this view, a person is identified with his or her mind, or mental substance.

Substance theory faces some major philosophical challenges particularly because substance is just not something that can be perceived, and it came to be to be increasingly questioned by philosophers. Hume applied his empirical test to the notion of substance and concluded that the idea of substance could neither be derived from an impression of sensation nor from an impression of reflection, or introspection. He concluded that the term ‘substance’ must be meaningless, and that there was no choice but to opt for ‘bundle theory’, that is, that a thing is just a bundle of properties, or a collection of particular qualities.

In a similar fashion, Hume also argued that we could have no impression of a mental substance or ‘self’, and he applied his principle to the idea of ‘self’, although, according to Dicker, what he had in mind was likely to have been the notion of a ‘mind’ or ‘soul’. When applied to ‘self’ what we find is a ‘constantly shifting vista of sense impressions, feelings, images, etc’. Further, ‘to try to identify oneself by introspection is to try to introspect the very subject of consciousness – the subject that is conscious of all the objects that one is aware of.’ Hume concluded that the notion of ‘self’ is, therefore, also meaningless and the mind can only be a bundle of conscious states.

49 Dicker, above n 17, 14.
50 Ibid 15.
51 Ibid.
52 Ibid.
53 Ibid 19.
54 Ibid.
55 Ibid 20.
56 Ibid 21.
Hume’s discussion of this point, however, leads to the concept of identity, and of what it is for a thing to retain its identity while undergoing change. Hume’s response was that for something to retain its identity it must not change at all: it must be ‘uninterrupted’, or ‘invariable’ and unchanging. As a consequence, Hume thought the idea of personal identity is nothing but a fiction.57

(c) Knowable propositions

Hume’s division of ‘knowable propositions’ or ‘ideas’ into two classes - ‘relations of ideas’ and ‘matters of fact’ - is fundamental to 20th century empiricism because Hume’s ‘ideas’ perform the work of ‘concepts’ and their use consists in the framing of an image.58 ‘Relations of ideas’ have two characteristics: they are intuitively and demonstrably certain, and they do not assert the existence of any non-abstract entities, such as physical objects or minds, or physical or mental events or states.59 ‘Matters of fact’, on the other hand, also have two characteristics: they do assert the existence of abstract entities and they are neither intuitively or demonstrably certain, with the exception of one class of entities.60

As an example of a relation between ideas, Hume gave the proposition that the square on the hypotenuse of a right-angled triangle is equal to the squares of the two sides.61 Relations of ideas, therefore, include what Hume saw as propositions that are ‘intuitively certain’, or ‘true’ just by understanding what it says, or ‘self-evident’ truths. The point for Hume with these propositions is that they would be true even if there were no right-angled triangles in the world and even if no-one had thought about them, and that their truth is demonstrable in some way. The proposition will remain true because it does not assert the existence of any abstract entity.

‘Matters of fact’ do assert existence and Hume’s point about these is that “[t]he contrary of every matter of fact is still possible; because it can never imply a contradiction”.62 Hume’s example is that the proposition ‘the sun will not rise tomorrow’ implies no more contradiction than that the ‘sun will rise tomorrow’.63 Unlike relations of ideas, matters of fact are never demonstrably certain. Hume included among matters of fact propositions that imply the existence of non-abstract entities, such as every event has a cause.64 These propositions assert existence if they are taken together

57 Ibid 21-22.
58 Ayer, above n 20, 41
59 Dicker, above n 17, 36.
60 Ibid.
61 EHU, above n 20, 28 [1].
62 Ibid 28-29 [2].
63 Ibid.
64 Ibid 29.
with a proposition reporting some observed event. They allow us to infer the existence of something unobserved from something observed. From the observation that thunder follows lightening, we may infer from a flash of lightening that thunder will follow.

Hume’s empiricist and skeptical position holds, in the negative, that no matters of fact are self-evident, nor are they demonstrable. They cannot express the certainty required of knowledge, as can relations of ideas. Together Hume’s relations of ideas and matters of fact closely resemble Kant’s analytic and synthetic truths. Hume’s problem here is largely that his own proposition that there are two classes of propositions appears not to be a relation of ideas, but a matter of fact, and is therefore itself unknowable.

(d) Failure of Causal Reasoning & Inductive Reasoning

Hume’s proof for his proposition about the non-demonstrable status of matters of fact is given in his critique of causal reasoning, and in his critique of inductive reasoning. He uses his empirical thesis to prove that we cannot ‘know’ from an event A occurring, such as a flash of lightning, that it will be followed by an event B, the clap of thunder. We may have past experience that event B will follow event A, but Hume’s famous proof is that we cannot infer from experience that this will necessarily be so.

It is not my intention here to examine Hume’s proof in detail but rather to focus on its implications. Hume’s basic premise, that we cannot show that one event is caused by another event, begins with the observation that the future has always resembled the past, and if expressed differently: the future will always resemble the past, so that if there is an event such as A, it will be followed by event B. Hume argued that this inference is invalid because there are no ‘secret powers’ that can be observed to cause these events. The basic premise is neither self-evident, nor demonstrable, nor is it self-contradictory, therefore it cannot form the basis of a valid inference. Having given this proof, Hume acknowledges that most of natural science is based on the belief that the course of nature will not change. The result is that while he has proven that inductive reasoning (or inference from experience, as opposed to deductive reasoning from self-evident premises) cannot be

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65 See below 36.
66 Dicker, above n 17, 56.
67 EHU, above n 20, Part 4, 28-53 [1-55].
68 Dicker, above n 17, ch 3.
69 Ibid 87. Dicker suggests that Bertrand Russell makes this alteration.
70 Ibid 88. Self-evidence can be a set of statements, all of which are self-evident.
71 Ibid 90.
rationally justified, he also acknowledges that it is indispensable to goal-oriented or scientific enquiry. Dicker summarises Hume’s conclusion:

As thinkers (philosophers), we must recognise that our “reasonings, concerning matters of fact”, are not susceptible of any rational justification. But as humans planning and acting in the world and inquiring into its workings, we cannot avoid relying on it.72

What follows from Hume’s proof is firstly the question of whether having proven that inductive reasoning cannot be rationally justified, Hume himself was a complete skeptic, and whether he means that inductive reasoning cannot be justified, without holding that it is therefore irrational.

Hume seems to answer this question himself. He went on to write the Dialogues concerning Natural Religion, from which it would appear justified to say that he thought that some inferences were, at least, better than others, and that they could be the basis of belief and therefore, of action.73 More importantly, it has been argued that induction itself can be rationally justified because it can be inferred from self-evident (or analytic) truths that it is reasonable to have a degree of belief in something proportional to the number of favourable instances and the variety of circumstances in which these instances occurred.74 It might be argued, therefore, that it is reasonable to maintain that the process of inductive reasoning is rational, even though its results cannot be fully justified.

(e) Existence of Body – Constancy and Coherence – Following Custom

As was common in the 17th and 18th centuries, Hume believed that things we perceive with our senses are nothing but our own ‘perceptions’ or ‘impressions’ of sensation, that is, that they are simply our own sensations or ideas. The idea is that what we perceive are not bodies themselves but impressions that depend: firstly, on the conditions in which we perceive them, and secondly, on the reliability of the perceiver’s own senses. As well as reliability of senses, Hume thought that evidence for the separability of the object perceived from its impression could also be evidenced by the fact that we can distort our view of something by deliberately altering our senses, and that we can sometimes hallucinate to produce impressions of something not present before us at all. Epistemologically this idea is expressed as that what we perceive provides us with ‘sense-data’.75

Unlike most philosophers of his time, Hume did not accept that we legitimately infer the existence of bodies outside our minds from knowledge of our impressions. He saw this as being, in effect, a

72 Ibid 91.
73 David Hume, Dialogues Concerning Natural Religion (Penguin, first published 1779, 1990 ed) (Dialogues); Dicker, above n 17, 91.
74 PF Strawson, An Introduction to Logical Theory (Methuen, 1952), 248-63. For Dicker’s argument on Strawson, see Dicker, above n 17, 91-98.
75 Dicker, above n 17, 156-8
causal argument that our sensations or impressions are caused by bodies for which there is no basis in reason. For Hume, the only inference we can draw is one from the causal relation between the experience of one thing to the experience of another so that we find from experience, that the two occurrences are ‘conjoin’d together’:

The idea of this relation is deriv’d from past experience, by which we find, that two beings are constantly conjoin’d together, and are always present at one to the mind.76

But these are only ever impressions, or as he puts it ‘resemblances’.77 We cannot draw from these experiences any conclusions as to the existence of bodies and his argument follows from his rejection of the causal argument. At the same time, he rejected the view that it follows that bodies are merely groups of impressions.78

Hume argued that neither our belief in external bodies, nor our belief in the continued existence of external bodies while not being perceived by us, could be proven by the senses or from reason. He argued instead that even so our beliefs arise from the fact that our impressions have two particular features: ‘constancy’ and ‘coherence’.79 Constancy represents the quality that objects have that distinguishes them from impressions ‘whose existence depends on our perception’.80 When we return our attention to these objects, we find ‘they present themselves in the same uniform manner, and change not upon account of any interruption in [our] seeing or perceiving them’.81 Coherence represents the quality of an object that makes it comprehensible even when it has changed due to an interruption in our perception, so that a fire that has burned away in my absence is still comprehensible to me although it has clearly changed, because it has made such changes before.82

It is clear that Hume is trying to describe the uniformity of our impressions but he does so by talking about ‘bodies’. Whether this is ‘careless’ as claimed by Dicker,83 or the inevitable point of his commitment to empiricism is a matter of considerable debate.

Hume’s idea of ‘constancy’ is linked with his theory of identity through time, or the idea of ‘sameness’, and with a psychological principle concerning the effects on our minds of

77 EHU, above n 20, 134 [11-12].
78 Dicker, above n 17, 161.
79 Ayer, above n 20, 54.
80 Treatise, above n 76, 194-5.
81 Ibid.
82 Ibid 195.
83 Dicker, above n 17, 170.
These ideas lead us to the conclusion that our impressions meet the conditions required for identity and that they are therefore identical. He completes his argument for constancy by confirming that belief is a ‘lively idea related to a present impression’ that we achieve from our present memory of a vast number of impressions resembling each other, returning at different times and after considerable interruptions. According to Hume ‘our memory … bestows a vivacity on that fiction; or in other words, makes us believe in the continued existence of body.’ The more lively the idea, the more likely we are to believe it, and vice versa.

Hume completes his examination of the false belief in the existence of bodies by comparing the ‘vulgar’ or common view that objects of the senses are bodies, with the philosophical view that bodies and impressions have separate existences, and with the extremely skeptical view that both are wrong. None of these views satisfactorily proves the existence of bodies.

(f) Hume’s Skepticism

Hume declares himself at one point to be a ‘true’ skeptic, and a ‘mitigated’ skeptic at another, therefore, it seems not unreasonable to claim that he is a skeptic of some sort. Exactly what sort of skeptic that amounted to is, however, a matter of some controversy. Some interpreters see a form of naturalism in his skepticism, or provide a naturalistic explanation for his skepticism, although this is not without problems, particularly for the normative aspect of our reasoned conclusions. In the space available here I can make only a few comments about Hume’s understanding of belief and reason.

At the end of his exposition ‘Of scepticism with regard to reason’, Hume says:

My intention then in displaying so carefully the arguments of that fantastic sect, is only to make the reader sensible of the truth of my hypothesis, that all our reasonings concerning cause and effect are deriv’d from nothing but custom; and that belief is more properly an act of the sensitive, than of the cognitive part of our natures. ... If belief ... were a simple act of the thought, without any peculiar manner of conception, or the

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84 Treatise, above n 76, 253; Dicker, above n 17, 171.
85 Treatise, above n 76, 208.
86 Ibid 209.
87 Treatise, above n 76, 273.
88 EHU, above n 20, 140 [24].
89 Mounce argues from a naturalist perspective that Hume’s arguments need not lead him into skepticism. Mounce, above n 20, ch 5.
91 For naturalist readings see Norman Kemp Smith, The Philosophy of David Hume: A Critical Study of its Origins and Central Doctrines (Macmillan, 1941); Mounce, above n 20. For the problems with this naturalist reading, see Ainslie, above n 90, 252-53.
addition of a force and vivacity, it must infallibly destroy itself, and in every case terminate in a total suspense of judgment. 92

What Hume seems to be suggesting is that skepticism should only be a worry to those who hold a particular conception of belief as a ‘simple act of thought’ that leaves them susceptible to a particular conception of belief. 93 Belief is rather a passive event brought about by experiences that impact on various associative propensities, so that causal reasoning, for example, is brought about by feeling that objects belong together. For Hume neither the belief, nor the doubt following it, are brought about by the will. Reason does not act in isolation from our other senses. The question of reason’s authority, why it is that I should believe the inferences from the various associations of objects I make, becomes less important for Hume because the ‘vivacity’ of an idea just is the psychological manifestation of its having authority with me. 94

For Hume, the worry about the authority of our belief comes only after we have formed the belief, only after we have become immersed in it. To call a belief into doubt we have to step back from it by means of a new mental act that Hume calls a ‘reflex of the mind’. 95 The reason for taking that step back will also be something acting upon us, such as a concern about being right. But a recalculation of a demonstration, such as a calculation, is not likely to bring us any closer to an ‘authentic’ belief, that is, one that we know to be true. Such a recalculation, is also a matter of making associations that will only increase the probabilities of our being correct in the original calculation. 96

It was different for the neo-Stoics, who conceive belief as an act of self-conscious reasoning that we take in order to ‘get things right’. The skeptics’ worry about the infinite regress of justification will always be a problem on this model, as opposed to Hume’s. 97 While the skeptic can still ask of Hume’s model about its ‘authenticity’ or its ultimate truth, Hume argued that we need a reason to reflect on our reasoning. We are not compelled into an infinite regress. 98 The person who is motivated for some reason to reflect on their reasoning will, after a few rounds of checking, determine their position, ‘rest on their verdict’ and go about the rest of their life. 99

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92 Treatise, above n 76, 183-84.
93 Ainslie suggests that although Hume identifies the Pyrrhonians as his target group, more accurately his target appears to have been the Neo-Stoics, particularly Descartes and Malebranche. Ainslie, above n 90, 258.
94 Ibid 259.
95 Treatise, above n 76, 184. Ainslie, above n 90, 260.
96 Ainslie, above n 90, 261.
97 Ibid 260.
98 Ibid 262.
99 Ibid 263.
There is, however, one particular motivation that does lead to the significant problem of the regress, and that is the philosopher’s curiosity about the status of reason itself, the search for the unimpeachable answer. On this point, Hume agrees with the Pyrrhonist that no such answer is possible, our reasoning is always potentially fallible.\textsuperscript{100} Hume says:

This sceptical doubt … with respect to reason … is a malady, which can never be radically cur’d, but must return upon us every moment, however we may chase it away … ’Tis impossible upon any system to defend … our understanding; and we expose [it] farther when we endeavour to justify it in that manner …\textsuperscript{101}

According to Hume, philosophical attempts to somehow ground, justify or authenticate our reasoning only result in the regress. It is possible, but not necessary to undertake these ‘reflexes’ of the mind when they are viewed, as Hume suggests, as psychological.

It is here that some philosophers argue for a naturalist view of Hume’s skepticism because Hume goes on to hold that the skeptic cannot maintain that philosophical state of mind. Nature is too strong.\textsuperscript{102} Reasoning, like breathing or feeling, is just as natural to us. None of these activities act in isolation from the rest of our body and our environment. Reason can judge the world because it is already related to the world in ways that are not of its own making.\textsuperscript{103}

Hume argues that we are psychologically unable to stay with the philosopher’s constant questioning of reason, and that attempting to do so undermines our capacity to continue to investigate.\textsuperscript{104} What we learn from such an attempt at philosophical reasoning is not to show that reason is fallible or vindicated, but that it leaves us without ‘reason’ itself – the very thing we have put on trial. For Hume then, the ‘true’ skeptic, as opposed to the ‘total’ skeptic, acquiesces to his reason, recognizing its fallibility.\textsuperscript{105}

In a corresponding section of the \textit{Treatise} Hume argues similarly that we cannot justify or authenticate our senses and yet we do continue to rely on them.\textsuperscript{106} In the same way that we do not normally reflect on our reasoning, we also take our senses to reveal to us the existence of an independent world. We take this as granted and even though we may think that we need to

\textsuperscript{100} Ibid.  
\textsuperscript{102} Ainslie, above n 90, 264.  
\textsuperscript{103} Mounce, above n 26, 52. Mounce draws an analogy between Hume and Calvanist thinking at this point. Calvanism holding that all our faculties are liable to corruption. Mounce supports this analogy by arguing that Hume sees metaphysical (philosophical) reasoning as a corruption of reason.  
\textsuperscript{104} Ainslie, above n 90, 264-66.  
\textsuperscript{105} Ibid 267-68. Ainslie argues that in this respect, at least, Hume’s ‘true’ skepticism has more in common with Academic skepticism than with Pyrrhonian skepticism.  
\textsuperscript{106} \textit{Treatise}, above n 76, 187.
authenticate the existence of an independent world, reflections on this aspect of reason only serve to dissolve the object of our study. Philosophy fails us and we must fall back on our natural faith in both reason and our senses.107

(g) “Ought” from “Is”

Hume is well known for his famous claim that you cannot get an ‘ought’ from an ‘is’, more often referred to as the ‘naturalistic fallacy’. He wrote:

> In every system of morality, which I have hitherto met with, I have always remark’d, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz’d to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought* or an *ought not*.108

Hume accepted that moral values ‘have an influence on [our] actions and affections’.109 But reason alone is not responsible for exciting our passions. Because we cannot prove the existence of God, or the soul or causality, moral values cannot be derived deductively from the fact of the existence of a God, or a soul, or causality. Moral conclusions, somewhere along the line of deducibility would require another moral premise in their support. Clearly, this is not without its own further problems, particularly those of infinite regress or circularity. But Hume’s reliance on causal links, on which he thinks we rely because of our ordinary impressions (including our passions) and ideas, in spite of their failure to prove the existence of God, allows him to go on and discuss what we find to be ‘good’ in any event. He makes no claim to the ‘existence’ of ‘good’ other than as an impression or perception, and he clearly believes that we can continue to argue about the conclusions to be drawn from the scientific observation of people and how they behave, and what they ‘by convention’ or ‘custom’ or ‘habit’ believe.

Dworkin accepted Hume’s argument that we cannot justify moral facts from arguments about what exists in reality.110 He also had no problem accepting Hume’s argument that our inability to prove the existence of God, souls, and matter from any scientific viewpoint, made little difference to moral argument and the impact of moral beliefs on our actions. What Dworkin disagreed with was Hume’s ultimate reliance on observation, experiment, custom and habit as the basis of argument for

107 Mounce, above n 20, 269. Mounce argues that in this section Hume’s arguments ‘run out of control’ and that there are sections here where he becomes involved in the ‘total’ skepticism from which he is attempting to free himself: at 49, 53-61.

108 *Treatise*, above n 76, 469.

109 Ibid, 457.

our moral behaviour and his skeptical conclusions about the possibility of there being, notwithstanding the lack of observational proof, no right answer to moral issues.

(h) Conclusion

Dworkin and Hume appear to have two things in common besides their agreement in the relevance of the ‘naturalistic fallacy’ concerning normative reasoning. Firstly, there is little doubt that Dworkin adopts Hume’s thoughts about the need for consistency and coherence for achieving a satisfactory understanding of the world about us. Secondly, Dworkin appears to adopt something like Hume’s conclusion about belief, however like other naturalists, he does not adopt Hume’s skeptical conclusion.

Dworkin is content to accept Hume’s arguments that morality cannot rely on facts about what exists in the world alone and that our morality does affect what we do. Arguably, Dworkin might be said to adopt some form of skepticism by avoiding or ‘suspending’ judgment on what exists in the world and what the world is composed of, accepting that that question will ultimately be answered by reality itself. It would be a mistake, however, to assume from this that Dworkin is any kind of a skeptic.

Hume, on the other hand, was making a specific point here. He wanted to show that the existence of God was something that could not itself be proven by experience or experiment, and therefore could not be the basis for our justifications of belief that ground our knowledge. At the same time, he seems also to be saying that it is part of our nature to follow custom and in doing so to hold to certain beliefs that at the same time do not amount to knowledge. Hume saw belief, and reflection on our beliefs, as something passive, something produced by external desires or passions as well as something internal. Dworkin does not appear to adopt this conclusion of Hume’s. For Dworkin beliefs are much more closely related to reason alone, although influenced by the world around us. For Dworkin it is possible for reasons to ‘cause’ us to change our beliefs.

One of the problems with making any comparison between Hume and Dworkin is that Dworkin’s theory is always conceptual whereas Hume’s focus on empiricism and objects leads him into what some philosophers see as confusion and this so particularly in his arguments about skepticism. Dworkin appears to take Hume’s conclusions and move in a different direction with them: a direction that appears to be much closer to Mounce’s argument about the influence that the epistemological naturalism of the Scottish naturalists had on Hume from which he did not, and may not have intended to escape.
Kant, on the other hand, rejects Hume’s characterisation of reason as something passive that cannot look at itself. Because Kant does not focus on knowledge and reason as objects, he arguably gives a clearer understanding of the limitations of knowledge, while also attempting to explain just such a transcendence that our knowledge appears to assume as Hume, it may be argued, was either deliberately, or perhaps, unwittingly suggesting.

3 Immanuel Kant (1724-1804)

(a) Kant’s Critical Philosophy

Without doubt Kant’s major contribution to philosophy was the *Critique of Pure Reason (the CPR)* and whatever the difficulties may have been with both its language and its logic, it has been the source of many of the philosophical discussions in the subsequent 19th and 20th centuries.

In the CPR, Kant undertook the task of responding to the philosophical controversy between the Empiricists on the one hand, and the Rationalists on the other. Indeed, Kant seems to be attempting to find a middle way between the dogmatic extremes of the two positions. Kant was not a religious skeptic, and he believed humans needed to have faith in the concept of God, although he agreed with Hume that there could be no objective proof that a God exists.

Kant responded to both the empiricists and the rationalists with his theory of ‘transcendental idealism’ in the CPR.

(b) Kant’s Philosophical Task

In his mature philosophy Kant saw himself as answering four fundamental questions: what can I know; what should I do; what may I hope; and finally, what is the human being? The answers to these questions are contained within Kant’s three ‘Critiques’, although they are considerably supplemented through other writing. The formation of the questions by Kant in the first person suggests that Kant is asking the questions from the perspective of any conscious being who can use the word ‘I’: that is, a being who can identify him or herself as the subject of experience. This requires a starting point of consciousness, and self-consciousness. On this point, Kant is clear that

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112 AC Ewing, *A Short Commentary on Kant’s Critique of Pure Reason*, (University of Chicago Press, 1967). Ewing discusses many of these problems in a sequential approach to the issues raised by Kant’s *Critique of Pure Reason*.

his work is not intended as a form of empirical psychology.\textsuperscript{114} In fact, much of the importance of Kant’s work arises from the fact that he looks at the subject, rather than the object, as the focus of cognition.\textsuperscript{115}

Kant’s theory of ‘transcendental idealism’ provides the answers to the first two questions – what can I know and what should I do. In this context ‘transcendental’ needs to be distinguished from the familiar concept of ‘transcendent’, which refers to something that is not a possible object of experience. ‘Transcendental’ as used by Kant, refers to the necessary conditions of our experience.\textsuperscript{116} Kant argues that we can know the laws of nature with fundamental certainty because these laws are nothing but the laws of human thought, or reason, that are accessible to us as human beings. The second question is answered as a consequence of the freedom, or autonomy, provided to us by reason to formulate not only the laws of nature but also the moral laws of human action as well. Freedom in this sense means free from any external authority whether that be of God or other humans. What I may hope, answered in the \textit{Groundwork of the Metaphysics of Morals}\textsuperscript{117} and the second \textit{Critique of Practical Reason (CPracR)},\textsuperscript{118} is that I can achieve the ends required of me by the moral law to transform the natural world into a moral one conforming to those moral laws. The freedom of choice given to us to act morally is not, therefore, unrelated to the natural world.\textsuperscript{119}

The fourth question - what is the human being? - is introduced in the third \textit{Critique, the Critique of the Power of Judgment (CPJ)}.\textsuperscript{120} In the CPJ Kant argues that we may use our experience of natural beauty and the organization of nature (among other things of beauty), as ‘an emotional support for the plausibility of this hope’.\textsuperscript{121} Kant’s answer follows from his view that the human being is the source of natural and moral law as well as of the experience that assures us that these two forms of legislation are mutually consistent.\textsuperscript{122}

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\textsuperscript{115} Nectarios G Limnatis, \textit{German Idealism and the Problem of Knowledge: Kant, Fichte, Schelling, and Hegel} (Springer, 2008) 20.
\textsuperscript{116} Ewing, above n 112, 25.
\textsuperscript{117} Immanuel Kant, \textit{Groundwork of The Metaphysics of Morals} (Mary J Gregor trans, Cambridge University Press, 1998) [trans of: \textit{Grundlegung zur Metaphysik der Sitten} (first published 1785)] (\textit{Groundwork}).
\textsuperscript{118} Immanuel Kant, \textit{Critique of Practical Reason} (Mary J Gregor trans, Cambridge University Press, 1996) [trans of: \textit{Kritik der practischen Venuuft} (first published 1788)](\textit{CPracR}).
\textsuperscript{119} Guyer, above n 113, 6-7.
\textsuperscript{120} Immanuel Kant, \textit{Critique of the Power of Judgment} (Paul Guyer trans, Cambridge University Press, 2000) [trans of: \textit{Kritik der Urteilskraft} (first published 1790)] (\textit{CPJ}).
\textsuperscript{121} Ibid 7, 37. See also, Dworkin, R, \textit{Religion Without God}, (Harvard University Press, 2013). Ewing, above n 112, 28. Ewing asserts that it does not follow that Kant’s choice of the term ‘aesthetic’ in the ‘Transcendental Aesthetic’ has any connection with beauty. However, it is not hard to see that there may have been a connection between Kant’s early choice of the concept of the ‘Transcendental aesthetic’ and his subsequent links between nature and beauty, through his early ideas of the ‘unity’ of consciousness and it might be inappropriate to rule out \textit{any} linkage as Ewing has done.
\textsuperscript{122} Guyer, above n 113, 8.
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(c) Transcendental Idealism

Kant’s theory of ‘transcendental idealism’ is detailed in the CPR. Kant sets out his argument in two distinct parts: the first is a constructive, purely theoretical, part and the second is a critical part in which he critically analyses and rejects the claims of the rationalists and empiricists about the immortality of the soul, and the existence of God. In doing so, Kant arrives at the same point as Hume, concluding that we cannot prove either the existence of God or the immortality of the soul. However, contrary to Hume, Kant argues that we must accept as an a priori truth that every effect in nature has a cause.123

Guyer summarises Kant’s ‘full-blown’ doctrine of ‘transcendental idealism’ as follows:

[Although sensibility and intellect are fundamentally different cognitive capacities, sensibility producing “intuitions” or representations of particular objects and the intellect “concepts” or representations only of general types of objects, the latter could not yield genuine knowledge without the data provided by the former, and thus that all of our knowledge is restricted to the way in which the world necessarily appears to creatures like us – although we remain free to think of the world in other ways, and even must do so for the purposes of morality.124]

Another way of considering Kant’s ‘transcendental idealism’ is to see it as a ‘novel conception of objectivity.’125 The idea is that knowledge is possible only with the synthesis of experience that provides content without form, and reason that provides form without content.126 Knowledge requires reason and experience to work together. Knowledge produced in this way is objective in that it ‘transcends’ ‘the point of view of the person who possesses it, and makes legitimate claims about an independent world.’127 While Kant’s theory of ‘transcendental idealism’ is a connecting theme throughout his subsequent work, it contains ambiguities and logical problems that have led many philosophers either to reject or deride it.128 However, in his two part argument, Kant arrives, perhaps much more convincingly, at the same point as Hume, concluding that we cannot prove the existence of God or the soul, but that we must accept as an a priori truth the principle that every effect has a cause.129

123  Scruton, above n 114, 129.
124  Guyer, above n 113, 29
125  Scruton, above n 114, 27.
126  Ibid.
127  Ibid.
128  See, eg, Guyer, above n 113, 58 n73.
129  Scruton, above n 114, 129.
Kant’s constructive contribution is purely theoretical. He does not undertake empirical experiments in any scientific fashion to arrive at, or to prove, his theory because his topics are metaphysical, about the concepts of ‘existence’, ‘knowledge’ and ‘truth’, which he does not believe can be ‘shown’ in any empirical manner. The role of formal logic is one of the topics that Kant takes to task. Kant was of the view that formal logic pertains to the expression and in no way to the content of knowledge in respect to objects. The role of formal logic is in mathematics and metaphysics. Kant confines his arguments to the logic of reason as expressed through the meaning of language.

The ambiguities, inconsistencies, and errors of logic in the CPR, do not completely detract either from its overall message, or from its numerous contributions to philosophical thought. In the limited space available here, I will attempt to introduce a few of Kant’s relevant contributions, not only from the CPR, but also from his work as a whole.

(d) The Analytic/Synthetic – A Priori/A Posteriori Distinctions

Kant draws a distinction between two different kinds of propositions or ‘acts of judgment’ or ‘beliefs’ that take the form of a subject and an object. Where Hume had accepted that some statements could be self-evidently, or obviously true, Kant formalized these statements by identifying them as ‘analytic’. An analytic judgment is one whose ‘predicate $B$ belongs to the subject $A$ as something that is (covertly) contained in this concept $A$.’ Analytic propositions are those terms that are true simply in virtue of the meaning of their terms and the laws of logic. An analytic truth is not simply a statement whose predicate contains a definition. Kant’s example of an analytic proposition is that ‘all bodies are extended’. A more commonly used example is ‘All bachelors are unmarried males’. A contradiction of either term makes no sense of the other.

For Kant, analytic a priori ‘cognitions’ or knowledge need not be based on any experience (although they may be confirmed by experience), whereas a posteriori knowledge has its source in empirical experience of particular objects. A posteriori knowledge, therefore, can only inform us about the behaviour of the particular objects of our observation. However, all a priori cognition, whether analytic or synthetic, requires necessity and strict universality.
The subject rather than the object takes a primary place in Kant’s theory. As part of an argument for what Kant calls the ‘unity of apperception’, he concludes that all propositions, as judgments, presume the implied prefix ‘I think …’. More controversially, Kant claim that ‘existence’ alone does not constitute a predicate but is rather an assumption of a proposition containing both a subject and an object. This unity of apperception that one apprehends from one’s own point of view is not a conclusion from experience, but a presupposition of it.

Synthetic propositions are those in which the predicate \( B \) lies entirely outside the concept \( A \). Kant’s example of a synthetic proposition was that ‘All bodies are heavy’. He argued that there can be synthetic a priori propositions in spite of the object not being ‘contained in’ the subject and he reasoned that this must be because of something other than the meanings of the terms involved and the laws of formal logic. For Kant analytic judgments are ‘judgments of clarification’, while synthetic judgments are ‘judgments of amplification’.

For Kant analytic judgments are known to be true ‘a priori’. Once we know the meaning of the terms, and the laws of logic, we know that the proposition is true without making observations. It is clear that many synthetic statements can be known from ‘observation or experience’, that is ‘a posteriori’, but the observations remain pertinent only to the objects observed. I can only know the colour of my book on Kant is blue, from an observation of it because the concept ‘blue’ is not contained in the concept ‘book’. Nor can I generalize from that experience that all books are necessarily and universally, therefore, blue. Experience for Kant, however, does include the experience of others of which I am aware.

Hume had argued that the distinction between analytic a priori (relations of ideas) and synthetic a posteriori propositions (matters of fact) exhausted all possible truths. Kant agreed that there cannot be any analytic a posteriori propositions, but he argued that there could be synthetic a priori propositions and that they included all the fundamental propositions of philosophy, as well as the contents of pure mathematics (which Hume had included in ‘relations of ideas’), as well as the basic

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135 Limnatis, above n 115, 29. This is something that becomes important for German Idealism. See Scruton, above n 114, 43. For the importance of this concept, see Limnatis, above n 116, 29.
136 Guyer, above n 113, 22. See Limnatis, above n 115, 61 for a discussion on Kant’s logic of existence and logic.
137 Scruton, above n 114, 44.
138 Ibid.
139 See Limnatis, above n 115, 24 for a discussion of the problems surrounding Kant’s choice of ‘extension’ and ‘heavy’ to differentiate between the ‘analytic’ and ‘synthetic’.
140 Guyer, above n 113, 47
141 Ibid.
142 Ibid 24. While the expressions ‘synthetic’ and ‘synthesis’ as used by Kant may not be synonymous, they are not accidental.
principles of natural science (sometimes referred to as ‘first principles’). It is Kant’s inclusion of mathematics in the synthetic a priori that forms the primary, and assumed, basis of his argument here.\(^{143}\)

\((e)\) Kant’s Copernican Revolution

As a result, Kant’s fundamental task became that of showing that there can be ‘synthetic a priori’ truths; that even though these propositions are based on experience, synthetic a priori judgments can be both necessary and universal.\(^ {144}\) He argues his case ‘synthetically’, that is, according to the principles of pure (not empirical) reason, rather than ‘analytically’, that is, by regress from effects back to causes. This theory is the substance of what Kant called his ‘Copernican Revolution’.\(^ {145}\)

If our intuitions (where ‘intuition’ is used by Kant in the sense of ‘observation’ or ‘looking at’)\(^ {146}\) are to become cognitions, or a matter of a priori knowledge, rather than a posteriori generalization, then those intuitions need to conform to our faculty of intuition and not vice versa.\(^ {147}\) What we need to discover are:

\[
\text{[T]he fundamental forms for the sensory representation and conceptual organization of objects within the structure of our own minds, then we can also know that nothing can ever become an object of knowledge for us except by means of these forms and thus that these forms necessarily and universally apply to the objects of our knowledge – that is, that they are synthetic a priori.}\(^ {148}\)
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In the ‘Transcendental Aesthetic’ Kant establishes the two basic a priori elements of sensible perception and judgments,\(^ {149}\) where he explains that \textit{space and time} are the two basic ‘forms’ of the faculty of sensibility.\(^ {150}\) They are not concepts of the faculty of intuition, because each sensation requires temporal, and sometimes spatial, input.\(^ {151}\) Guyer suggests that ‘this claim that space and time are nothing but ‘the essential forms of our representation of things’ is Kant’s doctrine of ‘transcendental idealism’.\(^ {152}\) The issue of the separation of space and time in the faculty of sensibility, as opposed to in the faculty of intuition, is that space and time become the basis for

\(^{143}\) Ibid 48-49; Ewing, above n 112, 20.
\(^{144}\) Guyer, above n 113, 47
\(^{145}\) Ibid 48-9; Ewing, above n 112, 16.
\(^{146}\) Ewing, above n 112, 18, 28.
\(^{147}\) Guyer, above n 113, 49.
\(^{148}\) Ibid 49-50.
\(^{149}\) As distinct from the a priori forms of concepts or categories, see below 41.
\(^{150}\) For the use of ‘aesthetic’ and its connection with beauty, see Ewing above n 112, 28. The ‘Transcendental Aesthetic should therefore be understood as meaning “theory of perception”. See also Scruton, above n 114, 41, where he suggests ‘aesthetic’ refers to ‘sensation’.
\(^{151}\) Scruton, above n 114, 41.
\(^{152}\) This seems to be an understatement because transcendental idealism requires more than the forms, it also requires the ‘categories’ of the understanding. For me, this claim typifies the differences in the various attempts to locate precisely the crucial element of Kant’s concept of ‘transcendental idealism. See ibid n 114, 27-28.
Kant’s critique and reconstruction of traditional metaphysics.\textsuperscript{153} If that is so, then presumably it is not because of what space and time \textit{do}, but what they \textit{are}.\textsuperscript{154} Time and space are not characteristics of things, nor objects, they are part of the ‘human being’ and not ‘human thinking’.\textsuperscript{155} As such, they do not figure in the process of the understanding, they are contained in the perception, or experience itself. In particular, time is a form of ‘inner sense’ of all states of mind, whether or not directed at an objective reality. There could not be a mental state that is not in time and made real to us through organization of our experience.\textsuperscript{156} Space is a form of ‘outer sense’ of intuitions that we refer to an independent world as appearances of objects or things.\textsuperscript{157}

Significantly for Kant, these forms of sensible perception only apply to the ‘\textit{appearances}’ of things, that is to our thoughts or cognitions (which Kant, in a different context, refers to as ‘\textit{phenomena}’) not to ‘things as they are in themselves’ (which Kant later refers to as ‘\textit{noumena}’). We are still free to think of things as they are in themselves independently of these forms, indeed in the case of practical reason we may need to do so.\textsuperscript{158}

If it is part of Kant’s ‘transcendental idealism’ that we have a priori knowledge only of ‘\textit{appearances}’ and not of ‘things as they are in themselves’,\textsuperscript{159} then Kant is here establishing a controversial dualism through a separation of what is ‘real’ from how we think of ‘what is real’. It is also a division that makes the search for ‘the metaphysical’ in itself an epistemological matter, and Kant sees his theory as entailing ‘epistemological idealism’ because he limits ‘knowledge’, as opposed to belief, only to those appearances of things, or ‘things-in-themselves’ (or in another context ‘\textit{noumena}’), that is to objects of our sense experience.\textsuperscript{160}

It goes almost without saying that there is considerable conflict over the correct interpretation of Kant’s theory about the effects of space and time and the assumptions that it requires. However, the importance of the dualism here, of the ‘thing-in-itself’, is not to be underestimated from the

\textsuperscript{153} Guyer, above n 113, 53; Ewing, above n 112, 28.
\textsuperscript{154} Guyer, above n 113, 53
\textsuperscript{155} See Ewing, above n 112, 53-65 for a critical view of Kant’s thought here.
\textsuperscript{156} Scruton, above n 114, 41.
\textsuperscript{157} Ibid.
\textsuperscript{158} Guyer, above n 113, 53; Scruton, above n 114, 40-1.
\textsuperscript{159} Scruton, above n 114, 55.
\textsuperscript{160} It is a slide to suppose that ‘\textit{phenomena}’ and ‘\textit{noumena}’ are synonymous with ‘\textit{appearances}’ and ‘things-in-themselves’, or with empirical objects and ideal entities respectively. But this may be consistent with a sympathetic reading of Kant, see Scruton, above n 114, 58.
perspective of the future developments of German Idealism, because it ‘imposes an unsurpassable veil-of-ignorance about the ultimate nature of the universe’.  

4 Kant’s Constructive Theory

Kant’s transcendental logic has two stages: the ‘Transcendental Analytic’, which contains the balance of Kant’s constructive theory, and the ‘Transcendental Dialectic’, which contains Kant’s critique of all traditional metaphysics of his time.  

The ‘Transcendental Analytic’ contains Kant’s constructive theory together with the ‘Transcendental Aesthetic’. The Transcendental Analytic deals with the faculty of the understanding. According to Kant, our knowledge of objects comes from two sources: firstly, our sensory perceptions that require the forms of space and time; and secondly, a faculty of concepts of the understanding. For Kant these are two separate processes that are not to be confused. The latter concerns the ‘mode of our knowledge of objects’ rather than the objects themselves. My concepts would not be intelligible without the experience of having them, and vice versa, my experiences make no sense to me without my concepts. At issue here is the correspondence of the object I perceive with how it seems to me in my perception. Experience must already contain the concept to make ‘sense’ of the perception and it is inextricably ‘subjective’.  

For Kant, although knowledge (or judgments about) objects cannot be acquired without sense-experience of the object or ‘thing-in-itself’ to which the perception itself relates, all genuine knowledge, put into effect by the faculty of judgment, also requires intellectual organization: that is, knowledge requires both direct ‘intuitions’ and organizing ‘concepts’. Kant said:

Thoughts without content are empty, intuitions without concepts are blind.  

This is what Kant called the ‘synthesis’ of intuition and concept. The synthesis seems to have two stages: ‘the ‘pure’ synthesis whereby intuitions are grouped together into a totality, and then the act of judgment, in which the totality is given through a concept.’ This synthesis is not the result of an empirical act, it is a ‘transcendental’ act because it is pre-supposed in self-conscious

161 Limnatis, above n 115, 57.  
162 Scruton, above n 114, 32. Scruton describes the two parts of the transcendental deduction as ‘subjective’ and ‘objective’ parts.  
163 Ibid 35.  
164 Ibid 33.  
165 Ibid 36.  
166 Guyer, above n 113, 53; Ewing, above n 112, 187-95. Ewing discusses some of the problems associated with Kant’s idea of ‘things-in-themselves’.  
167 CPR, above n 111, 193 [A 51,B75].  
168 Scruton, above n 114, 35  
169 Ibid 36.
experience, not derived from it. My concepts would not be intelligible without the experience of having them, and vice versa my experiences make no sense to me without my concepts.

At issue here, is the correspondence of the object with how it seems to me in my perception. Empiricism holds that concepts are derived from our sensory perceptions, but what Kant is doing is turning this process around so that our reason is providing concepts that make sense of our sensory perceptions. Experience must already contain the concept to make ‘sense’ of the perception.

The organizing concepts that Kant derives are twelve ‘categories’ that he calls the ‘pure concepts of the understanding’ and he thought these corresponded to all the disputes of metaphysics. Two particularly important categories, which form the basis of the Transcendental Analytic, are the category of substance and the category of form. Kant argued that the categories possess ‘objective validity’: that is, that they ‘apply necessarily to all our representations’ and that we can have no experience of any kind that is not subject to the categories. In this way the categories are the ‘conditions of the possibility of experience.’

When the categories are applied to our experience of empirical intuitions with its spatio-temporal form, they will yield a number of synthetic a priori principles. This process, or ‘schematism’, will reveal three a priori principles that collectively respond to Hume’s skepticism. The three principles are: that all change in the quantum of substance is always preserved; that every change occurs in accordance with a causal law; and that all objects existing simultaneously in space are in mutual interaction.

Kant ultimately agrees with Hume that we can have no knowledge of an immortal soul, since the soul is something of which we have, and can have, no experience. Likewise, we can have no knowledge of a God because there is no object of our experience to base this idea upon, at least as a substance or body; and similarly we have no way of experiencing the infinitude of the universe or cosmos. The concept of infinity is, however, a concept that is applicable to, and arguably necessary for, both mathematics and physics: it is a concept of logic.

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170 Ibid.
171 Ibid. The example is of the ‘pain’ that is not just ‘in the room somewhere’ but is inextricably mine.
172 Ibid 37.
173 Guyer, above n 113, 71. For a breakdown of the categories into their respective ‘features’ or ‘functions’ of judgment: at 72-80.
174 Ibid 71.
175 Ibid 126-154. Guyer discusses the topics of the ‘Transcendental Dialectic’.
The objective part of the transcendental deduction was particularly important to Kant, particularly if he was to show that ‘transcendental idealism’ was different from previous versions of rationalism and he amended, and added to, this section in the second edition of the *CPR.*\(^{176}\) The point appears to be that to differentiate his ‘transcendental idealism’, Kant needed to prove that it provides human beings with objective knowledge. Most philosophers have found Kant’s objective proofs unsatisfactory in one way or another, but there are some important features within this section that are important in Kant’s overall scheme for the human consciousness and which can only be highlighted here at the acknowledged risk of taking them out of context.

(a) *The Unity of Apperception*

In order to argue for the categories to provide objective validity Kant introduces a new concept, ‘the unity of apperception’. The ‘unity of apperception’ is a ‘unity of consciousness that precedes all data of the intuitions’ or ‘a pure, original unchanging consciousness of the ‘numerical identity of oneself in all of one’s various experiences.’\(^{177}\) The basic idea of ‘transcendental apperception’ seems to be that at any time I have an experience, I can know that it is mine. The ‘I think’ can accompany all my perceptions. The experience belongs with the ‘self’ that is experiencing it.\(^{178}\) But the unity of experience that I apprehend is not a conclusion of experience, but rather is a presupposition of it. It is the task of the objective deduction to show that this view is possible only in an objective world.

Kant argues that the ‘unity of apperception’ is synthetic and presupposes a synthesis. Guyer states that what Kant means by this is that

> in ascribing a “manifold” of representations – a multiplicity of particular observations or empirical intuitions to ourselves, we assert that there is a connection among them – each of them belongs to the same self as all the others belong to – that is not a logical part of the content of any one of them considered by itself; thus the connection between the different representations that belong to a single self cannot be known by any mere analysis."\(^{179}\)

All my experiences belong to the ‘unity of my own consciousness’ and become both synthetic and, controversially also a priori.\(^{180}\) Guyer suggests that what Kant is saying is that ‘what it *means* to ascribe one representation to oneself is that it is ascribed to the same self as any and all other representations that are ascribed to oneself’;\(^{181}\) Scruton suggests that ‘in an objective world in

\(^{176}\) Ibid 80-1.

\(^{177}\) *CPR*, above n 111, 232-5 [A 107, A113].

\(^{178}\) Guyer, above n 113, 84-91.

\(^{179}\) Ibid 85.

\(^{180}\) Ibid; Scruton above n 114, 44-5.

\(^{181}\) Guyer, above n 113, 86.
which things may be other than they seem … the unity of apperception describes the condition of subjectivity, in which everything is as it seems and seems as it is.182

Kant concludes that this synthesis in the ‘unity of apperception’ provides a necessary ‘affinity among all our representations’ and as a result concludes that ‘the understanding is itself the source of the laws of nature and thus of the formal unity of nature.’183 Thus, for Kant, the unity is only possible if the subject inhabits the kind of world that the categories describe. Later in the CPR, Kant says that ‘we have experience and not merely imagination of outer things’ so that ‘even our inner experience is possible only on the assumption of outer experience.’184

(b) The Principles of Empirical Judgment

It is part of Kant’s concern to show that the categories, which have merely logical content, are not self-evidently applicable to objects. He introduces the idea of a third element that is necessary for the process of assigning concepts to objects – the schematism of our understanding.185 Our experience does not immediately present itself in the logical terms of the categories, it presents itself in spatio-temporal terms.186 Some of the concepts of our experience, for example geometrical representations such as circles, or empirical concepts like dogs, present themselves immediately in homogenous concepts. These concepts, analytic concepts, can be thought of as ‘rules for the application of a name on the basis of observable properties.’187 These types of objects ‘present themselves immediately to the schema of the imagination’ where the immediate relation is ‘identity’ because the concept there is nothing more than the rule for constructing or recognizing instances of the concept.188 It is only in the case of synthetic concepts that there are some rules not already contained in the content of the concepts, that have to be found in the categories in order to apply those concepts to objects. Because time is the formal condition of all representations, the schemata for these concepts must be ‘transcendental time determinations’ and they will be ‘homogenous’ with the categories because they are universal and a priori.189

Synthetic judgments cannot be formed on the basis of the contents of the identity of subject-predicate contents and the basis of the principle of non-contradiction alone, they require in addition the temporal structure of our experience. Kant said, that ‘[t]here is only one totality in which all of

182 Scruton, above n 114, 44.
183 CPR, above n 111, 242 [A127]. See also Guyer, above n 113, 86, and for objections to this argument: at 86–8.
184 CPR, above n 111, 326 [B275]; Scruton, above n 114, 45.
185 Guyer, above n 113, 96-100.
186 Ibid.
187 Ibid.
188 Ibid.
189 Ibid 99-101, and for the various schemata applied to different categories: at 99.

45
our representations are contained, namely inner sense and its *a priori* form, time.’ Since time itself cannot be perceived, Kant argues that it must be represented through the use of certain synthetic a priori principles employing the categories of substance, causation and interaction.

In the ‘Analogies’, for example, Kant argues that ‘all explanation of change requires the postulation of an unchanging substance’. He then uses this as proof of the validity of a fundamental ‘law of conservation’ in science, an idea that translates into the modern idea of a ‘unity of science’. In another analogy, Kant argues that the ‘relation of cause to effect is the condition of the objective validity of our empirical judgments’. In other words, it is only because we can find causal connections in a world of enduring things, that we can postulate its objectivity. Causality is a species of necessity. Therefore, to have knowledge about objects, we must also have knowledge about what is necessary and what is probable.

Kant’s point in all of these arguments is that we cannot know the world as it really is independently of our own point of view, independently of any possible perception. Whereas proofs of Leibniz’s ‘principle of sufficient reason’ have not been forthcoming, Kant argued that the transcendental version of this principle becomes the law of causality, or the law that every event in the empirical world is bound by causal connections.

*(c) The Negative Argument*

The second, or negative part of the *CPR* is a critique by Kant of traditional theories of metaphysics, or of the illusions of metaphysics. It follows for Kant that although we can use the pure concepts of the understanding to conceive of objects that lie beyond the limits of our sensual perception, that is we can imagine concepts such as God, these ‘conceptions do not amount to knowledge and lead only to the fallacies and contradictions of ‘traditional metaphysics’. Kant argues that knowledge must be supported by the conditions of experience, whereas reason cannot help seeking the ‘unconditioned’ (the ultimate condition of all conditions), a situation that leads philosophers into the ‘antinomies’ of contradictory positions. Kant called these unconditioned ideas the ‘ideas of pure reason’.

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190 *CPR*, above n 111, 281 [A 155, B 194].
192 Scruton, above n 114, 50-1.
193 Ibid 51-52.
194 Ibid.
195 Ibid.
196 Ibid.
197 Guyer, above n 113, 33-4.
Kant held a teleological view of human powers believing that all our powers have a proper use if they are understood correctly, however, the proper use of the ideas of pure reason are practical and related to morality and not to theoretical science directed as it is to the world.\textsuperscript{198} While the ideas of God, our immortal soul, and our own freedom (or autonomy) cannot be theoretically proven nor can they be disproven, these ideas, particularly the idea of freedom, are necessary presuppositions of our moral conduct.\textsuperscript{199} However, they will then be objects of belief or faith, not objects of knowledge. This is why Kant had to ‘deny knowledge in order to make room for faith’.\textsuperscript{200}

\textit{(d) The Illusions of the Faculty of Reason}

According to Kant, the ‘illusions’ of metaphysics are entirely natural. They arise from ‘an ambition of pure reason that leads to illusion when it is not constrained by a proper understanding of the conditions necessary for knowledge but which, precisely because it is natural, must also have some proper function.’\textsuperscript{201} Pure reason leads to illusion when we attempt to use it independently of sensibility with its inherent limitations in order to gain theoretical knowledge of objects that lie beyond the limits of our senses. On the other hand, there is a positive aspect to pure reason, because only pure reason can provide what is necessary in the practical sphere of moral conduct; that is, provide the ‘fundamental principle of morality, the ‘practical law’ of right and wrong.\textsuperscript{202} As ‘postulates of pure practical reason’, the ideas of the freedom of our own wills, the immortality of our souls and the existence of God are objects of justified belief.\textsuperscript{203}

However, the focus on the Dialectic in the \textit{CPR} is also a critique of metaphysical theories and a response to skepticism.\textsuperscript{204} The essential message of Kant’s \textit{CPR} is that knowledge of objects cannot be obtained by the use of pure reason alone.

Kant utilises two essential ideas in this part of the \textit{CPR}: the distinction between ‘phenomena’ and ‘noumena’ and the idea of the ‘unconditioned’. In his constructive part, he used a distinction between ‘appearances’ and ‘things-in-themselves’. Here ‘phenomena’ are objects of which we can have knowledge and use in the positive sense, but ‘noumena’ are objects known only through the intellect and can only be used in a negative sense. We need thoughts of ‘objects-in-themselves’:

\begin{itemize}
\item \textsuperscript{198} Ibid.
\item \textsuperscript{199} Ibid 127.
\item \textsuperscript{200} \textit{CPR}, above n 111, 117 [B xxx].
\item \textsuperscript{201} Guyer, above n 113, 127.
\item \textsuperscript{202} Ibid.
\item \textsuperscript{203} Ibid. Kant changes his mind about the necessity of the concept of the immortality of the soul when he concludes that the moral law is something that humans can achieve in this life because the freedom of the will always enables them to make a different choice: at 234-5.
\item \textsuperscript{204} See Ainslie, above n 90.
\end{itemize}
that is, concepts of which we have no sense-perception, but that knowledge will be incomplete and only lead to confusion, or illusion.\textsuperscript{205} The concept of the ‘noumenon’ derives from the Greek ‘nous’ for something known by the intellect alone.\textsuperscript{206} Kant uses the concept of ‘noumena’, or ‘ideas’, because we must use reason alone to conceive of our own free wills, immortal souls and the existence of God. But this use comes under the heading of belief or faith, not knowledge. This area is somewhat difficult to understand and not without its controversy.\textsuperscript{207}

(e) Pure Reason and Metaphysics

Kant referred to the particular illusions of cosmology as ‘antinomies’. An antinomy is a ‘peculiar fallacy that enables us to derive both a proposition and its negation from the same premiss.’\textsuperscript{208} For Kant, antinomies are not genuine contradictions since both of the propositions that constitute them are false because they rest on the same false assumption.\textsuperscript{209} In the case of claims about cosmology the false assumption is that we can think of the world in its ‘unconditioned’ totality. However, to do this we would have to be able to transcend the perspective of ‘possible’ experience, and look at nature from a point of view outside it. A dialectical contradiction follows from such an assumption.\textsuperscript{210}

Kant deals with all the traditional metaphysical arguments for the existence of God as ontological questions that assume the existence of God and he responds to these arguments (in anticipation of modern logic)\textsuperscript{211} with the doctrine that ‘existence’ is not a predicate.\textsuperscript{212} The argument is that to say something, $x$, exists does not add anything to its concept and it takes us no further from the concept to reality itself. Kant argued that if the statement ‘God exists’ were true, then it would be analytic. However, the consequence of Kant’s argument is that all existential propositions are synthetic.\textsuperscript{213}

Kant’s discussion of the distinction between the ‘logical’ and the ‘real’ on this point is of considerable interest in any consideration of Dworkin’s position on determinacy. Kant argued that the logical law of contradiction that allowed for propositions confirming and denying the same ‘identity’ makes no sense, and needs to be renounced. Amongst other thing, both the positive and negative forms of the proposition require a search for the same ‘unconditioned’. The

\textsuperscript{205} Guyer, above n 113, 129-30.
\textsuperscript{206} Ibid.
\textsuperscript{207} Ibid. See Scruton, above n 114, 57-60; Ewing, above n 112, ch 5.
\textsuperscript{208} Scruton, above n 114, 62.
\textsuperscript{209} Ibid.
\textsuperscript{210} Ibid.
\textsuperscript{211} Ibid 66-68.
\textsuperscript{212} Ibid. For an elaboration of the issues of logic underlying this argument, see Limnatis, above n 115, 61.
\textsuperscript{213} Scruton, above n 114, 68-9.
‘unconditioned’ here is something that is a condition for other things but is not dependent itself on any other condition. According to Kant, reason inevitably leads us to form unconditioned realities.\textsuperscript{214} He argues that reason uses the categories it needs for phenomena, or appearances, to derive three unconditioned starting points: the absolute (unconditioned) unity of the thinking subject – or the soul; the absolute unity of the series of conditions of appearance – or the whole world; and the absolute unity of the conditions of all objects of thought in general – or God. For Kant these ideas then are not the arbitrary inventions of philosophers, but the natural products of reason itself.\textsuperscript{215} However, because these ideas arise from reason alone, they cannot be proved to be true or false and result in theoretical arguments for which there are two contradictory conclusions – these arguments Kant refers to as antinomies, and they may be recognized as the subject matter of Pyrrhonian skepticism.

But as Kant points out we need these ideas of ‘unconditioned totality’ and the ‘perfect creator’ in their constitutive role where the correct way to view them is as ‘regulative principles’.\textsuperscript{216} This use of ‘ideas’ comes from within the standpoint of experience and does not attempt to transcend it. The contradictions of the antinomies stem not from the idea itself, but from the wrong application of them.\textsuperscript{217} In referring to the regulative function of these ideas, Kant sometimes calls them ‘ideals’.\textsuperscript{218}

Looked on as regulative principles of reason, and not as constitutive concepts, the ‘ideal of a supreme being’, for example, ‘which directs us to look upon all connection in the world as if it originated from an all sufficient and necessary cause’\textsuperscript{219} becomes the ideal source of knowledge, instead of an object of illusion. In this way, the ‘idea’ shows us how to seek to determine the constitution and connection of the objects of experience and the ideas remain circumscribed by the conditions of possible experience and their compliance with the categories.\textsuperscript{220}

In a discussion of another antinomy, the immortality of the soul, Kant argued that the ‘transcendental unity of the apperception’ gives someone the assurance of the unity of their present consciousness, but it does not tell them anything about the kind of ‘thing’ that bears it.\textsuperscript{221} ‘Thought’ cannot be demonstrated as being reducible to properties or products of extended matter,

\begin{footnotesize}
\begin{itemize}
\item[214] Guyer, above n 113, 130-1.
\item[215] Ibid.
\item[216] Ibid 169-173; Scruton, above n 114, 69.
\item[217] Scruton, above n 114, 69.
\item[218] Ibid.
\item[219] Ibid. \textit{CPR}, above n 111, 577 [A 619, B 647]. Dworkin’s use of the ideal of ‘Hercules’ matches precisely the type of ‘ideal’ that Kant seems to have in mind here.
\item[220] Scruton, above n 114, 69.
\item[221] Ibid 71.
\end{itemize}
\end{footnotesize}
but neither is the ‘self’ completely distinct from matter. This is because the representation of the
self shows us nothing about the constitution of our soul in any way that confirms the possibility of
its separate existence.\textsuperscript{222} Notwithstanding Kant’s argument here, we need to keep in mind that Kant
believes that the ‘transcendental self’ stands at the beginning of all cognition and that as a result
‘truth’ is determined within the subject and not the object, that is, it must be possible for the ‘I
think’ to accompany all my representations.\textsuperscript{223}

5 Reason, Freedom and the Moral Law

From any perspective the CPR is Kant’s major work and contribution to philosophy because it
contains within it his theory of ‘transcendental idealism’. He leads us toward the ‘ideas’ of reason
that cannot on their own, without the categories, support ‘knowledge’ of the existence of
‘appearances’ or ‘phenomena’. But the ‘ideas’ of reason come from the creative, or regulative (as
opposed to constitutive), part of reason, and they have other important parts to play in our daily
lives. These ‘ideas’ of pure reason now become the ‘ideals’ of practical reason and provide us with
the answer to the question ‘what should we do’? In a further dualism, Kant argues that pure
practical reason, as opposed to pure theoretical, or speculative reason, is concerned with human
action, or activity. The ‘ideas’ of ‘unconditioned totality’, and the ‘perfect creator’ here become
‘regulative principles’ of human activity upon which we may base our hypotheses for action, rather
than as ‘constitutive’ of any object.\textsuperscript{224}

Two of Kant’s important ideas come together in the Groundwork of the Metaphysics of Morals
(Groundwork) and the Critique of Practical Reason (CPracR) to form the basic principles on which
his law of morality and ethical theory are ultimately based. These are the ideas of ‘human freedom’
or ‘autonomy’, and the idea of the ‘categorical imperative’ or the moral law.

(a) Freedom

Kant recognized a distinction between ‘knowing the truth’, that is forming judgments of what is
true, and making decisions about what to do. Both are based on reason but only the first can be true
or false. Making judgments requires determination of the truth; acting rightly requires reflection
on the right thing to do. If this is the case, then reason must have an additional function not aimed at
‘truth’ and for Kant that function is ‘duty’ and it is around the concept of ‘duty’ that Kant’s moral
theory is based.

\textsuperscript{222} Ibid.
\textsuperscript{223} Limnatis, above n 115, 29. CPR, above n 111, 246 [B132].
\textsuperscript{224} Scruton, above n 114, 69.
For Kant the ‘right action’ to take must always be possible: ought implies can. It follows that I must always be free to perform the action. The very idea of morality, that as humans we can do the right thing, forces the idea of ‘freedom’ on us. This conclusion forms the substance of Kant’s third antinomy. How can we be ‘free and autonomous’ while at the same time being humans as part of a nature determined through cause and effect? Kant argues that the unconditional principle - that I am free to take what actions I please - is a pre-supposition of all human action in the world. In short, the agent is the originator of what he does. Sometimes, Kant goes further than this and gives ‘practical reason’ primacy so that if we could not think practically, we could not think coherently at all.

For Kant, the moral law becomes to practical reason what the law of causality is to theoretical reason. Kant calls this ‘transcendental freedom’. The law of cause and effect operates only in the realm of nature (the empirical realm). Freedom belongs to the intelligible realm to which the categories do not apply. Because ‘I’ exist in the realm of nature as a ‘thing-in-itself’, the conclusion must be that ‘freedom’ is a transcendental idea that has no application in the empirical world.

Kant has already argued, however, that there is nothing meaningful to be said about the world of ‘things-in-themselves’. Therefore, the idea that we can see ourselves as both a phenomenon and a noumenon seems paradoxical. It may be that we are meant to relate the ‘transcendental freedom’ that underlies practical reason to the ‘unity of apperception’ that underlies our knowledge of nature, taking the latter as the starting point for our knowledge of truths, and the former as our starting point for all practical deliberation. In any event, both are transcendental in the negative sense of being presupposed by reason itself.

‘Freedom’ is a perspective ‘on’ the empirical world of which we, as humans, are a part. We know ourselves through practical reason that is only through the exercise of freedom itself. Practical reason, then, also relies on synthetic a priori principles of action, or laws that can be derived from the perspective of the unconditional transcendental freedom. Unlike the principles associated with the unity of apperception, these principles or laws are not ‘true’ or ‘false’, and they are not descriptive, nor predictive, nor explanatory. They are simply practical laws, concerning what to

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225 Ibid 74.
226 Ibid. Scruton observes that Sartre’s existentialism owes much to Kant’s doctrine here. See also Onora O’Neill, Constructions of Reason: Exploration of Kant’s Practical Philosophy, (Cambridge University Press, 1989).
227 Scruton, above n 114, 75.
228 Ibid 76.
do. These laws bind us in all our practical reasoning because acceptance of them is a presupposition of the freedom without which practical reason is impossible.230

The question of ‘what ought I do?’ requires a reasoned answer and it assumes that at least some of my actions are intentional, and that those reasons justify rather than explain actions.231 Practical reasoning is concerned either with the ‘ends’ I wish to accomplish, or with the ‘means’ by which to achieve them. A skeptic, such as Hume is assumed to be, sees reason as being a slave to the passions, only ever justifying what we already are motivated to do.232 Kant, on the other hand, takes a ‘common-sense’ view, that reason may ‘constrain and justify, not only the means, but also the ends’.233 This idea does not take Kant to a utilitarian conclusion based on the achievement of ‘ends’. For Kant, it follows that if reason can justify both the means and the ends, then practical reason can be objective, recommending ends for all rational beings, irrespective of our passions, or desires. The way that reason becomes objective, is not by forming judgments, but rather by issuing imperatives.234

In practical law, reason determines the will immediately.235

The practical reason that flows for Kant from these two assumptions must be internal to the self (autonomous), and not issue from external commands (heteronomous), otherwise we would not be exercising our own free will, and the action would not be ours. The paradigm of a free action is that it is one brought into being by reasoning alone.236 Kant goes on to develop the idea of the ‘autonomous agent’ who is able to overcome external influences including self-interest and desire where they conflict with reason.

(b) The Moral Law

The fundamental principle of morality, according to Kant, must be unconditionally, that is, universally, valid for every rational human being. He argued that the only thing of unconditional value is the ‘good will’, which manifests in doing one’s duty for its own sake. Moral laws must be derivable from the very ‘universal concept of a rational being as such’.237 Other things of value, such as strength, talent, and resources, are not unconditionally valuable, because whether these are

229 Ibid 77.
230 Ibid.
231 Ibid 78.
232 Ibid 26-8, 92.
234 Ibid.
235 CPracR, above n 118, 158 [5:25]; Scruton, above n 114, 79.
236 Scuton, above n 114, 80.
237 Groundwork, above n 117, 65 [4:412].
good or evil depends on what they are put to by a good will. Controversially, Kant argued that a person cannot achieve a ‘good will’ simply by performing an action that conforms with a duty, the action must be consciously done from duty alone. His conclusion is that:

I ought never to act except in such a way that I could also will that my maxim should become a universal law.

According to this principle, the moral law must be completely necessary and universal. This fundamental principle of morality presents itself to us as a ‘categorical imperative’, that is, categorical because it is unconditional, and as an imperative because we recognise it as something we ‘ought’ to follow. Kant distinguished ‘categorical imperatives’ from ‘hypothetical imperatives’ which are conditional, usually having the form of ‘if I do … then …’, and which can never be binding either on myself or on others. Hypothetical imperatives cannot be unconditional because they are driven by the need to achieve something and even in the case of a goal of something ‘good’, like happiness, this is likely to be something of self-interest.

Kant rejected ideas, such as Hume’s, that pursuit of objects such as benevolence could satisfy the moral law. For Kant, the focus on the ends to be achieved was not so important as the means by which the end is achieved. From this Kant derives his deontological ethical theory relying on the imperative of duty, or means over ends, as opposed to the utilitarian teleology of ends over means. The most controversial point of Kant’s deontological theory is that, for Kant, the ‘duty’ imposed by the moral law is always more important than the end achieved even where the ends achieved may be unfortunate. For Kant there is only one valid good to be pursued in a teleological fashion and that is a good will achieved by following the duties imposed by the moral law derived from the categorical imperative.

Having stated this maxim as the one single categorical imperative, Kant then, perhaps confusingly, provides several differing iterations of the categorical imperative. It may be that other iterations

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238 Guyer, above n 113, 180. For a description on what it is to have a ‘good will’: at 181.
239 *Groundwork*, above n 117, 57 [4:402]. Guyer states that a ‘maxim’ is ‘the principle on which one usually acts … so the categorical principle requires that each of us act only on principles on which everyone could act without contradiction’, Guyer, above n 113, 182.
240 Guyer, above n 113, 182.
241 Ibid 180.
242 Ibid 183.
243 Kant’s view about the goal of ‘happiness’ is controversial. See Guyer, *Freedom Law and Happiness*, (Cambridge University Press, 2000).
244 Guyer, above n 113, 184. Guyer states that Kant gives five formulations of the categorical imperative, although Kant usually refers to only three.
of the imperative are simply derivations of the imperative that each human being exists as an end in itself.245

The idea of each human being as an end in itself leads Kant to the conception of the ‘kingdom of ends … in which the universal legislation to which we all willingly bow when acting autonomously has become a law of nature’.246 This suggests that the result of everyone following the categorical imperative would be an ‘ideal world’ where ‘things are as they ought to be and ought to be as they are’, at least among humans.247 It seems to follow that the world is not as it should be. If this is so, then this may not constitute a ‘utopian ideal’, because Kant does not assume that this ideal state of a kingdom of ends can be achieved.248 The very point of freedom and its autonomy is that humans must each reach their own ideal achievement in this world. As autonomous humans, we always have the opportunity to do things differently.249 For Kant, though, we need the ideal of God to provide us with an ideal of perfection as a possibility of something to strive for.

(c) Derivation of Duties
From the various formulations of the categorical imperative, Kant goes on to establish a complete legal and political philosophy as well as an account of personal ethics. It is Kant who makes the connection, so important in Dworkin’s work, between morality and politics. It is this connection that provides skeptics with an important difficulty: even if we could avoid moral decisions, avoiding political decisions is much more difficult. For both Kant and Dworkin, political decisions just are moral decisions.

Kant begins by dividing duties into two kinds: ‘duties of right’ and ‘duties of virtue’. Kant’s rights follow from the obligations we have not to restrict the freedom of others, and the obligations that are appropriate to be coercively enforced by the power of a state, and therefore, which morally must be enforced by a state.250 Duties of virtue are those appropriate in our private lives.251 The duties required by the moral law then, divide into rights between citizens considered by the law as part of the political exercise of political collective,252 and virtue ethics considered by each individual alone.

245 Ibid 185-86.
246 *Groundwork*, above n 117, 83 [4:433]; Scruton, above n 114, 87.
247 Ibid, above n 114, 87.
248 Ibid 127. This point is clearly debatable if you consider Kant’s political ideals, particularly those for a national association of republics he clearly saw as the inevitable end of a republican dream and a solution to world peace.
250 Guyer, above n 113, 301. The state in this context is any state, including that of a state ruled by an individual.
251 Ibid chs 7-8.
252 Ibid 279-80; Scruton, above n 114, 115.
A state exists to protect the right of every human being to personal freedom as well as their rightfully acquired property and other rights.253

Kant’s political theory is based around the ideal of the social contract, which he saw as culminating in a form of Republic. The ideal state, or Republic, according to Kant, would be established: firstly, on the principle of the freedom of its members as individuals; secondly, on the basis of the dependence of all on a single common legislation (as subjects), and thirdly, on the law of their equality (as citizens).254 It follows from Kant’s ideas, particularly those against rebellion and revolution, that he believed that it is never possible to ‘wipe away the legacy of history’ without risking a return to the state of nature as ‘war of all against all’.255 Therefore, he recognized the social, historical and cultural place of humans.

Duties of virtue are personal duties of morality. These are the duties firstly to ourselves, in the form of our personal ethics, and then the duties we have towards others, our moral duties, but not such duties as require intervention by the state.256 Our duties towards others are also divided between two concepts: that of love and that of respect. By ‘respect’ in this context, Kant means duties we have not to ‘be arrogant to others, not to defame them, and not to ridicule them’ but rather to be ‘modest, dignified, and humane in relation to others.’257

There are many aspects of these theories that could be the subject of discussion, but what is relevant for comment here is that Kant’s theories are extensive, reaching to both national and international formulations of republican government and into very personal sexual associations, although always he is tying his ideas back to the requirements of the categorical imperative. Further although Kant’s fundamental unconditional moral principle relates to freedom, because this freedom is directed as much to others as it is to self, the issue of equality quickly becomes paramount in the theory of the doctrine of the right in establishing duties of those who are responsible for the legislative responsibilities of the state.

(d) Aesthetics and Science

253 Guyer, above n 113, 279-80.
254 Ibid 281-82.
255 Scruton, above n 114, 114.
256 Guyer, above n 113, 253.
257 Ibid 255.
Kant’s third critique, *Critique of the Power of Judgment (CJP)*, was published in 1790, two years after the *CPR* and was accompanied by other writings concerning the ideas of religion and the sublime. The *CJP* was divided into 2 parts: the first part concerns ‘Aesthetic Power of Judgment’ or judgments related to the ‘arts’ and discusses issues of beauty and sublimity in both nature and art; while the second part concerns the ‘Teleological Power of Judgment’ and provides Kant’s argument for the purposiveness of nature. The second part discusses the systemic organization of nature as a whole as if it were a single, and well-designed system. While Kant had written about both topics previously, he had not joined them in this way before.

The connection between the two ideas of beauty and the unity and purposiveness of nature is that both utilize ‘reflecting judgment’ that ‘seeks to discover a concept for a particular object that is given to it, rather than to find a particular object to which to apply a concept that it already has’, the latter Kant has now termed a ‘determinative judgment’.

Kant may have had multiple purposes in the *CPJ* in attempting to connect the ‘arts’ and the ‘sciences’. He wanted us to look at the products of nature and then from seeing those products as particulars of a whole, to look at nature itself as if those products of nature have purposive significance. Another purpose was to re-assert the place for an intelligent, purposive designer of nature, in such a way that could also be consistent with a ‘mechanistic world’.

In the ‘Aesthetic’, Kant argues that aesthetic experience has its own unique form that provides support for humans as both rational and sensuous beings to achieve autonomy in the moral sense. Aesthetic, or ‘reflective’ judgment is based on ‘feelings of pleasure’ produced by the ‘free play of the imagination and higher cognitive powers’ induced by the form of an object of nature or of art, that goes beyond the purpose of that object. Reflective judgment needs to be distinguished from ‘determinative judgment’ of pure reason, because it can never lead directly to knowledge. The importance of the aesthetic judgment lies in its capacity to provide us with ideas of beauty and sublimity that go beyond, or transcend, the ideas of pure reason, but which allow us to explore things through pure reason. It is aesthetic ideas that can give us a sense of the ‘supersensible’.

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258 *CJP*, above n 120.
260 Ibid.
261 Ibid.
262 Ibid.
263 Ibid.
If it was his goal in his third *Critique* to connect the reflection of the arts with the determinative reason of the sciences, Kant does not seem to achieve this. In a sense, he might be seen as simply creating a further dualism: the first dualism created in the *CPR* between mind and world; the second dualism within reason itself in *CPracR*, and here cemented in the reflective and determining judgments of the *CPJ*. If it was his intention to justify a form of theistic realism in the *CPJ*, even in his arguments for a reflective, purposive, intelligent designer, he uses circular argumentation that results in this intention being ultimately unsuccessful.\footnote{Ibid.}

From the *CPR*, through the *Groundwork* and *CPracR* to the *CPJ*, Dworkin’s theories resonate with Kantian ideas, themes and arguments. It remains a relevant question whether Dworkin’s concept of the unity of value replaces Kant’s idealistic theism.

6 Conclusion

This very limited outline cannot provide a comprehensive review of the theories of either Hume or Kant. The section on Hume highlights the issues raised not just by empiricism at the time, but also subsequently, on the requirement that for knowledge a valid proof would be based on observation and experiment alone. Importantly, Hume’s skepticism that observation, at best an estimation of probability, could satisfy our basic beliefs sufficiently to provide a ‘science of man’ also sets the tone, not only for psychological science, but also for future skeptical moral theories. Hume’s positive contribution to Dworkin is firstly to provide a particular internal understanding of what it is to believe, as something passive; as something we must do as surely as we must do anything instinctive or natural to humans. Notwithstanding the similarities here between Hume and Dworkin, Dworkin does not appear to come to the same skeptical conclusion about belief and knowledge that Hume apparently did.\footnote{Cf Mounce, above n 20. Naturalism is effectively inconsistent with skepticism. A naturalist reading of Hume would not necessarily take the view that he was a skeptic at all.} Secondly, Hume provides a strong methodology as to how to utilise reason in order to attain knowledge by recognising reason’s need for unity through the ideas of ‘constancy’ and ‘coherence’: a methodology for the unity of the understanding that Kant’s dualisms, and complex ‘schemata’ and ‘categories’ could not match.

Where Dworkin differs from Hume is in relation to the role of custom and reason. While custom might provide a valid starting point, for Dworkin custom does not preclude subsequent reasoning to a new, right answer; or recalculating a belief on the basis of active reasoned reflection. Hume proposed a role for ‘custom’ and the ‘passions’ that placed his own ideas on benevolence at a
disadvantage because his overall position was very much directed to a strong argument for human determinism. Kant, on the other hand, rejects human determinism in favour of a theory of freedom and autonomy that, while it might lack empirical scrutiny, makes more ‘common sense’ than Hume’s determinism based on man’s ‘passions’ or instincts alone.

The extended examination of Kant highlights just how many areas of his work influenced subsequent philosophers, including Dworkin. There seems to be little question that Dworkin can be comfortably set among Kantians, and not only for the influence of Kant’s deontological moral theory. The extent to which Kant’s constructive theory has influenced Dworkin will be the subject of chapter four below.

Even though it might have been Kant’s intention to find a middle path between ‘empiricism’ and Cartesian ‘rationalism, the fact that Dworkin appears to be still seeking that middle way, indicates that the divisions evident in the theories of Hume and Kant, between empiricism and rationalism, skepticism and realism, and determinism and free will, continue to provide the issues that divide philosophers in criticism of Dworkin. Even though it might have been Kant’s intention to find a middle path between ‘empiricism’ and Cartesian ‘rationalism, the fact that Dworkin appears to be still seeking that middle way, indicates that the divisions evident in the theories of Hume and Kant, between empiricism and rationalism, skepticism and realism, and determinism and free will, continue to provide the issues that divide philosophers in criticism of Dworkin. In this chapter I have attempted to highlight those divisions.

How Dworkin achieves his Kantian input into a theory of law will be examined over the next three chapters.

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266 This is so, even if Kant’s ‘analytic/synthetic’ distinction has been subsequently discredited. See Gilbert Harman, ‘Epistemology and the Diet Revolution’ in Michaelis Michael and John O’Leary-Hawthorne (eds) Philosophy in Mind: The Place of Philosophy in the Study of Mind (Kluwer Academic Publishers, 1994). Harman makes some interesting claims including that the Cartesian approach that all beliefs can be justified in terms of self-evident beliefs is ‘now history’: at 210.
CHAPTER THREE

III THE RIGHTS THESIS – THE ROLE OF POLITICAL MORALITY IN THE LAW

A Introduction

From the perspective of legal theory, Dworkin’s major project was to reintroduce the legitimate role of moral principle into legal decision-making. This chapter, and the next, are intended to explain how he attempted to accomplish this, and to establish the major themes of his work that have lasting relevance to his philosophical and jurisprudential theory. The particular focus of this chapter is how he argues through the ‘rights thesis’ as contained in ‘Hard Cases’ that legal reasoning and political morality cannot be separated.

From the beginning, it is important to understand that Dworkin is providing a theory of legal rights not a description of them. They are concepts not objects. He makes no claim that ‘rights’ have some sort of ‘existence’ and, in fact, he denies this. For Dworkin, rights, along with law and adjudication, are contested concepts that are not apt for one universally necessary analytic definition.

B Dworkin’s Conceptual Analysis

1 Analytical Philosophy

The purpose of Dworkin’s earliest work,1 published in Taking Rights Seriously, was to criticise the jurisprudential practices in the US and Great Britain that he saw as having ‘distorted jurisprudential issues … by eliminating just those issues of moral principle that form their core.’2 He began with a concerted attack on legal positivism3 when he published two articles attacking Hart’s Concept of Law,4 ‘Model of Rules I’, first published in 1967, and ‘Model of Rules II’ in 1972.5 In 1975, he published ‘Hard Cases’, which contains a detailed analytic conceptual response to Hart’s theory of

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1 Various separate articles published over the previous decade were brought together in the publication, Ronald Dworkin, Taking Rights Seriously, (Harvard University Press, 1977, 1978) (‘Taking Rights Seriously’).
2 Ibid 4.
3 See previous chapter.
the concept of law as the application of rules. Dworkin’s response takes an analytical, ideological and interpretive form of conceptual response. The law is not something to be ‘described’ as Dworkin claims Hart was attempting to do. Description must be reserved for empirical objects of our experience. As far as Dworkin was concerned, one strand of American Legal Realism had shown that there is very little about what judges do that can be accounted for by empirical observation. For Dworkin, adjudication and the law are both ‘conceptual’ and ‘evaluative’.

Both Hart and Dworkin were part of what might be called the ‘analytical school of philosophy’. Although it is difficult to establish exactly what membership of this school required, a general description might be that at the very least, analytical philosophers focus on the concepts of truth of propositions, as opposed to objects, and originally sought to find analytic truth for concepts through reductive analysis, by breaking a concept down into smaller parts and in so doing to find a definition that could be judged to be an ‘analytic truth’. Brian Leiter, noting that the discipline is now ‘defunct’, has questioned this understanding of the analytic school of philosophy and suggests that its difference from the Continental school of philosophy, for which it is mostly known, might have been primarily in the ‘rigour’ of its analysis. He finds that whatever the difference might have been between ‘analytic’ and ‘Continental’ philosophy, there was no significant difference by the turn of the twentieth century, the real issue having been supplanted by concerns about, among other things, Wittgensteinian quietism. However, the method of analysis with which Dworkin associates Hart suggests that the intention was to attempt to replicate scientific, or descriptive, methods that seek to find truth by reducing objects to smaller particulars, water becomes H2O thus providing an ‘analytic’, as opposed to synthetic, definition that must necessarily be true.

By providing ‘law’ with the corresponding sense of being about the application of rules, Dworkin argues that Hart sought to provide a universally acceptable definition of what ‘law’ is by providing what he thought was a ‘description’ of the law. He bases this claim on Hart’s observation that this was his intention. But in that respect, so Dworkin claims, Hart’s theory is no more ‘empirical’

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7 Hart, above n 4.
8 Taking Rights Seriously, above n 1.
9 Ronald Dworkin, Justice in Robes (Belknap Press, 2006) ch 6 (‘Justice in Robes’).
11 Ibid.
13 Ibid.
14 See Justice in Robes, above n 9, ch 6. Dworkin there responds in detail to Hart’s ‘Postscript’ in Concept of Law, above n 4.
than his own. It is not a sociological or scientific investigation of what occurs in the law. It is entirely conceptual and theoretical.

Instead of looking for an analytic definition of what ‘law’ is, Dworkin shifts his focus to epistemological enquiry, in the fashion suggested by Leiter, and asks what is it that makes propositions of law true? For Dworkin the metaphysical task of finding analytic definitions for contested concepts is a confusion of the task of the conceptual philosopher.

Both Hart and Dworkin are, nevertheless, reasoning towards a ‘theory’ about law. Both draw on previous judicial decisions as ‘evidence’ for their theory. The major difference lies in Dworkin’s clear rejection of the possibility of finding a meaningful analytic truth for the concept of law. Dworkin has accepted G.E. Moore’s findings about ‘analytic truth’. It is always open to ask of a concept like ‘happiness’ whether ‘pleasure’ is ‘happiness’.

One of the alternatives to concepts that could be shown to be true by way of experience was via Kant’s idea of ‘synthetic a priori truth’. Following Kant, rather than Hume, a judgment could be said to be analytic if the predicate concept is contained in the subject concept and it was subject to the law of contradiction, however, Kant’s theory was that there are also ‘synthetic’ a priori truths based on universal, necessary principles. Questions about ‘what we ought to do’ were for Kant determined from such principles. Dworkin does not reject the idea that there are analytic concepts, such as ‘bachelors being unmarried males’, but he does reject the idea that contested concepts such as law, justice and equality can be defined, or described, in this analytic manner. A concept such as law is far too complex, and too contentious, for such an achievement. It certainly appears that the two philosophers, Dworkin and Hart, were not attempting the same project.

Certainly by the time of the publication of *Justice for Hedgehogs*, Dworkin has accepted a clear distinction between what is appropriate for empirical and scientific study, and what is theoretical in the sense of being evaluative and, therefore, interpretive. The task is not one for metaphysics: it is an epistemological exercise. Dworkin draws a clear distinction between ‘natural kind’, or criterial, concepts that are appropriately the concern of science and value concepts that are applicable to

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15 See Leiter above, n 12.
17 See discussion above, ch 2.
18 Heil, above n 10, 26-7.
interpretation. It is the evidence for ascertaining its meaning that is different in each case. Again, Dworkin accepts Hume’s division between the ‘ought’ and the ‘is’, but he equally accepts the reverse – you cannot obtain an ‘is’ from an ‘ought’. The interpretation of values still requires evidence and that evidence will go ‘very deep’, but it will be evidenced by its coherence with a value system as a whole. Dworkin’s arguments about the rights thesis are, if nothing else, a theory about propositions, and therefore a theory about meaning.

2 Ordinary Language Analysis

Although Dworkin’s claim is that he is describing what judges do, he is particularly guarded in his claim:

The thesis presents, not some novel information about what judges do, but a new way of describing what we all know they do; and the virtues of this description are not empirical but political and philosophical.

What we know judges do is that they come to conclusions about what the law means in such a way as to legitimise the use of coercion by a state against some of its citizens. There is a sense in which this is a sociological claim. Dworkin points to examples of legal decisions as evidence for the sociological aspect of his claim, although the evidence amounts to little more than that judges are interpreting the law and arriving at different conclusions in doing so. They are determining what proposition in any particular case is the better decision amongst the possibilities, and they must decide, in most cases, between two contradictory positions. However, judges are not the only interpreters, all citizens to whom a system of law applies will be interpreters, but judges are the paradigm example of interpreters.

It is common for Dworkin to make a claim ‘about what we all know’ or something similar. This appears to be a form of transcendental argument. It is designed to get around the metaphysical question of whether the concept you are debating exists. The moment you enter into Dworkin’s debate, you do two things – you agree there is something to debate about, and you take a position in relation to his – you accept it or contradict it. You may be uncertain about the answer, but if you contradict it, or either of the postulated positions, Dworkin argues that, by doing so, you take up a substantive position that also requires a substantive argument and that is a theoretical or interpretive one. If the concept under debate is a contested concept then, it follows, from that conclusion that there is no analytic definition available. The answer lies in the case to be made for the choice of ‘definition’.

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20 This is the point of Justice for Hedgehogs, above n 19. The one big thing a hedgehog knows is about the unity of value.

21 Taking Rights Seriously, above n 1, 90.

22 One emphatic example is that in Justice for Hedgehogs, above n 19, 26, where Dworkin says that ‘[s]omeone who sticks pins into babies for the fund of hearing them scream is morally depraved. Don’t you agree?’
But the use of ‘we all know’ in this manner suggests something else. Following Hume’s empiricism, the analytic school of philosophy, as it developed under Bertrand Russell, and GE Moore, thought that the process of analysis revealed the true structure of the world and that every meaningful sentence could be analysed into its atomic components. The extreme outcome for these views was logical positivism, which held, roughly, that the role of philosophy was the discovery of scientific sentences. What followed from logical positivism, adopting the early work of the early Wittgenstein, was that some sentences, such as ethical statements, were considered simply to lack meaning because they do not reveal anything about the world.

In this way logical positivism was closely linked with empiricism, and analysis in this sense was closely linked to metaphysics. Analysis was about the discovery of objects of reality. As such proof is not restricted to the use of Aristotelian logic, it can include any kind of mathematical or algebraic proof. One ‘sign’ or ‘symbol’ can be substituted for another, so an algebraic symbol can be substituted for a word. This arrangement does not follow for the ordinary language philosopher who is restricted, just as Kant was, to a logic dependent on the use of words, not symbols. As Gilbert Ryle, among others, pointed out, one word can be used in more than one way, in more than one context. As a result of Ryle’s views and also developments that took place after the publication of Wittgenstein’s later work, *Philosophical Investigations*, some of the previous proponents of analytical philosophy moved in a different direction known generally as ‘ordinary language philosophy’. This movement, following the ideas of Wittgenstein held, very briefly, that the significance of concepts lies in linguistic practice itself – in their use or purpose. This included the traditionally problematic philosophical concepts of ‘truth’ and ‘knowledge’. Ordinary language philosophers ask how a word functions in our ordinary everyday settings. We should not confuse concepts like ‘mind’ and ‘body’ as both being material entities simply because they are used together. We must look at how they are used.

In many ways, Dworkin’s assertion, ‘we all know’, signals this aspect of his approach. He is inviting us to examine our own understanding, or usage, of the terms ‘right’ and ‘rights’, and ‘right or wrong’. We all use these terms and we do not, Dworkin argues, think they represent ‘objects’.

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23 Heil, above n 10, 26.
24 Ibid.
27 Heil, above n 10, 26. Heil claims that this loose movement was inspired in Great Britain by Wittgenstein, John Wisdom, Gilbert Ryle, Norman Malcolm and J.L. Austin.
They are about practical, and normative, human activity. They are about what we ought to do and we do think it makes sense to make claims concerning these concepts. Dworkin invites us into a dialogue about our own understanding, or usage, of these terms. It is part of his assertion that they cannot, because of our history and culture, be eradicated from our general, and specific, vocabularies, in spite of the attempts some would make to do so.\(^{28}\) It is also true that, because of their connection to public understanding, the meanings of the terms may vary over time.

Around the same time as the movement in analytical philosophy toward ordinary language philosophy occurred, other developments were happening on the Continent in the area of phenomenology. Kant had refocused philosophy from the metaphysical object to the epistemological subject or agent. On the Continent phenomenological studies picked up on this point of Kant’s. Phenomenology may be described as

the study of consciousness as experienced from the first-person point of view. By etymology, phenomenology is the study of phenomena, in the root meaning of appearances; or better, the way things appear to us in our experience, the ways we experience things in the world around us.\(^{29}\)

As we have seen above, Kant drew the distinction between ‘noumena’ or things as they are in themselves … as they are known to be through pure intellect’, and ‘phenomena’ or the objects of sensibility, which are merely the ways things appear to us’ to draw just this distinction between ‘thoughts’ or ‘ideas’ and objects to be described.\(^{30}\) Husserl provided a classic phenomenological structure to Continental philosophy that included linguistic experience from a first-person perspective. Husserl’s idea ‘characterises a given form of consciousness from a person’s own subjective perspective’ and meaning is central to Husserl’s phenomenology.\(^{31}\)

Dworkin’s assertion that this is something about which ‘we all know’, similarly, takes us into this first person perspective and thence directly into the area of epistemology and truth. We form our own convictions about what we know with, or without, reflection from our own experience, in that sense our convictions are contingent, and part of our own consciousness. For Dworkin, this might explain those beliefs, or convictions, but it does not justify them.\(^{32}\) We justify those beliefs with

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\(^{28}\) Rorty seems to be suggesting that some quietists would have us give up certain outmoded notions, such as ‘world’, ‘mind’ or ‘language’, see Richard Rorty, ‘Naturalism and Quietism’ in Mario de Caro and David Macarthur (eds) *Naturalism and Normativity* (Columbia University Press, 2010).


\(^{30}\) Paul Guyer, *Kant* (Routledge, 2006); see also above 45.

\(^{31}\) Woodruff Smith, above n 29.

\(^{32}\) *Justice for Hedgehogs*, above n 19, 76-82.
argument, either to ourselves or to others. Our conclusions, thus formed, guide but do not necessarily instinctively, like a ‘tic or a cough’ might, direct our subsequent actions.

Dworkin does not really enter into a detailed debate about consciousness and truth until the publication of ‘Objectivity and Truth’ and more particularly in Justice for Hedgehogs. However, these publications explain his position more fully, and this phenomenological aspect of his work appears to be present in his early work.

Besides a focus on the use of the first person, Dworkin’s ‘Hard Cases’ focuses on two other Kantian themes: firstly, the tension that exists between the individual and the community; and secondly, the importance of history and culture in our beliefs and belief structure. The latter of these traces back directly to the different approaches between Hume and Kant to the contribution that community makes to our understanding of value. For Hume community provides the ‘conventions’ or ‘customs’ that determine our beliefs, but for Kant community involves its own form of respect and consequent duties. Dworkin challenges Hume’s claim that our ‘value’ concepts are fixed by ‘custom’ or ‘convention’, at the same time accepting Kant’s hypothesis that history is relevant to our understanding of our value concepts. However, as he makes clear when he re-characterises Hart’s legal positivism in Law’s Empire as ‘conventionalism’, although the best interpretative approach is a coherent one linking present ideas with past ideas, interpretation is not limited by past custom or convention.

3 Responding to Skeptics – The ‘No Right Answer’ Thesis

In Taking Rights Seriously, Dworkin adopts for the most part the ‘ordinary language approach’ that he has perfected in Law’s Empire but his early attempt at justifying his argument against the ‘no right answer’ thesis is initially not absolutely couched in ordinary language. However, in his ‘Reply to Critics’ published in that same book, he acknowledges his need to improve on this

33 Ibid 223-4. Dworkin prefers to concern himself with this issue as one of ‘judgmental responsibility’. When do we need to take responsibility for our actions: at ch10.
35 Justice for Hedgehogs, above n 19.
36 Taking Rights Seriously, above n 1, ch 4. This second relates to his theory of meaning and should in no way be interpreted as Dworkin moving into a social science, or anthropological model. Although his claim in ‘Hard Cases’ is that his interpretative understanding and the anthropologists conclusions sit comfortably together, they do not however rely on one another: at
37 See above ch 2.
38 Dworkin, Law’s Empire (Belknap Press, 1986) ch 4 (‘Law’s Empire’).
39 Taking Rights Seriously, above n 1, ch 13, 283.
40 Ibid Appendix, 332.
argument for this theory, and in *Justice for Hedgehogs*, that argument is entirely expressed in ordinary language.41

Dworkin’s argument against the ‘no right answer’ thesis stands out as differentiating Dworkin’s constructive interpretation from other constructive or interpretive, and particularly other pragmatic views.42 It is a view for which he perfected his arguments over time, and from which he never resiled. This view stands in contrasted to the work of Hume, Wittgenstein, and Rawls. Hume advocated for a form of ‘mediated’ skepticism, while both Wittgenstein and Rawls left the matter of their skepticism in some doubt. Dworkin seemingly leaves us in no doubt that his position is anti-skeptical. Judgmental responsibility requires the best judgment you can make at the time, not any judgment. Indeed, Dworkin usually couches his argument against the ‘no right answer thesis’ as a response to skeptics.

Dworkin’s approach is, in the phenomenological sense, a first person one. It is our own consciousness, our own experience that provides us with our own truth, but a truth nevertheless. In a statement reminiscent of Hume, he agrees that sometimes we ‘just see’ that something is true.43 But this is not usually the case. Usually, we can reflect and provide a justification for our beliefs. The point is that a justification is not a critical element to our holding beliefs.

Dworkin argues consistently throughout his work that the solution being sought to any controversial proposition of law is the better or best one. This is no more, or less, than the same test that would be applied by any scientific experimental result, and any argument of indeterminacy between the possibilities under consideration is itself a substantive argument and not the default position.44 He rejects the idea, therefore, that the answer in any hard case is indeterminate as a matter of course. It is uncertainty that is the ‘default’ position for Dworkin. Indeterminacy is a substantive position that requires the same evaluative form of argument to support it.45

42 For discussion of Dworkin’s constructivism, see below ch 4. See also Dworkin’s acknowledgement, and criticism, of the work of CS Peirce, in *Justice for Hedgehogs*, above n 19, 177-8.
44 See discussion on ‘truth’ below ch 5. Husserl’s influence is also evident in this search for the ‘ideal’ or ‘best’ answer.
45 See below ch 5.
4  Disconnecting Metaphysics

Ordinary language philosophy moves away from any connection between meaning and
metaphysics. This is something Dworkin felt he had not made completely clear in ‘Hard Cases’.46
The purpose of ordinary language philosophy is to understand the use made of various concepts, not
to objectify, or reify, those concepts in any way. Dworkin never makes, or even attempts to
construct an understanding of ‘rights’ as ‘entities’ with properties. If philosophers think that his
thesis, therefore, lacks validity, as logical positivists might, they will disagree with Dworkin, but
their arguments will need to contain philosophical argument on which their own thesis must rely for
support.47 That philosophical argument is likely to need to rely on concepts that also defy
reification in that way.48

Rather than approach the metaphysical implications of moral principles directly, that is as
metaphysical issues, throughout his work Dworkin relies heavily on the concepts of the ‘external’
and the ‘internal’. We see this early development occurring in ‘Hard Cases’, but it is not put to the
same use we see in his later work, particularly Law’s Empire49 and Justice for Hedgehogs50. But as
well as acknowledging the first person perspective, critical to the phenomenological approach, this
external/internal distinction contains in it Dworkin’s distinction between what a philosopher is
doing and what a sociologist, or psychologist, or anthropologist, is doing when they examine the
same practices. The latter are concerned with a description of reality – of the ‘external’. The
philosopher needs to be immersed in the practice itself.

In rejecting the analytic-synthetic distinction, Quine argued against the dogma of empirical
reductionism. He said:

The dogma of reductionism survives in the supposition that each statement, taken in isolation from its fellows,
can admit of confirmation or information at all: My counter suggestion … is that our statements about the
external world face the tribunal of sense experience not individually but only as a corporate body.51

He goes on to say of empiricism:

A conflict with experience at the periphery occasions readjustments in the interior of the field. Truth values
have to be redistributed over some of our statements. Re-evaluation of some statements entails re-evaluation
of others … Having re-evaluated one statement we must re-evaluate some others, whether they be statements

46  Taking Rights Seriously, above n 1, 335-6.
47  See below ch 5.
49  Law’s Empire, above n 38.
50  Justice for Hedgehogs, above n 19.
51  WVO Quine, ‘Main Trends in Recent Philosophy: Two Dogmas of Empiricism’ (1951) 60(1) The
Philosophical Review 20-43, 38.
logically connected with the first or whether they be statements of logical connections themselves. But the total field is so undetermined by its boundary conditions, experience, that there is much latitude of choice as to what statements to re-evaluate in the light of any single contrary experience.\(^5^2\)

The effects of these views on analysis itself are evident. It is not just a matter of breaking an object or concept down into its constituent parts that is important, it is being able to put those parts back together within our broader understanding of reality as a whole that is just as important. This latter is a ‘constructive’ and not solely a ‘reductive’ process. It is in the construction where the complexities and the controversies will largely arise.

If we can conclude nothing else about Dworkin, we can draw a conclusion as to the importance to him of epistemological holism, or epistemological coherence. We see this in the preliminary reduction of his analysis to identify the principles at stake, and then again in the reconstruction that gives those principles identified as relevant the support of the whole of a scheme of principle. In ‘Hard Cases’ that scheme of principle is the set of principles that comprises our understanding of political morality. But this epistemological approach remains a separate issue from his theory of truth, which he did not see as coherentist, and this aspect is explored in chapter five below.\(^5^3\)

C  The ‘Rights Thesis’ in ‘Hard Cases

1  Confusion or Synthesis

I have suggested here that Kant’s influence on Dworkin’s work has resulted in a theory that directs it away from British empirical philosophy in several respects and further that his theories also exhibit the influence of later Continental philosophers who were also influenced by Kant’s philosophy. It is not difficult to identify what might be considered to be an influence from the neo-Kantian Frankfurt school of philosophy. These philosophers saw philosophy as having a critical and reflective role, and as being inherently self-aware.\(^5^4\) They disputed the idea that philosophy was simply a matter of mirroring an independent realm of facts.\(^5^5\) For them, facts and theories are part of an ongoing, dynamic historic process in which the way we view the world and the way the world is reflect one another.\(^5^6\) Dworkin seems to share with Habermas, and these philosophers a

\(^{5^2}\) Ibid 39-40.

\(^{5^3}\) There are some who would argue that an epistemological coherence theory results in a coherence theory of truth. Dworkin is clear that this is not his own view. ‘Truth’ is no more than the ‘conviction’ itself, with or without its supporting structure.


\(^{5^5}\) Ibid.

\(^{5^6}\) Ibid.
concern to identify the social conditions that foster autonomy and create truly democratic institutions.\textsuperscript{57}

Like Dworkin, Habermas appears to have taken the view that not all knowledge needs to conform to the canons of natural science, and he accepted that there are different kinds of knowledge.\textsuperscript{58} Habermas was similarly interested in hermeneutics and pragmatism.\textsuperscript{59} However, in addition, Habermas was of the view that a criterion of a good social theory was the extent to which it explained, and preserved the successes of its antecedents and competitors, while remedying their defects.\textsuperscript{60} To this extent, Habermas adopted ‘an elaborate synthetic approach’.\textsuperscript{61} In the following chapter, I will propose that Dworkin similarly attempts a remedying of defects in Rawls’s form of Kantian constructivism. I suggest that far from being confused, the overlapping philosophical ideas that tend to lead the novice in multiple philosophical directions, particularly in relation to Dworkin’s theory of truth is, in fact, an example of a similarly dedicated attempt at a synthesis of competing philosophical ideas.

Rather than a community of communication as Habermas sought to describe,\textsuperscript{62} Dworkin’s task was to develop a community of principle.\textsuperscript{63} His theory throughout involves showing the role of the court in guiding the community through reason towards that goal. That task seems to be made difficult for Dworkin by two problems inherent in his work. Firstly, by building on the assumption of ‘contested concepts’ (even if we change the name as Dworkin does to ‘interpretive concepts’) and thereby starting in the area of epistemology, Dworkin attempts to avoid controversial issues surrounding metaphysical questions to do with the ‘reality’ of these principles at all. Secondly, there is a complexity to constructive interpretation built around the need for ‘principles’ to cohere with a system of political principle as a whole that seems to defy the abilities of the ordinary person, even if Dworkin believes he is capable of achieving this. These two factors, controversy and complexity, conspire against Dworkin’s success in his overall project. However, it would seem to be fair to say of Dworkin that he is similarly eclectic to Habermas. He tends to choose philosophical views from many sources, often with little recognition, and they span a very broad philosophical range. It would, I believe also be possible to identify many Continental philosophical

\textsuperscript{57} Ibid 15.
\textsuperscript{58} Ibid 18.
\textsuperscript{59} Ibid.
\textsuperscript{60} Ibid 19.
\textsuperscript{61} Ibid.
\textsuperscript{62} Ibid 40-55.
\textsuperscript{63} \textit{Law’s Empire}, above n 38, 211-215.
ideas in his later work, such as *Justice for Hedgehogs*, but they are not so apparent in *Taking Rights Seriously*, and in that respect it might be reasonable to suggest that these influences developed in Dworkin’s work as it matured over time.

Indeed, it is in *Justice for Hedgehogs* that Dworkin really begins to identify other influences in his philosophy. In this respect, Guest commented:

> Dworkin is not a scholar in the usual sense. You do not find in Dworkin’s writings detailed analyses of what other philosophers have said, although there is an impressive breadth of background knowledge ranging through theories of ethics, aesthetics economics, language and logic.

Guest’s comment lends some support to the claim of Continental philosophical influence in his recognition of the importance to Dworkin of the interdisciplinary nature of philosophy.

2 **Issues Arising from the Rights Thesis**

Simply put, the rights thesis is that judicial decisions enforce existing political rights. Dworkin also suggests that where the US constitution expresses various democratic protections, those clauses should be interpreted as legislating abstract rights that trump any attempts at their diminishment by a court of law. Initially, at least, Dworkin’s right thesis is a theory of *adjudication* and does not claim to be a theory of *law*, although Dworkin develops the ideas used in his theory of adjudication for a full theory of law in *Law’s Empire*, where he claims that the best interpretation for the doctrinal concept of law is to interpret ‘law’ used in that sense as ‘law as integrity’. Dworkin’s theory as a form of interpretive constructivism is examined in the next chapter.

In particular, Dworkin’s early work argued that the ‘rights thesis’ is a superior conception of doctrinal law to Hart’s rival ‘rules thesis’. The rights thesis depends on a controversial distinction between principles that reflect ‘individuated abstract political rights’ and policies that reflect ‘collective goals’. Dworkin argued that the philosophical and political theories held by the judge adjudicating any matter would affect the outcome because those theories would affect the weight given by individual judges to competing principles and policies. More importantly, as well as determining the weight to be given to those principles, judges also need to consider their part in the history and culture of the particular political community and its political institutions. The thesis

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64 *Justice for Hedgehogs*, above n 19.
65 *Taking Rights Seriously*, above n 1.
66 *Justice for Hedgehogs*, above n 19.
68 *Law’s Empire*, above n 38.
also argues for the recognition of the differences between various forms of political rights, and that differing weights needed to be attributed to each form.

As well as requiring the acceptance of the idea of contested concepts as opposed to definitions, from a philosophical perspective the rights thesis also requires the acceptance of a form of idealism. The ideal being sought is the result that best justifies the pre-existing right of one of the parties to succeed.70 This in turn involves a complex theory of constructive interpretation that Dworkin developed in various articles and published as one specifically written thesis in *Law’s Empire*.71 However, this theory requires a differentiation between political ideals of law of the constitution, the law created by legislation, and the law developed by the courts.

In this chapter I want to examine briefly the first of these issues relating to the differentiation between principles and policies. The next chapter will explore some philosophical issues arising as part of Dworkin’s theory of law as integrity as a form of constructive interpretation. While Dworkin’s ‘rights thesis’ sets the tone for his subsequent work in that it introduces the concept of ‘legal rights as principles’ existing within the law itself, ‘rights’ by no means remains the focus of his later work. The importance of the ‘rights thesis’ lies in its assertion that values underlie and are an integral part of legal adjudication while at the same time being historically limited.

By selecting as his topic ‘adjudication of hard cases’, Dworkin has selected a practical, and relatively confined activity, again not an object, to ‘describe’, or ‘construct’. It is our actions, including our decisions, with which Dworkin is always concerned.72 There is a sense in which Dworkin seems to accept the predicament of inevitable human alienation through the acceptance of the very idea of ‘essentially contested concepts’.73 This idea assumes on-going argumentation, or inevitable disagreement: what might be seen as the constant potential for alienation of the decision-maker from the subjects of the decisions.

While he suggests that he is describing what judges do, his work is theoretical in an ‘internal’ sense. It is not intended to be an empirical study. A theory of law will, according to Dworkin, be both theoretical and conceptual, but not empirical because it is not about an object. Dworkin does

70 Dworkin’s early work is particularly concerned with civil rather than criminal matters, which he conceded involved separate issues.
71 *Law’s Empire*, above n 38. For discussion on constructive interpretation, see below ch 4.
72 In *Justice for Hedgehogs*, above n 19, this becomes an ethical focus on ‘living well’ or ‘adverbial value’ rather than on the ‘good’. ‘The final value of our lives is adverbial not adjectival’: at 197.
73 Both Rawls and Dworkin use this idea attributed to WB Gallie, ‘Essentially Contested Concepts’ (1965) 56 *Proceedings of the Aristotelian Society* 167-98. Gallie suggests various criteria that determine what amounts to an essentially contested concept that do not seem to be strictly adopted by either Rawls or Dworkin.
appear to be trying to remove at least one of Kant’s dualisms – the divide between theoretical and practical reason. The resultant activities may be practical but the reasoning, although not the evidence for that reasoning is largely the same. This is no less than the same activity with which judges are also concerned. Dworkin accepts that because his work is theoretical it will invite disagreement, and in many ways that appears to be his purpose.

Just how ‘theoretical’ a theory of law would be is apparent from Dworkin’s assessment of just how many theories would be involved in theorizing about the law. A theory of law, he says, would also need a theory of legislation, of adjudication, and of compliance that would look at normative questions from the different standpoints of the lawmaker, the judge, and the ordinary citizen. A theory of adjudication would itself be complex and include theories of controversy and jurisdiction. In relation to a theory of adjudication, the point Dworkin makes later in Law’s Empire is that a theory of law will offer a theory of adjudication whether it directs itself to that issue or not. Dworkin’s point is to emphasise the need for coherence between our theories, or views.

But Hart’s theory of law did offer a theory of adjudication. Hart theorized that hard cases, where there were no identifiable rules, or where the rules were so ambiguous that they were contestable, existed in a ‘penumbra’. In that penumbra judges could use their discretion, in a strong sense, as to an interpretation of the applicable rule for those cases. Hart originally did not see the penumbra as being relevant to any considerable number of cases in which judges would have to use this discretion. For Dworkin the number of uncertain cases in the ‘penumbra’ was significant and, amongst other things, included the most sensitive political cases. On Dworkin’s understanding of the ‘hard case’ in the US, as in Australia, arguably every case that reaches the US Supreme Court, or the Australian High Court, is potentially a ‘hard case’, and important in that it will subsequently act as a precedent for other cases. Given its importance, for Dworkin it was not sufficient in a theory of adjudication to provide for the strong form of ‘discretion’ that follows from Hart’s theory – one which enable judges to ‘strike out on their own’. Dworkin did not argue that judges had no discretion at all in ‘hard cases’, but that what discretion a judge did have in such cases, was only a ‘weak’ one. Judges cannot strike out on their own, but are restricted in the possible answers available to them, by the political principles embedded in previous practice.

74 For Dworkin’s linkage of these two ideas, or the impossibility of their separation, see below ch 5.
75 Taking Rights Seriously, above n 1, viii.
76 Ibid.
77 Hart, above n 4, 135; cf 12-13.
Dworkin recognized that when one puts adjudication of hard cases into the broader context of the law, it becomes evident that a political tension exists between the judicial arm of government and the legislative arm of government – a tension, that is thought to be addressed within democratic political theory. Basic democratic theory gives the authority to legislate new rules to the elected body of representatives and, therefore, the authority to create new rights and responsibilities lies with the legislature. Courts (in the US only the higher courts) are comprised of non-elected officials. It is, therefore, in these instances contrary to democratic political theory that judges should be given a wide discretion, or a ‘carte blanche’, to legislate in the case of ‘hard cases’. This exercise, commonly referred to as ‘judicial activism’, is contrary to the expectations of citizens in a democracy, where it is anticipated judges will apply the law and not make it.

Dworkin argues that Hart’s ‘penumbra’ makes judges deputies of the legislature in ‘hard’ cases. Dworkin argues that such a broad discretion offends against a well known and accepted ‘principle’ that the law will not create retrospective rights and responsibilities, something that would occur, if judges were able to ‘strike out on their own’ in that way. A court that did ‘create law’ in this way would place one of the parties in the position of being penalized for an act or responsibility that was not a legal problem or responsibility when the act occurred.

A satisfactory doctrinal theory of law in a jurisprudential sense, therefore, needs also to account for a theory of adjudication, both of which sit comfortably within the broader political, that is also normative, arm of philosophy. Both theories need to satisfy, or be consistent with, the requirements of a broader political theory – a theory that will itself be implied by, or follow from those theories, even if only indirectly. In accordance with Hume’s requirement that one cannot argue an ‘ought’ from an ‘is’, Dworkin argues that only philosophical and political argument can justify these theories. Whatever else it might be, legal and political argument is, at least in part, an argument about political morality – about fundamental political principles and aims.\(^\text{78}\) Dworkin’s point is that conceptual theories about adjudication and law both lie within this branch of philosophy.

3  Law, the Individual and the State

(a) Differentiating between Principles and Rules – The Doctrine of Political Responsibility

Dworkin has placed himself at the centre of a political dilemma (generally referred to as ‘judicial activism’): when is it, if ever, appropriate for judges to ‘make law’? His view is that in an established system of law judges should not need to ‘make law’ at all, because there are already

\(^\text{78}\) See Kant’s connection here, above 52.
guiding political moral principles embedded within the legal system, of which each case is a part, and which each judge has undertaken to uphold by accepting the role he has within that system. Those principles provide the answer to the questions arising in hard cases, and by analogy they have already provided the answers to questions arising in easy cases as well. Dworkin needs to establish a particular responsibility for judges that corresponds to their special role within the legal system and he needs to explain how they get rights from principles. He achieves the first of these goals through the doctrine of political responsibility, and the second in a two-step process that firstly distinguishes principles from rules, and then principles from policies.

In the first instance, Dworkin must draw the distinction that he is making between principles and rules.

[When no settled rule disposes of the case, one party may nevertheless have a right to win. It remains the judge’s duty, even in hard cases, to discover what the rights of the parties are, not to invent new rights retrospectively.]

and:

The rights thesis maintains that judicial decisions enforce existing political rights … Political rights are creatures of both history and morality: what an individual is entitled to have, in civil society, depends upon both the practice and the justice of its political institutions. … [J]udges 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.

Dworkin concludes that the doctrine of political responsibility requires that judges accept certain responsibilities as being part of their acceptance of the judicial role they play within a state’s legal system. Dworkin claims that ‘judicial decisions are political decisions’ at least in the broad sense that attracts ‘the doctrine of political responsibility’:

This doctrine states, in its most general form, that political officials must make only such political decisions as they can justify within a political theory that also justifies the other decisions they propose to make.

Judicial decisions are not ‘intuitionistic’. The importance of the issues of consistency and coherence is apparent here. Dworkin’s two dimensions, of ‘fit’ and ‘value’, or later ‘fit’ and ‘justification’, are evident even at this early stage of his work:

In Hard Cases, I offered an account of what it means to say that a principle is ‘embedded in’ or ‘implicit in’ or may be ‘inferred by analogy from’ a set of earlier decisions. I said that a principle bears that relationship to

79 For Dworkin’s principle of political responsibility, see Taking Rights Seriously, above n 1, 87-88.
80 Taking Rights Seriously, above n 1, 81.
81 Ibid 87.
82 Ibid.
83 Ibid.
84 Ibid. Dworkin intends here to refute any philosophical argument that rights are based on ‘intuition’, an argument which Dworkin attributes to Rawls.
earlier decisions, or other legal material, if the principle figures in what I called the best justification of that material. That makes it, of course, a matter of judgment about which lawyers may and will disagree, whether a particular principle is ‘inferable’ from past material. One justification may be better than another … in two different dimensions: it may prove a better fit, in the sense that it requires less of the material to be taken to be ‘mistakes’, or it may prove a morally more compelling justification, because it comes closer to capturing sound political morality.\(^{85}\)

A political, and therefore, judicial official cannot make decisions in isolation from their other decisions or the decisions of other previous judges. Their decisions must be able to be brought within some comprehensive political theory for the sake of consistency. Citizens are entitled to consistency from their political office holders. In other words, individuals have a right to expect political officials, including judges, to make decisions consistent with their espoused political system. For example, a member of parliament who votes against abortion on the grounds that life is sacred would be inconsistent if she subsequently voted to allow abortion for babies who would be born deformed.

This is not to deny that judges have a role to play in recognizing mistakes of principle within the law. In such cases judges may have a responsibility to correct those mistakes for future cases.\(^{86}\) But within this, the doctrine requires that judges treat all the parties who come before them with equal concern and respect.

Principles have an additional benefit over rules – they do not run out. One of Dworkin’s problems with Hart’s theory is that rules run out. A theory relying on rules would, as Hart accepts, leave judges in a position to impose (indeed, require them to impose) new rights based on their own ideas of a good direction for the law – one that might be based on collective benefit. For Dworkin this is a role for the legislature, not the judges. Dworkin’s argument is that in the case of any uncertainty about what the rules of the applicable law are, judges should look to the political moral, principles underlying, or embedded in, the rest of the law through its established legal and political system. Those principles will be for the benefit of individuals and not the collective. The reason for this is contained in the differing roles that democracy gives to the courts and the legislature. The role of the court is to protect the existing rights of individuals and not to guide collective goals – or behave as deputy legislators. This is, of course, part of Dworkin’s sustained argument against the application by the courts of utilitarian principles.

\(^{85}\) Taking Rights Seriously, above n 1, 340 (Dworkin’s footnote reference deleted).

\(^{86}\) Ibid 118-23.
The rights theory, then, is not a list of what rights a citizen has, but a comprehensive outline of the role of judges in the political system, and a description of how judges do, and ought to, determine the pre-existing ‘rights’ of the parties in hard cases when the rules run out, or are unclear in the circumstances. In ‘hard cases’ both parties come to court believing that they have a right to win. They substantiate their position with, among other things, arguments of principle in favour of their respective cases.\textsuperscript{87} Those arguments will be supported by institutional history. The judge will decide which party, on balance, is justified in his or her expectations.

This argument for judicial responsibility is strongly connected to the importance of political history and moral culture. Here Dworkin is at the centre of another political dilemma: the political tension that exists in any state between its citizens’ rights as individuals and the power of the state to coerce their behaviour. Dworkin uses his controversial distinction between principles that represent individuated political aims, and policies that represent collective goals to resolve this dilemma. For Dworkin, the role of the court attaches to the former and not the latter. Rights are always trumps over state coercive policies. Policies may influence the court and have weight but they cannot outweigh all political rights, or they would not be rights at all.

\textit{(b) Differentiating between Principles and Policies – the Role of the Courts in the Political Tension between the Individual and the State}

Dworkin’s distinction between the role of the legislature and the role of the courts in turn depends on the importance of the distinction between ‘principles’ and ‘policies’. The legislature is the political institution established and competent to consider and adopt programs based on arguments of policy.

Dworkin initially attempted to define ‘principles’ and ‘policies’ in ‘Model of Rules I’:

\begin{quote}
I call a ‘policy’ that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community … I call a ‘principle’ a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.\textsuperscript{88}
\end{quote}

But he provides an important characteristic of the difference later:

\begin{quote}
Arguments of principle attempt to justify a political decision that benefits some person or group by showing that the person or group has a right to the benefit. Arguments of policy attempt to justify a decision by showing that, in spite of the fact that those who are benefited do not have a right to the benefit, providing that
\end{quote}

\textsuperscript{87} It is at this point of his early argument that Dworkin raises, and refutes, the philosophical argument that when it is not possible to demonstrate precisely what legal rights parties have, that there is ‘no right answer’ to the case. He subsequently devotes an entire chapter to this important issue, see \textit{Taking Rights Seriously}, above n 1, ch 13.

\textsuperscript{88} Ibid 22.
benefit will advance a collective goal of the political community. It is important not to confuse this distinction, between arguments of principle and arguments of policy, with a different distinction, which the distinction between consequentialist and non-consequentialist theories of rights.89

In the early stage, Dworkin’s major purpose seems to have been to distinguish ‘principles’ from ‘rules’. He begins by referring to two civil cases to make his point about principles. In *Riggs v Palmer*,90 the court needed to decide whether a person could inherit under the will of a relative whom he had murdered where the legislation and cases were silent on the point. In that case, the court found that there existed a ‘principle’ which stated that ‘[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.’91

In the second example, *Henningsen v Bloomfield Motors, Inc.*,92 the court needed to decide whether it would extend liability to the manufacturer of a defective automobile for medical expenses incurred by persons in a crash, where the purchaser had signed a contract limiting the manufacturer’s liability to fixing the defective parts. The court looked at several relevant principles including the principle ‘that in the absence of fraud, one who does not choose to read a contract before signing it cannot later relieve himself of its burdens’. But they also considered the ‘very basic principle of Anglo-American law’ that ‘the courts will not permit themselves to be used as instruments of inequity and injustice’.93 The second example is particularly significant because it demonstrates the need for the court to consider the ‘weight’ of competing principles.

Whereas ‘rules’, according to Dworkin, operate in an all or nothing fashion where one overrides another and the overridden rule ceases to be effective, principles compete against one-another – highlighting their contested nature. There is no ‘algorithm’ for determining the weight or precedence of principles. It will be up to the judges of the court to attribute differing weights to the principles, choosing one over another without overriding a previous principle that will, for the most part, survive for future cases.

More important to understanding political principles is their difference from political policy. This needs an important distinction that goes to the heart of the tension between the individual and the

89 Ibid 294.
90 *Riggs v Palmer* 115 NY 506 (1889), 22 N.E. 188 in *Taking Rights Seriously*, above n1, 23.
91 Ibid.
93 Ibid.
collective represented by the state. To make this distinction, Dworkin defines his understanding of 'rights' in terms of 'political rights'. Political rights represent an individuated political aim in that:

a political aim [is] a generic political justification. A political theory takes a certain state of affairs as a political aim if, for that theory, it counts in favor of any political decision that the decision is likely to advance, or to protect, that state of affairs, and counts against the decision that it will retard or endanger it. A political right is an individuated political aim. An individual has a right to some opportunity or resource or liberty if it counts in favor of a political decision that the decision is likely to advance or protect the state of affairs in which he enjoys that right, even when no other political aim is served and some political aim is disserved thereby, and counts against the decision that it will retard or endanger that state of affairs, even when some other political aim is thereby served. A goal is a non-individuated political aim, that is, a state of affairs whose specification does not in this way call for any particular opportunity or resource or liberty for particular individuals.94

The rights thesis provides a mechanism for supporting individuated political aims. It requires judges to determine the rights of the parties by considering arguments of ‘principle’ and not arguments of ‘policy’:

Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole. The argument in favor of a subsidy for aircraft manufacturers, that the subsidy will protect national defense, is an argument of policy. Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right. The argument in favor of anti-discrimination statutes, that a minority has a right to equal concern and respect, is an argument of principle. These two sorts of argument do not exhaust political argument. Sometimes, for example a political decision, like the decision to allow extra income tax exemptions for the blind, may be defended as an act of public generosity or virtue rather than on ground of either policy or principle. But principle and policy are the major grounds of political justification.95

Not only do ‘principles’ provide a justification to challenge Hart’s model of rules, but the concept of ‘principles’ as individuated political aims also provides Dworkin with a platform to launch his attack against the appropriateness of the judiciary relying on a utilitarian, or more appropriately a majoritarian, approach to political morality (because as we have seen it is not the teleological aspect of utilitarianism that Dworkin is attacking). Dworkin’s argument is that utilitarians combine the concepts of rights and goals thereby subjugating the individuated political aim to that of the collective goals of the community.96 It is an important part of Dworkin’s thesis here to reject that ethical conclusion.

94 Taking Rights Seriously, above n 1, 91.
95 Ibid 82-3.
96 Ibid.
Collective goals are the domain of ‘policies’ and ‘policies’ are, in turn, the domain of the legislature. It is often appropriate for the legislature to discriminate in favour of groups of individuals, but this is not an appropriate course for the courts. The doctrine of political responsibility requires courts to treat all citizens with equal concern and respect. The concept of ‘principles’ embraces not only the concept of ‘rights’ as carefully defined by Dworkin, but also the reciprocal notion of responsibility or obligation central to his deontological theory. He says:

Arguments of principle attempt to justify a political decision that benefits some person or group by showing that the person or group has a right to the benefit. Arguments of policy attempt to justify a decision by showing that, in spite of the fact that those who are benefited do not have a right to the benefit, providing the benefit will advance a collective goal of the political community. It is important not to confuse this distinction between consequentialist and non-consequentialist theories of rights.

Someone suffering a nuisance from emissions from another’s land might appeal to the legislature to prevent the omissions on the basis of principle for example, that they have a right all things considered to enjoy their property free from pollution, or on the basis of policy that the community as a whole would be better off if people were prohibited from polluting in this way, or at least made to compensate others for the pollution.

An argument based on the rights of the person suffering from the nuisance might be based purely on convention for example, that people have bought in the area on the basis that they can breathe clean air, or the person suffering from the nuisance might advance a more consequentialist argument that their health and that of their family will suffer if the pollution is allowed to continue, and they have a right to protection arising from that consequence. This second consequentialist argument does not become an argument of policy because it is based on the potential consequences to the sufferer from the nuisance – it does not convert the argument from principle to one of policy. Dworkin is not saying, by using the comparison of policies and principles, that any argument that directs attention to consequences is an argument of policy. A person claiming a right might use both consequentialist and non-consequentialist arguments.

Consequentialist arguments might also be used in such situations where the person causing the polluting nuisance also claims a right to use their land in the relevant manner. In this instance, the consequentialist arguments would be part of an appeal as to the respective weights of the two

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97 For Dworkin’s development of his theory of ethical individualism, see Justice for Hedgehogs, above n 19, ch 9.

98 Taking Rights Seriously, above n 1, 294.
claims. A question of rights might be based on a calculation of consequences and this does not convert the decision to one based on policy.

The distinction between ‘principles’ and ‘policies’ generated a large amount of debate, but these two concepts are clearly contested concepts, the meaning of which also requires theoretical justification, or interpretation. At some level political policies must be generated by political principle. On the face of it, there seems to be no reason why the concept of policies should not refer just as well to policies designed to effect individuated aims. However, if policies are seen from the perspective of enforcing collective goals, then the conception that Dworkin draws, and the distinction he makes between policies and principles, helps to make his point about political rights and political theory and their particularly moral nature.

It is of no concern here to Dworkin that policies might also be utilized to effect individuated aims elsewhere. Individuals, including rulers, might have policies designed to carry out their own personal agenda. Dworkin is conceptualizing ‘policy’ within the political and particularly legal court environment, suggesting that it is the policy, goal, aim or point, of that whole environment to give effect to political principles, or individuated aims, by recognizing individual rights and weighing competing rights against the political principles being served. In any event, it would be fair to argue that in practice it might be difficult to distinguish between policies and principles, and that utilitarian judges, as well as others, may prefer not to do so as part of their own broader political theory.

Justification for a legislative program would require the consideration of both principles and policy. It is a function of the legislature to concern itself with the implementation of collective goals. Dworkin also acknowledges that laws are often designed to put these collective goals into effect and that these policies impinge from time to time on individual rights, or particularly liberties. When these laws are perfectly clear, he acknowledges that the court has no option but to put these laws into effect.


100 For Dworkin’s additional distinction between ‘constitutive’ and ‘derived’ principles, see Ronald Dworkin, ‘Liberalism’ in A Matter of Principle (Oxford University Press, 1985) 181-204, 184-5 (‘A Matter of Principle’).
One of the major distinctions between policies for collective goals and principles relating to individual rights, and therefore, responsibilities enforceable by the state, is that policies of the legislature need not be provided equally to all. The legislature often discriminates for or against particular individuals, or at least groups of individuals in order to achieve collective goals. For a court concerned with the application of principles, these principles must be applied equally to each and every individual. The distinction is, therefore, of some importance.

Both ‘rights’ and ‘policies’ may be absolute or less than absolute. Although collective goals may be absolute it is more likely that a community will pursue more than one collective goal at a time and this will then involve the community in various trade-offs. In making these trade-offs between benefits or burdens, political policies, such as subsidies to improve economic efficiency, will not necessarily demand equal treatment for those involved. Rights may also be absolute in the sense that there could be no reason for not securing that liberty to the individual except impossibility. They may also be less than absolute. In this case they will have a certain weight that amounts to their ‘power to withstand competition’ from other principles or policies. A right must be able to withstand at least some collective goals or it could not be considered to be a right at all.

A ‘political right’ is identified by a ‘political aim’ that exists within a particular ‘political theory’. Rights, and their respective weights, will therefore be dependent upon the political theory being argued and accepted. Dworkin argues that the doctrine of political responsibility requires political officials, including judges, not just to be consistent with past decision but that their decisions should show a coherent application among all legal decisions based on their own political theory. This requirement for epistemological coherence is itself a matter of controversy. Even so, the selection of political principles and the weight given to those principles, particularly when they are in conflict, as they inevitably will be, is a matter of interpretation. Consequently, different judges will reach different decisions.

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101 Taking Rights Seriously, above n 1, 92.
102 For Dworkin’s ‘Seamless Web’, see ibid 115.
103 The two major objections to epistemological coherence theory are that it either leads to an infinite regress, or to circularity. Dworkin appears to accept the latter view, but not that it is necessarily endlessly circular, see Justice for Hedgehogs, above n 19, 38. ‘…I emphasize there, again, that a theory of moral responsibility is itself a moral theory: it is part of the same overall moral theory as the opinions whose responsibility it is meant to check. Is it reasoning in a circle to answer the question of reasons in that way? Yes, but no more circular than the reliance we place on part of our science to compose a theory of scientific method to check our science.’
Dworkin’s early attempt at a theory of adjudication, in the ‘Model of Rules I and II’, is to argue for an interpretation of adjudication as ‘rights’, rather than as ‘rules’. Quite significantly, he later changes this characterisation of legal positivism from one of rules to one of ‘conventionalism’, and his own characterisation of law, as opposed to adjudication, as integrity.

There appears to be a two-fold purpose, or point, to the ‘rights thesis’. The first seems to be to link ‘legal rights’ with political rights and thus to political and moral theory. By doing this, Dworkin also integrates morality with the very activity of adjudication. The nature and weight given to the political rights identified will differ with each interpretation constructed from the corresponding political theory of each judge. Dworkin’s rights are based on liberal principles on which democratic political theory relies, including principles regarding equality, liberty, justice and community. However arguments for rights based on those liberal principles are made on the basis of their political and moral requirements and not because of their association with democracy, even though those particular principles are among the ‘grand abstract rights’ of political theory. With the exception of the requirement for the judiciary to extend to every citizen equal concern and respect, in a democracy those ‘grand rights’, as abstract rights, require very little in terms of individual concrete legal decisions except as those concrete rights derive from them.

Dworkin does argue that there is one right, in particular, that can be presumed from the doctrine of political responsibility as it relates to judges in the legal system and that is the right to equal concern and respect, in that citizens have a right to be treated ‘as equals’ by their government but not necessarily ‘equally’ in terms of distribution. In terms of liberal political theory, Dworkin argues for the priority of equality in that sense over liberty. Indeed, he argues that the concept of equal concern and respect provides sufficiently for a form of individual autonomy that cannot be better achieved by arguing for different conceptions of liberty in such a way that the liberal values of liberty and equality conflict. Although he does not appear to be arguing that this version of liberalism is the only justifiable political theory, he does appear to be claiming that ‘equal concern and respect’ is an absolute right from which other concrete rights can be derived. It seems to be

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104 Taking Rights Seriously, above n 1, chs 2 and 3.
105 Law’s Empire, above n 38.
106 Taking Rights Seriously, above n 1, 146-7.
108 A Matter of Principle, above n 100, 190.
109 Taking Rights Seriously, above n 1, ch 12.
intended as some kind of ‘foundational’ political right, or assumption, though he does not use that term.

The second purpose behind Dworkin’s ‘rights thesis’, is that by arguing for a deontological moral approach from adjudication as opposed to a utilitarian one, individual ‘rights’ achieve priority over ‘collective goals’ from the perspective of the political role of the courts.

As a matter of legal or adjudicative theory, Dworkin does not provide either a definitive list of rights or principles such as might be found in a UN Declaration because that would read like a list of rules and this is not Dworkin’s purpose. This would not be possible because each party comes to a court arguing that they have the right to a decision in their favour. For Dworkin the argument about rights ‘is about rights’, that is, the argument is about someone claiming that they have a ‘reason’ to have a decision in their favour.

The connection between someone having a right to a decision and there being a reason in favour of that decision is not contingent but conceptual. No plausible account can be given of what a right is that does not include, as belonging to the concept of a right, the idea that if someone has a right, then it is wrong for others to treat him otherwise than as specified, at least unless some strong countervailing reason for doing so is available. Any other account of what a right is – supposing that whether someone has a right is one question, and whether his having that right requires anyone to treat him differently is another – makes the mistake of reifying rights.110

In other words Dworkin claims that ‘rights’ give their holders reasons for them to be permitted to behave, or not to behave, in a certain way, even when some collective goal would be better served if they were required to behave contrary to the way they desire. Rights in this sense are inherently political and trump or take priority over collective goals or objectives. Even in this sense however, the definition of the extent of rights will still be controversial. What is given here is simply a basic platform of what the concept of ‘right’ assumes.

Consistently with his conceptual approach, Dworkin saw his task not as providing a list of rights, but a vocabulary of rights that is relevant to hard cases and the responsibilities of the adjudicating judges, given that there is no list of rights to be found. His own conception of ‘rights’ is that they are ‘political trumps held by individuals’ and he defines their function briefly:

110 Ibid 334.
Individual rights are political trumps held by individuals. Individuals have rights, when for some reason, a collective goal is not a sufficient justification for denying them what they wish as individuals to have, or to do, or not a sufficient justification for imposing some loss or injury upon them.\footnote{Taking Rights Seriously, above n 1, xi. Cf Mill’s statement of rights in Utilitarianism, ‘When we call anything a person’s right, we mean that he has a valid claim on society to protect him in the possession of it, either by force of law, or by that of education and opinion… To have a right, then, is, I conceive, to have something which society ought to defend me in possession of. John Stuart Mill, Utilitarianism (Andrews, UK, original 1861, 2011 ed) 60-1. For Dworkin on Mill’s concept of liberty, see Taking Rights Seriously, above n 1, ch 11.}

Unlike Hart’s legal rules and standards that are valid according to a ‘rule of recognition’, principles make no claim to validity due to their ‘pedigree’. They are binding because of their intrinsic value as a right. What those values require at any particular time will depend on the politics, culture and social conventions of the political community in question. Principles are not valid according to their pedigree, but according to their place within any given political theory. As concepts, they are inherently contestable. According to Dworkin legal disputes are ultimately resolved on the basis of ‘moral facts’, and not ‘social facts’ as the inclusive legal positivists would contend.\footnote{This is the fundamental difference Dworkin claims between his theory and that of the ‘inclusive legal positivists’ who accept that legal disputes may be settled on the basis of social facts as well as social rules. For Dworkin’s response to several of these positivists, see Justice in Robes, above n 9, ch 8. On the truth of moral facts, see below ch 5.}

\textbf{D Summary}

In summary, Dworkin uses four ideas to underpin his initial theoretical approach that focuses on the activity of adjudication. The ideas overlap and all are contentious. The first puts both the activity of adjudication and the philosophical approach firmly within the broader activity of ‘theory’, as opposed to empirical ‘experiment’. We are collecting data from experience and learning, but we are not carrying out scientific experiments. We can do no better than aim at reaching the best justification for making decisions, only these are moral decisions that affect the rights of individuals. The activity of adjudication involves theoretical conceptual analyses, just as political and moral philosophy involves political conceptual analysis and theory. It is not descriptive of any ‘thing’. Dworkin is not in any sense ‘reifying’ rights. From the very beginning of his work, he makes it clear that he is concerned with propositions, with concepts, and with political and moral principles.

Secondly, Dworkin, initially at least, asks us to see the purpose of adjudication as being about ‘rights’ rather than ‘rules’. The function of adjudicators is to determine which party has the successful claim. Rules form a part of what must be taken into consideration in weighing the competing rights claimed, but the rules themselves are based on political moral principles. When the rules run out, it is the principles underlying the existing rules, coupled with the competing existing rights of the parties, which must provide the answer to the question about which party has
the better claim to succeed. Those principles must guide the decision rather than either the subjective discretion of the judges, or concern for the collective goals for society as a whole.

The courts have always been about the interpretation of rights. But what the Enlightenment changes made clear was that the rights with which the courts are concerned are no longer those of an absolute ruler as opposed to its citizens, but between the citizens themselves, and the citizens as individuals against the majority of citizens represented by the legislature – a legislature whose powers are limited by the ‘absolute’ rights of its citizens as individuals.

The task for the judge remains discretionary in the sense that judges must still choose their own interpretation of what rights apply in any given concrete situation. But those interpretations are limited: firstly, by the principles already embedded within the law from underlying past political decisions, such as the constitution, legislation and precedent; and secondly, by the consistency of the political theories of the judges themselves, and the coherence that application of any principles achieves with the broader legal system. These limitations prevent any conclusion by judges that they might ‘strike out on their own’. Judges are not deputies for the legislature.

Thirdly, Dworkin utilizes a distinction between two concepts: principles and policies to emphasise the difference in function between the concerns of the legislature and the concerns of the courts. Dworkin’s conception of policies is particularly contentious because he claims that a court must avoid using policies to determine the rights of parties. Rights are individuated aims – the aims of individual citizens or groups of citizens – not of the collective of citizens known as society. This is the great advance of the Enlightenment. It is not just a power shift from monarch to majority. No doubt, individuals can have policies to carry out their own goals, but a court would not be concerned with such policies, and for Dworkin nor should it be concerned with collective policies. Policies in Dworkin’s sense amount to little more than strategies designed to achieve collective goals.

Lastly, Dworkin produces a vast vocabulary of rights, abstract rights, detached rights, individual rights, political rights, absolute rights, background rights, and the list goes on. Rights are a part of our vocabulary and they are contested concepts that admit of no one precise definition. Institutional rights suggest that we are entitled to play a game by its rules. This part of Dworkin’s work is curious. But what Dworkin does is underline the fact that the language of rights, and with it responsibilities, is part of our vocabulary used by, and understood by all of us at a broad conceptual level, even if we hold differing conceptions of their detail.
People do not just happen to win a lawsuit. They understand that the law is about ‘rights’ and ‘responsibilities’. They understand that the ‘rights’ acknowledged by the courts are considered to be so important that they will be backed up by the authority of the state. There is a vocabulary of rights and it also has its ‘grammar’ or ‘rules’. We cannot avoid the use of this word just for comfort’s sake and because it is a contested concept we cannot avoid having competing conceptions of it. It is not a matter of whether there are such things as ‘rights’, but whether we can justify our particular conceptions of them.

What Dworkin has done is seek to explain what is particular to individual rights about the legal system. In so doing he has explained the special role of the judge in upholding history and tradition; the need for all citizens to be treated as equals; and proposed an argument for a deontological rather than an outcome oriented approach to judicial decision that focuses on the needs and entitlements of the individual to self respect rather than the good of the community. When it is combined with his interpretive approach to the concept of ‘law’ itself, it provides a unique justification for the judicial process as a whole. It begins with a conception of adjudication as ‘rights’ but this is far from where it remains. We are placed via his rights thesis into the greater spectrum of political morality and the morass of controversy contained there.

A theory of law has a broader context lying as it does within jurisprudence and philosophy. In this chapter, the rights thesis focused on the connection between a theory of adjudication and the political and moral context in which it lies. But more particularly, we have now been provided with several important philosophical points of contention. Each of these issues takes the uninitiated further into the broader context of general philosophy rather than narrowing the field to the specific. This is an unusual form of analysis. It is a constant challenge for any reader of Dworkin. It is little wonder that Dworkin needed to call on a superhuman judge, Hercules, for his task of judicial interpretation of the political principles required in his theory of law as integrity, which is the subject of the next chapter.

113 See below, ch 6.
CHAPTER FOUR

IV DWORKIN’S CONSTRUCTIVE INTERPRETATION

A Introduction

In this chapter I examine Dworkin’s developed theory of law as integrity as a particular form of Kantian Constructivism. While there are many forms of constructivism, two stand out as relevant to Dworkin’s interpretive theory of law as integrity because they both claim to be forms of Kantian constructivism. These are the theories proposed by John Rawls and Onora O’Neill.¹

In *Law’s Empire*, Dworkin brought together previous ideas he had explored in *Taking Rights Seriously* and *A Matter of Principle*. He claims that:

> legal reasoning is an exercise in constructive interpretation, that our law consists in the best justification of our legal practice as a whole, that it consists in the narrative story that makes of these practices the best they can be.²

If Dworkin’s ‘interpretivism’ is a form of constructivism, as he claims it is, and as I claim here that it is, there would seem to be little doubt, based on the significant number, or least nature, of references to Rawls provided by Dworkin, that a reader might safely rely on Rawls alone, and that may well be the case. Dworkin admits to Rawls’s positive influence on his work in more than one place and he also acknowledges Kant’s influence.³ However, in drawing this connection between Dworkin and either Rawls or O’Neill, I need to be clear that Dworkin makes no claim that his own theory is a form of ‘Kantian constructivism’.

On the other hand, although Dworkin rarely, if ever, referenced Onora O’Neill,⁴ he was not without his own criticisms of Rawls’s constructivism particularly in relation to the appropriate role of the ‘Original Position’, which he originally interpreted as being a ‘half-way’ point to more abstract principles that would be required to recommend the “original position”’.⁵ In correcting these criticisms in his own theory, Dworkin seems, perhaps unintentionally, to satisfy many of O’Neill’s

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⁴ If there are any references to O’Neill by Dworkin, they are not indexed in his major publications.

⁵ *Taking Rights Seriously*, above n 3, ch 6, 168-183.
criticisms of Rawls’s constructivism and by doing so seems to bring himself closer to O’Neill’s understanding of ‘Kantian Constructivism’. This is far from suggesting that Dworkin satisfies all of O’Neill’s major problems with Rawls’s or Dworkin’s versions of constructivism.

O’Neill’s constructivism is relevant to Dworkin, not only because of her direct criticisms of Rawls’s account, but also because her theory claims to be faithful to Kant, whereas Rawls’s claim to Kantian constructivism was circumscribed. Rawls stated that his use of the term ‘Kantian’ to describe his form of constructivism was because it ‘sufficiently resemble[d] Kant’s in enough fundamental respects so that it is far closer to his view than to the other traditional moral conceptions that are appropriate for use as benchmarks of comparison.’ However, what O’Neill offers in particular is a framework for comparing Dworkin’s, Rawls’s and O’Neill’s version of constructivism along with the criticisms she offers of those other views.

I will begin this chapter by asking what constructivism is, and what it is that is being constructed. I will then compare O’Neill’s Kantian framework, which utilises Kant’s metaphors of ‘tribunal’, ‘debate’ and ‘community’, with Dworkin’s theory of interpretivism. In this comparison, due to space constraints, I shall limit the comparison to the metaphors of ‘tribunal’ and ‘debate’. Where applicable I shall make comparisons with Rawls’s alternative views.

**B Rawls’s Model of Constructivism**

Rawls’s first venture into ‘constructivism’ was via a form of ‘contractarianism’ or social contract theory. In *A Theory of Justice* he wrote: ‘Justice as fairness is an example of what I have called a contract theory.’ He proposed that his theory of justice would have two parts: ‘(1) an interpretation of the initial situation and of the problem of choice posed there, and (2) a set of principles which, it is argued, would be agreed to’ by the participants in that situation. He accepted that a person might accept the first part of the theory while rejecting the principles he derived from it, or vice versa accept his principles while rejecting the initial contract situation he proposed, which he called the ‘original position’. His theory was, or at least, became, limited to the ascertainment of justifiable principles of social justice. While he initially thought that the original position might be used to embrace a generalized discussion of comprehensive virtues in a similarly

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8 *Constructions of Reason*, above n 6, 17.
9 *A Theory of Justice*, above n 1, 14
10 Ibid.
systematic way, he made no attempt to do so in *A Theory of Justice*, and subsequently accepted that this aspect remained a limitation on his theory.\(^{11}\)

Rawls attributed the re-classification of his theory of justice as a form of ‘constructivism’ to Dworkin.\(^{12}\) In his 1980 Dewey Lectures,\(^{13}\) in which he revised parts of his original theory of justice, he went on to describe his form of Kantian constructivism as being directed towards specifying ‘a particular conception of the person as an element in a reasonable procedure of construction, the outcome of which determines the content of the first principles of justice.’\(^{14}\) More particularly, he says that:

this kind of view sets up a certain procedure of construction which answers to certain reasonable requirements, and within this procedure persons characterized as rational agents of construction specify, through their agreements, the first principles of justice.\(^{15}\)

What Rawls is constructing is quite limited to principles of ‘justice’ and amounts to an idealised procedure whereby rational agents, defined or limited through a ‘particular conception of the person’, might agree to ‘first principles of justice’ for the establishment of just social institutions. Rawls’s conception of the rational person was one of agents who have limited knowledge of their place within their community and the goods that they possess. The famous ‘first principles’ of justice at which they arrived confirmed the liberal values of freedom and equality, although he never developed these into ‘comprehensive liberalism’.\(^{16}\) Rawls, then, is constructing a procedure to determine the very limited project of producing principles to guide the establishment of just institutions in a society.

C  *O’Neill’s Model of Kantian Constructivism*

O’Neill, on the other hand, takes a much broader approach to the project of the construction of action-guiding principles than Rawls. Like Dworkin, O’Neill sees the construction of action-guiding principles as an alternative to ‘teleological’ or utilitarian approach to ethics. She says, with significant generality, of constructivism:

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\(^{12}\) Ibid.

\(^{13}\) These lectures are published as ‘Kantian Constructivism in Moral Theory’, in Samuel Freeman (ed) *John Rawls: Collected Papers* above n 7, 303.

\(^{14}\) Ibid 304.

\(^{15}\) Ibid.

\(^{16}\) *Political Liberalism*, above n 11, xxvi-xxvii.
Constructivism in ethics … is not a novel philosophical method or procedure. To construct is only to reason with all possible solidity from available beginnings, using available and followable methods to reach attainable and sustainable conclusions for relevant audiences.17

Nevertheless, the issues of ‘available beginnings’, followable methods, and attainable and sustainable conclusions resonate throughout her own constructive theory.

O’Neill’s project on Kantian constructivism commences with Kant’s own project of the critique of reason itself.18 According to O’Neill, Kant was attempting to construct an edifice considered as the ‘sum of all knowledge’.19 The materials for building this edifice are, however, limited to reason itself. These materials cannot be found by introspection alone, nor can they simply be established externally from empirical observation. This construction needs an ‘audience’ of ‘critics’ and ‘fellow workers’.20 The workers not only need materials but a plan of construction and there will always be disagreement among the workers about the plan itself.21 Kant is using the metaphor of building construction ‘to explain his view of philosophical method’.22

Kant argued that we cannot run our lives according to instinct and that we must guide our actions by adopting certain practical principles as our maxims.23 Kant’s project has as much to do with the plan for the building, that is, with methodology, as with the available materials (reason) and Kant develops his account of reason’s authority by moving to political metaphors to develop the critique of reason, or as O’Neill refers to it – the vindication of reason. According to O’Neill, reason must rely on negative instructions, on a system of precautions and self-examination that must begin with a critique of reason itself, where reflection is not instantaneous mirroring, but involves iteration.24 For Kant, above all else, reason involves discipline and this is not something that can be imposed by power or force, instead it always involves ‘the agreement of free citizens’.25 It seems altogether reasonable then, that Rawls would, like Kant, have utilised a model directed to contract or agreement.

This is a first of all a practical project with an intended practical outcome. O’Neill’s understanding of practical reasoning, with which Dworkin would not disagree, is stated as follows:

17 Towards Justice and Virtue, above n 1, 63.
18 O’Neill takes her model of Kantian Constructivism directly from her interpretation of Kant’s Critique of Practical Reason, see Constructions of Reason, above n 6, chs 1, 2 & 11.
19 Ibid 11.
21 Ibid 11.
22 Ibid.
23 Ibid 12.
24 Ibid 14.
*Action-oriented conceptions of practical reasoning* seek to vindicate action, policies and characters as reasoned not by showing that they are constitutive of or instrumental towards ends of any sort, but, more directly, by showing that they embody certain types or principles of action, described with varying degrees of specificity or abstraction.\(^\text{26}\)

What Kant is looking for are principles to act as constraints on our practical decisions about action, including thinking. The primary metaphors for Kant’s project or plan, which is a critique of reason, are political and juridical. According to Kant a critique of reason requires a ‘tribunal’ and there is no such tribunal in place, nor can the plans for it be agreed upon. O’Neill suggests that the reason for the political and juridical metaphors at this stage are because Kant thought of the problems of ‘cognition and political order as arising in one and the same context.’\(^\text{27}\)

1. Three Juridical Metaphors

O’Neill focuses on three of Kant’s political metaphors for the construction of knowledge through the materials of reason: they are the tribunal, debate and the community or the *sensis communis*.\(^\text{28}\)

(a) The Tribunal

Firstly, O’Neill argues that Kant likens reason to a legal tribunal. Clearly there could be a problem here in keeping this metaphor from regressing to one of mere authority (something Kant has already noted needs to be avoided). But the relevant likeness is that a legal tribunal arrives at its conclusions in light of the fundamental principles of its own construction from within its own institution. A legal tribunal secures order because it has to follow recognized methods of legal action and those methods end in a judgment that strikes at the conflicts and aims to secure a peace.\(^\text{29}\)

O’Neill’s interpretation of the metaphor of the tribunal is that it is not a reference to a Hobbesian contract. The aim of the tribunal in its critique of pure reason is not to seek the agreement of the plurality of agents affected. The requirement is to provide a strategy through which the plurality of potential reasoners can interact without relying on force or the fiction of pre-established harmony. Tribunals judge and deliberate and if there are ‘modes of co-ordination’ ‘they could, as it were retrospectively, be said to be principles of reasoning.’\(^\text{30}\) On O’Neill’s interpretation of Kant, we can see immediate problems for Rawls’s tribunal constituted in the ‘original position’. Even after he alters his conception of his theory of justice from one of ‘contractarianism’ to one of

\(^{\text{26}}\) *Towards Justice and Virtue*, above n 1, 49.

\(^{\text{27}}\) *Constructions of Reason*, above n 6, 16. In what is reminiscent of Dworkin’s distinction between ‘principles’ and ‘policies’, see above ch 1, O’Neill is distinguishing here between ‘teleological conceptions of practical reasoning’ that vindicate action, policies etc, by showing they are instrumental towards certain ends.

\(^{\text{28}}\) Ibid.

\(^{\text{29}}\) Ibid 18.

\(^{\text{30}}\) Ibid.
‘constructivism’, the issue of agreement of his two principles of justice remains of paramount importance to him.\textsuperscript{31} O’Neill considers this aspect of Rawls’s project to be a major problem for it because the decisions of a tribunal might aim at and produce ‘finality’, but they do not produce, and ‘would not’ produce agreement. O’Neill argues that the best the tribunal can achieve is principles that ‘could’ be adopted by all, not principles that ‘would’ be adopted by all.

In addition to his claim that there is no foundational authority for reason, Kant also claimed that reason is not algorithmic.\textsuperscript{32} The complex cognitive capacities of the intellect provide, as it were, an inventory of disconnected materials still to be constructed. Sensibility and understanding are not to be used without the ideas of reason. The aim of Kant’s tribunal is to systematically identify and vindicate (or justify) the maxims or principles to regulate the use of those complex capacities of sensibility, understanding and imagination and from those materials then construct the ‘edifice of human knowledge’. In the same fashion as the principles of a legal tribunal constrain and judge, so will the principles of reason. According to O’Neill, for Kant thought and action can at most be constrained, and not fully determined, by reason.\textsuperscript{33} These capacities of cognition, the elements of human knowledge, still require a plan in order to be put together or constructed and there is no master plan for this ‘inscribed in each of us’\textsuperscript{34} There is no pre-established harmony between thinkers or reasoners, or between reasoners and a transcendent reality.\textsuperscript{35}

From this, O’Neill concludes that the most basic requirement (or guiding principle of action) for a plurality of agents must also be negative. She says that a ‘minimal negative step toward any solution must be to refrain from adopting plans that others cannot adopt’.\textsuperscript{36} Therefore, any principles of thinking and acting that can have authority on members of a plurality must also be negative; that is, they must not be principles on which some members of a plurality cannot (rather than ‘would not’) act.\textsuperscript{37} This conclusion, in turn, leads O’Neill directly to Kant’s supreme principle of reason, the Categorical Imperative, but now interpreted by O’Neill as a negative instruction.\textsuperscript{38} If we are to avoid the threat of disorientation, of voices speaking past one-another rather than to one-another, we must act only on ‘a maxim through which we can will that it be a universal law’ and

\textsuperscript{31} O’Neill offers a critique of Rawls on this issue in \textit{Constructions of Reason}, above n 6, 206-210.
\textsuperscript{32} Ibid 18
\textsuperscript{33} Ibid 19.
\textsuperscript{34} Ibid.
\textsuperscript{35} Ibid 16.
\textsuperscript{36} Ibid 23.
\textsuperscript{37} Ibid 19.
\textsuperscript{38} Ibid 15-17.
this becomes not only the supreme principle of practical reasoning, but the supreme principle of all reasoning.\textsuperscript{39}

O’Neill considers Kant’s instruction to be negative in the sense that the goal is to seek principles to which everyone ‘could’ rather than ‘would’ agree. She states this as:

\begin{quote}
The most then that [reasoners] can do is to reject basic principles of thought and action that are barriers to cognitive order. A minimal, negative step toward any solution must be to refrain from adopting plans that others cannot adopt. Those who are to be fellow workers must at least refrain from basing their action on basic principles that others cannot share. Those who act on such maxims are not guaranteed agreement, at all points; but if they wholly reject it, communication and interaction (even hostile interaction, let alone coordination) will be impossible.\textsuperscript{40}
\end{quote}

\textit{(b) Debate and Recursion}

The second political metaphor O’Neill discusses is that of the ‘debate’. O’Neill stresses the importance of the debate for the critique of reason because it is deployed to assist in the problem of why a critique of reason by reason itself is not endlessly circular. The metaphor argues for reasoned communication and co-ordination modeled as free, critical and universal debate among fellow citizens.\textsuperscript{41} Debates do not usually produce agreement, but they do presuppose reason. Two important points about debates in this context are that they link a plurality of speakers, none of whom coerce the others; and secondly, that the debate is open-ended because at no stage are definitive answers established. What is important here is that principles derived by the method of debate survive open-ended questioning, including questioning of the standards that those same principles propose.\textsuperscript{42}

The debate metaphor stresses the recursive character of the critique of reason. O’Neill observes that Kant embeds this recursive account of the authority of the most fundamental principle of reasoning, now seen as negative, in a possible history of its emergence. Her suggestion is that Kant thought that the ‘inventory of materials’ that constrains any possible plan, can be ‘depicted as the product of an evolutionary and historical story’ of human existence.\textsuperscript{43} This point is of particular importance to Dworkin’s constructivism. In what seems to be an oblique comment about the necessary combination of both nature and nurture, O’Neill states that although the ‘rudimentary capacities to co-ordinate in beings’ that, for Kant, form the raw materials of reason are not intrinsically programmed, they do provide the context for the development of more elaborate

\begin{flushright}
\textsuperscript{39} Ibid. \\
\textsuperscript{40} Ibid 23. \\
\textsuperscript{41} Ibid 20. \\
\textsuperscript{42} Ibid. \\
\textsuperscript{43} Ibid, 21.
\end{flushright}
capacities. In line with this argument, and his desire to find the ‘right plan’ for his raw materials, Kant provides a ‘speculative natural history of the emergence of their gradual development toward completion in the “Enlightenment”.’

The focus of the evolutionary argument is on the ‘unsocial sociability’ of a plurality of ‘partially independent and mutually vulnerable’ beings who have to hand only the materials that evolution has produced. The historical task of formulating the ‘plan’ for the construction of human knowledge has been begun but is not complete. Kant may have thought that the task was nearly complete and would be with transition to a fully enlightened age. Our history might show that this ‘transition’ remains either not fully completed, or that the plans for the enlightenment itself were flawed. The point that O’Neill is making is that history looks backward while politics (and with it Kant’s political metaphors) looks forward. As temporalized beings we emerge at a point in time from which we can look backwards but can also look ahead. Without looking back at our history, we condemn ourselves to making the same errors again. O’Neill notes that any actual plurality might come to share optional specific rules and algorithms and differing views on their scope or use but these may be no more than ‘modes of inquiry and conventional morality of a particular time and place’. They will always, therefore, be subject to the recursive nature of reason itself.

As before, O’Neill takes up a negative point here. Reason cannot rely on the ‘despotic use of force’, or dogma, but neither can we reach agreement with just the raw cognitive materials with which we have been supplied. For O’Neill the best we can do is to refrain from producing disagreement by agreeing to act only on principles on which everyone ‘can’ agree to act even if they ‘may’ not do so. But the important issue here is that we achieve a ‘shared’ plan: one by which we can all act because the alternative is anarchy. Reason must be neither authoritatively imposed, nor must it be anarchic. O’Neill concludes that reason’s authority must be self-imposed.

44 Ibid.
45 Ibid.
46 Ibid 21-22.
48 Ibid 24
49 Ibid, 22.
50 For Dworkin’s equivalent understanding of this, see his comments against ‘checkerboard solutions’, Law’s Empire, above n 2, 178-184, 186-87, 217-18.
and that this requires that its vindication must be recursive.\textsuperscript{51} Those for whom reason is to be even partially attainable must be capable of autonomy in the Kantian sense.\textsuperscript{52}

The third element of the constraints imposed through the idea of the debate (that reason is neither authorititative, nor anarchic), is that reason is utterly practical. To use O’Neill’s and Kant’s metaphor, we may not achieve the tower that comprises full knowledge, but we do need a ‘secure home’.\textsuperscript{53} We cannot ‘think of reason in abstraction from acts of reasoning’.\textsuperscript{54} The strategy must be one that does not defeat the possibility of action, interaction and communication\textsuperscript{55}.

We may only be able to reach disagreement, but this remains preferable to ‘disorientation’. We are reminded here that before the ‘interpretative mode’ can commence in a society, reasoners must share a basic platform of the point or purpose of contested concepts, otherwise they will not share the concept at all.\textsuperscript{56} For O’Neill the fact that reason arrives at only negative instructions and perennial disagreement, is itself a testament to the fact that there are some standards of reason. If there were no standards of reasoning we would not mutually comprehend one-another at all. Disagreement must rest on mutual comprehension even if this is only partial.\textsuperscript{57} O’Neill returns here to the negativity of the Categorical Imperative that requires us to refrain from adopting plans that others cannot adopt.

\textit{(c) The community or ‘sensus communis’}

At the end of her consideration of these metaphors, O’Neill concludes that only a negative guide to action that constrains adoptable sets of principles has been achieved. She then asks whether the Categorical Imperative can be used as a guide to ‘thought and cognition’ rather than action; that is, whether it can be used to guide interpretation.\textsuperscript{58} In concluding that it can, she bases her interpretation of Kant on this point on his understanding of the political idea of the \textit{sensus communis}. She does not interpret \textit{sensus communis} in the modern sense of implying understandings that are actually shared in the community or more widely. Instead, she argues that Kant used the phrase to imply three (negative guiding) principles of communication that can be shared in possible judgments within any possible community.

\textsuperscript{51} Ibid 23.
\textsuperscript{52} Ibid. For Dworkin on the importance and relevance of free will and autonomy in ethics and morality, see \textit{Justice for Hedgehogs}, above n 3, 219-252.
\textsuperscript{53} \textit{Constructions of Reason}, above n 6,23.
\textsuperscript{54} Ibid 24. Cf, Dworkin’s claim, see ch 5 below, that morality, like reason, cannot get outside of itself to judge itself.
\textsuperscript{55} Ibid.
\textsuperscript{56} \textit{Law’s Empire}, above n 2, 46-48.
\textsuperscript{57} \textit{Constructions of Reason}, above n 6, 23.
\textsuperscript{58} Ibid 25.
The three principles require firstly that agents must think for themselves and not adopt the will of others.\textsuperscript{59} Secondly, we must think from the standpoint of everyone else.\textsuperscript{60} Unless we listen to and interpret others, and try to see the point of their contributions, we are not treating them as ‘fellow workers’ aiming to avoid principles to which they cannot agree. The idea here is to reflect on one’s own judgment from a universal standpoint. But that standpoint is no Archimedean point. It will not be external to the thinker’s own standpoint of reason. The point is to ‘orient one’s thinking in ways that do not preclude its accessibility to others’.\textsuperscript{61} The third, and perhaps the most important principle from Dworkin’s perspective, is always to think consistently.\textsuperscript{62} O’Neill stresses the recursive nature of this never-ending task and the reflexive character implied by a vindication of reason. As we move to the standpoint of others, the set of judgments that we independently form will be revised and change and lead us to inconsistency. This principle will not be easy to attain.

Dworkin adds to this list a fourth point of ‘coherence’ among the principles themselves. Not only must we be consistent in our application of a principle, but each principle must remain ‘consistent’ or ‘coherent’ with the others. This is one of the points that sets Dworkin’s interpretation apart from O’Neill’s and which ultimately enables him to produce an integrated morality and ethics that is so important to her.

In addition to there being no foundation for knowledge, and it having no algorithms to comprise its plan, the metaphor of the debate reminds us that the ‘edifice of human knowledge’ cannot be built by relying on ‘things as they may be in themselves’ or from introspection. The discipline required of reason is not external but is self-imposed.\textsuperscript{63} Again, it is this last point that becomes the cornerstone of Dworkin’s theory of determinacy.

D \textit{Dworkin’s Model of Constructive Interpretation}

O’Neill has provided us with a theoretical framework through which we might examine Dworkin’s interpretative theory as a form of Kantian Constructivism. I will concentrate here on the extent to which Dworkin satisfies that framework of Kant’s purpose specifically in respect to O’Neill’s treatment of Kant’s metaphors of the tribunal and the debate. O’Neill also develops a further framework for her consideration of constructivism in the context of scope, structure and content.\textsuperscript{64}

\begin{itemize}
  \item \textsuperscript{59} Ibid 25-6.
  \item \textsuperscript{60} Ibid.
  \item \textsuperscript{61} Ibid.
  \item \textsuperscript{62} Ibid.
  \item \textsuperscript{63} Ibid 13.
  \item \textsuperscript{64} This is the framework O’Neill utilises in \textit{Towards Justice and Virtue}, above n 1.
\end{itemize}
Due to the constraints of space, I will concentrate on the first two of elements of the initial framework, keeping in mind the first two elements of the second. Although, Dworkin has plenty to say about the sensus communis, which he interprets in terms of the ideal of an associative community of principle,\(^{65}\) it is the first two elements that seem to be the most important in the context of this comparison with O’Neill’s structure.

My purpose here is primarily to consider the Kantian nature of Dworkin’s constructive interpretation, conceding that there are some particularly relevant differences between the constructive theories of O’Neill and Dworkin. However, all three philosophers, O’Neill, Rawls and Dworkin, accept Kant’s point that not all of our concepts have agreed, ready-made, analytic meanings, or meanings that can be agreed by analysis of the parts of the whole. All seek to address Kant’s idea of the ‘synthetic truth’ through the construction and critique of reason and all agree that constructivism makes no metaphysical claims.\(^{66}\) Like O’Neill, Dworkin’s theory is not concerned with ‘cause’ or ‘motivation’ – this issue is set aside from ‘justification’ or ‘vindication’ as O’Neill refers to the process of reason. Dworkin states that:

Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong. … the history or shape of a practice or object constrains the available interpretations of it … \(^{67}\)

O’Neill rejects attempts ‘to locate the authority of practical reason in actual discourse (or the conditions of possible discourse)’ and asserts that such attempts have failed.\(^{68}\) In moving towards a theory of ‘interpretation’ and ‘concepts’, Dworkin not only placed himself clearly within epistemological concerns, but also was very clearly concerned with these issues as a matter of language, in spite of making the point that his ‘creative interpretation’ is not a ‘semantic’ theory – all concepts remain a matter of language. His utilisation of the term ‘constructive interpretation’ seems, however, not only intended to distance, or distinguish it, from other Kantian versions of construction, that utilise language, but also to align it more closely with practical reason itself.\(^{69}\) Importantly, Dworkin likens interpretation of legal principles or values to ‘creative interpretation’, that is, to the type of interpretation we undertake in relation to the arts, for example of plays,

\(^{65}\) Law’s Empire, above n 2, 211-15.
\(^{66}\) O’Neill argues that constructivism avoids making metaphysical claims through the use of ‘abstraction’ rather than ‘idealisation’. See Towards Justice and Virtue, above n 1, 17-37, ch 2.
\(^{67}\) Law’s Empire, above n 2, 52. For O’Neill, see Towards Justice and Virtue, above n 1, 7.
\(^{68}\) Towards Justice and Virtue, above n 1, 52.
\(^{69}\) O’Neill argues that Rawls’s emphasis was always on agreement and the social contract. Constructivism and Contractualism, above n 1.
paintings, novels, etc. He says it is not a form of ‘conversational’, or ‘scientific’ interpretation. This understanding places a strong emphasis on imagination.

1 Starting Point - the Contested Concept

For both Rawls and Dworkin, the relevant principles that form the basis of justice, the materials of construction, depend upon our understanding of what the concepts (or in O’Neill’s case – the virtues) we use to debate them require. O’Neill tells us that the point here is to ‘rely on abstract and minimal starting points’ that ‘prun[e] away assumptions whose truth cannot be ascertained’. Both Dworkin and Rawls accept a similar approach to construction. Their minimal starting point is the ‘contested’, or ‘interpretive concept’, and in Rawls’s case the particular contested concept of ‘justice’. However, contested concepts are those concepts that have no agreed, or analytic definition. They simply do not hold one definition applicable for all uses by all users and cannot be defined in the way a ‘bachelor’ can be said to be ‘an unmarried male’. To try to search for a single agreed definition is, in Dworkin’s terminology, to fall foul of the ‘semantic sting.’ Among other things, all of our concepts of value, whether of morality or personal ethics (‘justice’ or ‘virtue’), will fall within this category.

According to Dworkin, there must be a bare platform about the essential purpose or point of these contested concepts that will, and indeed must, be amenable to broad agreement. So that, for example, all the citizens of a place may agree that ‘respect’ is really about ‘courtesy’. This plateau is all that is required for most communication and Dworkin emphasises that this ‘communication’ is not just about sharing a ‘vocabulary’. It is also about

understand[ing] the world in sufficiently similar ways and hav[ing] interests and convictions sufficiently similar to recognize the sense in each other’s claims, to treat them as claims rather than just noises. That means not just using the same dictionary, but sharing what Wittgenstein called a form of life sufficiently concrete so that the one can recognize sense and purpose in what the other says and does … They must all “speak the same language” in both senses of that phrase … Dworkin’s potential ‘tribunal’ is very broad in this sense.

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70 Law’s Empire, above n 2, 50-53.
71 For O’Neill this is a negative requirement ‘justice demands that action and institutions not be based on certain requirements’, Constructions of Reason, above n 6, 216.
72 Towards Justice and Virtue, above n 1, 39.
74 Law’s Empire, above n 2, 45-46.
75 Ibid 47-49.
76 Ibid 63-64 (emphasis added).
It is only when someone’s understanding is questioned (the ‘hard case’) that the differing *conceptions* each user holds of a particular concept become important (for example, what ‘courtesy’ requires). But unless we begin from a platform of minimum agreement, all of our discussions about ‘respect’ will be ‘disoriented’ in O’Neill’s sense. Debaters will not even be using the same concept and they will be ‘talking past one-another’. But beyond that basic agreement there may be a deep and real disagreement over what ‘courtesy’ in the relevant sense will entail. Differing conceptions, however, lead to disagreement, not disorientation, and disagreement assumes and is the product of the reasoning process.

It is the nature of the disagreement that is the basis of an important distinction between Dworkin and O’Neill. The fact of disagreement leads O’Neill to the conclusion that such concepts are indeterminate while Dworkin does not hold to this conclusion.

Secondly, both Dworkin and O’Neill separate the process of reasoning from the act of judgment. However, Dworkin treats the act of judgment, or the forming of belief or conviction, very differently to O’Neill. For Dworkin the formation of the belief or judgment is the conviction that follows the constructive reasoning process (it may also precede it if the process is reflective) – the choice of the best interpretation of the concept or value that could, or for Dworkin ‘ought’ to be followed. Irrespective of the ‘open-ended’ nature of the debate, a Tribunal (and reasoners) must reach a conclusion. These convictions or beliefs will be the principles that are consistent with, or follow from, the choice of conception. Where an agent’s action differs from their stated position, they will appear to others to be personally inconsistent.\(^77\) Simply continuing the way they do is also a choice.

Perhaps the most important difference between O’Neill and Dworkin, although not necessarily between Rawls and O’Neill,\(^78\) is that O’Neill accepts the indeterminacy of reason in relation to virtues. She offers ‘constructivism’ as lying between realism and relativism.\(^79\) Dworkin does not accept this conclusion. For Dworkin the default position about what, for example, ‘courtesy’ requires is ‘uncertainty’ not ‘indeterminacy’ and this will only occur where a decision or judgment is not required.\(^80\) When a judgment or conviction follows the process of construction, a small part of the structure of knowledge is constructed, as one part of the larger edifice, and it is built as best it

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\(^77\) Ibid.
\(^78\) See Dworkin on Rawls in *Justice for Hedgehogs*, above n 3, 63-66. Dworkin argues that in spite of Rawls appearing, and sometimes claiming, to believe in the indeterminacy of our principles, he believes that Rawls ‘idealism’ allows for an internal realism similar to his own position. See below ch 5.
\(^79\) *Constructions of Reason*, see above n 6, 206.
\(^80\) See below ch 5.
can be. It may need to be taken down later as part of a reconstruction of the whole or a part of the whole edifice of knowledge, but it is, as it stands, part of the foundation for that edifice, such as it is.

2 Dworkin’s Tribunal

Looking more closely at the metaphor of the Tribunal, O’Neill was very critical of Rawls’s ‘tribunal’ in his construction of the Original Position. She had two particular problems with it – one was to do with the scope of its constitutive reasoners that she saw as being too confined and too special, and the second was with the idealisation surrounding those reasoners provided by the veil of ignorance. How does Dworkin’s tribunal stand up to those criticisms?

The task of Kant’s metaphorical ‘tribunal’ was the critique of reason. As we have seen, Kant saw ‘cognition’ and ‘justice’ as requiring the same understanding of reason so that the analogy of a judicial tribunal was very appropriate. Kant’s idea of the ‘fellow workers’, rather than the alternative ‘citizens’ is similarly fitting. What is significant about ‘fellow workers’ is that they have joined in with the building (reasoning) process. Kant’s tribunal is constituted not only by citizens who are capable of reason, but who have chosen to enter upon the process, something not every reasoner is prepared to do, or perhaps capable of doing. O’Neill includes all possible reasoners. Rawls, who limited his project to that of finding principles of justice only, provided further idealistic limitations on his tribunal members. For Dworkin the reasoners of construction are those ‘forms of life’ engaging in the disagreement between conceptions and the subsequent theory making and choice of theory involved in the resolution of the dispute. But all potential agents capable of utilising the same concepts could potentially join the dispute.

To establish the validity of ‘interpretation’, Dworkin’s initial tribunal is based on actual legal tribunals. The models he uses are those of the final courts of appeal of the United States and of England. Dworkin’s real tribunals have real judges who must make real decisions. Both the courts and the judges are ‘exemplars’ for Dworkin’s broader theory about ‘value’. Importantly, judges cannot walk off before completing the task (each case requiring a decision that becomes part of the legal system as a whole) – even if they do not complete the task in reaching a final decision, a dismissal would itself constitute a decision. The consequence is always to make a positive choice. Not to enter into the interpretive process, that is to accept the status quo, is also decision. Dworkin’s reasoners make their choice not because it achieves the utopian goal of the ultimate solution, because real tribunals and judges are always striving for a ‘utopian situation’ so they cannot have arrived at one. They consider what each concludes to be the best alternative, the best
answer in the situation, with the materials or knowledge that they have at the time after sound consideration of all of the available options. This process appears to be far from idealistic, although the possibility of a ‘right conclusion’ might be, it is hardly ‘utopian’.

O’Neill pointed out that Kant observed that actual reasoners do not come into a building process without some background: both natural evolutionary, cultural and historical background will be part of their working materials. Rawls tries to eliminate the problems associated with these restrictions by a process of idealisation of the reasoners in the Original Position as being behind a veil of ignorance. Dworkin does not try to eliminate these problems, instead he absorbs both limitations of reasoners into his building plan, which is adding to an already partially built construction – that is, the whole edifice of human knowledge. Dworkin’s requirement that the best theory ‘fit’ with past decisions, and with the larger set of legal decisions, and be acceptable to reasoners given their understanding of their current situation are clearly intended to accommodate these issues. They are not set aside. They become part of what must be critiqued and justified as part of the practical process – acknowledging that part of the structure they inherit might need to be rebuilt in the process.

By using a real tribunal and real judges as ‘exemplars’, at the level of the starting point, Dworkin does not appear to be indulging in an idealistic enterprise in the same manner as Rawls. The goal or aim of both is idealistic, as was Kant’s. O’Neill stresses that Kant’s ideal was to build the edifice of human knowledge, although he accepted that all we can achieve is a small secure building looking over the plain. Dworkin’s judge ‘Hercules’ represents no more than this ideal. The ideal, as opposed to the real, reasoner would be able to avoid the critical reasoning process and go straight to the overarching theory, but real reasoners have to settle, and do settle, in the reasoning of both science and value, on something less: the best answer at the time, recognising that it might not always be so. The fundamental disagreement of the plan for reasoning, Dworkin’s interpretive concepts, acknowledge Kant’s point that there is no ‘one agreed plan’ for the building, but does not preclude the ideal that one might be achieved. Indeed, the notion is required to enable us to pursue answers at all – for science no less than value.

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81 Constructions of Reason, above n 6, 21-22.
82 Towards Justice and Virtue, above n 1, 61.
O’Neill is highly critical of the use of ‘idealisation’ in the starting points of constructive theories; for example, Rawls’s use of idealisation of the reasoners in the Original Position. Two important points on this issue emerge from O’Neill’s criticism: firstly, in the task of identifying abstractions from concepts, she argues that ‘abstraction’ is acceptable in the ‘starting point’ for the critical reasoning process, although ‘idealisation’ is not; and secondly, she argues that it is not sufficient to provide a theory that will account only for principles of justice, it must at the same time be broad enough to cover the requirements for interpretation of a full comprehensive doctrine.

Taking the second point first, we have seen that Rawls finally accepted the two principles he proposed would emerge from the reasoners in the Original Position from behind the veil of ignorance were political principles only and that he was not concerned to argue that the Original Position could result in the reasoners finding the principles for a comprehensive ethical doctrine. Dworkin, on the other hand, suggests from the outset that his theory of interpretation would be suitable for just such an endeavour, and he sets out to do just this in *Justice for Hedgehogs*. But O’Neill’s criticism provides us with an understanding of Dworkin’s insistence not only that principles of justice be ‘consistent’ between each other, but that they be ‘coherent’ across a reasoner’s whole set of values that comprise their comprehensive doctrine. Indeed, it is this idea of the need for ‘coherence’ across values, as well as ‘consistency’ between various categories (or families) of values that Dworkin is attempting to capture in his idea of ‘law as integrity’ (although in the first instance it is restricted to ‘legal interpretation’). That he attributes this requirement to ‘legal reasoning’ is a testament to the importance he holds for this point.

The first point is more complex. O’Neill defends ‘abstraction’ by distinguishing it from ‘idealisation’. The distinction is important because abstraction, she argues, is both unavoidable and ethically important. All reasoning and language must be more or less abstract. Abstract reasoning does not ‘deny’ predicates that are true of a matter. Abstract reasoning makes claims that do not depend on a ‘predicate holding or not holding’ and does not ‘arbitrarily augment a given starting point’. Idealisation on the other hand can lead to falsehood because an assumption or theory idealises when it ‘ascribes predicates … that are false of the case in hand’ and so denies predicates that are true. To begin a theory of justice, as Rawls did, by assigning reasoners with idealised

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84 *Law’s Empire*, above n 2, 53.
85 See below ch 5.
86 *Towards Justice and Virtue*, above n 1, 40.
87 Ibid 41.
capacities, suggests that such a theory is, from the outset, inapplicable to the actual human case. Such idealisation would itself warrant justification. Perhaps Dworkin also recognised this problem in Rawls’s work, when he suggested that the Original Position could be seen as a half-way point between a higher level of abstraction on the one hand and the principles of justice on the other.\textsuperscript{88}

Even so, O’Neill does not rule out all idealisation in reasoning towards virtues. She agrees that idealisations are both important for formulating practical reasoning and indispensable for the theoretical purposes of assessing whether a hypothesis accurately ‘fits’ the world. But she believes idealisations are more dangerous for practical reasoning whose aim is to ‘fit the world … to its recommendations, rather than its conclusions to the world.’\textsuperscript{89} According to O’Neill, although a lack of justification for starting with ideal conceptions will provide reasons against idealised starting points, it will not provide reasons for starting from mere abstractions and, therefore, no argument for the rejection of abstraction as a tool for reasoning. Moreover, approaches that look to traditions or personal lives, for example, do not avoid abstraction.\textsuperscript{90}

Where, then, does Dworkin’s theory of interpretation as creative construction fall as regards this issue of ‘idealisation’ as opposed to ‘abstraction’ in terms of its basic assumptions? At least initially, Dworkin seems to have taken on board O’Neill’s issue with Rawls here. He has chosen an actual, and paradigmatic group of reasoners, judges or participants in the practice, in a paradigmatic actual tribunal, the court or the forum of the community in general. There is no idealisation in these starting points and where necessary Dworkin gives actual examples of cases to support the abstractions he does make.\textsuperscript{91}

While Dworkin’s ‘community of principle’\textsuperscript{92} and ‘Judge Hercules’\textsuperscript{93} are both clearly idealisations, neither form a part of his ‘starting point’, rather they form a part of his end point. They are part of what he seeks to establish.\textsuperscript{94} They represent the aim of the process of reasoning itself – the edifice of human knowledge, but more specifically of the ultimate comprehensive ethical doctrine about which O’Neill is so concerned. Given her exceptions for ‘formulating practical reasoning’ and ‘assessing theoretical hypotheses’, such idealisations as these should be acceptable to O’Neill.

\textsuperscript{88} Ibid. See also \textit{Taking Rights Seriously}, above n 3, ch 6. Rawls rejected this solution. See \textit{Justice for Hedgehogs}, above n 3, 63-4.
\textsuperscript{89} \textit{Towards Justice and Virtue}, above n 1, 42.
\textsuperscript{90} Ibid 38-44.
\textsuperscript{91} For example see \textit{Riggs v Palmer} 115 NY 506 (1889), 22 N.E. 188 and \textit{Henningsen v Bloomfield Motors Inc} 32 N J 358 (1960), 161 A 2d 69 in \textit{Taking Rights Seriously}, above n 3, 23.
\textsuperscript{92} \textit{Law’s Empire}, above n 2, 211, 213-14.
\textsuperscript{93} Ibid 239-240.
\textsuperscript{94} \textit{Towards Justice and Virtue}, above n 1, 41.
But for Dworkin all values express an ideal in themselves. In this sense, an ‘ideal’ argument is an alternative justification to, for example, a utilitarian one. These ‘ideals’ provide models to aid reasoners in finding or choosing one justification or conception as ‘better’ than another. ‘Ideals’ become part of the constructive process itself, and the reason it is undertaken at all. However, Dworkin is not under the illusion that these ideals do not require justification. Therefore, while the ‘plateau of agreement’ assigned to the original contested concept may be an abstraction, it appears that for Dworkin both the original contested concept, and the conceptions of its agreed plateau will also be, for him, ‘ideals’ chosen from the best construction at the time. O’Neill goes on to ‘abstract’ from ‘justice’ therefore, she would appear to have no problems with Dworkin’s starting-point in this respect.

O’Neill’s aim here is that all reasoning towards virtues needs to remain in the ‘possible’ world, and insofar as Dworkin utilises ordinary language, real starting points, and requires a ‘plateau of agreement’ for the concepts he seeks to justify, he seems also to satisfy O’Neill’s requirements regarding the ‘starting point’ for construction. Dworkin’s treatment of ‘courtesy’ as ‘respect’, and Rawls’ treatment of ‘justice’ as ‘fairness’ would both appear to be abstractions in O’Neill’s terms.

4 The Debate

O’Neill argues that Kant’s metaphor of the ‘debate’ is apt for constructivism not only because it emphasises the practical, and critical nature of the exercise, but also because a ‘debate’ is open-ended. In addition, she introduces Kant’s idea of the ‘discipline’ of reason. O’Neill argues that Kant uses the term ‘discipline’ to refer to a form of ‘negative instruction’ and argues that his point is that if ‘a critique of reason is to be possible, then our thinking too must be disciplined’. It is also important that this ‘discipline’ cannot in any way be imposed by an ‘external’ authority. If this is the case, then reason’s ‘authority’ must be ‘self-discipline’.

O’Neill places considerable significance on this idea that reason requires self-discipline in the form of ‘negative instruction. I will consider two of the issues she raises.

95 Taking Rights Seriously, above n 3, 232.
96 Constructions of Reason, above n 6, 13.
(a) Reason is Reflexive

Firstly, according to O’Neill, reason’s negative instruction requires that it be ‘reflexive’ and that this reflection is never merely ‘instantaneous mirroring’ but ‘iteration’.97

Rawls, in particular, builds this idea of the need for reason to be reflective into his idea of the reasoners continually aiming for a ‘reflective equilibrium’,98 and Dworkin is equally committed to the idea. Dworkin’s utilisation of the model of the court as his tribunal, and the interpretive process of the members of ‘Courtesey’, shows that Dworkin considers reason’s process of continuous reflection on its previous decisions as naturally occurring.99 For Dworkin, this feature of the reflection required by reason, appears to be a part of the reality of human life. As soon as we have made one decision, another action may require us to consider the same issues again, sometimes immediately. This is a recognized homeostatic human process. All humans do make judgments on what to do all the time. Sometimes these are not complex and require only that we follow a previous example and sometimes we may not even have to think consciously about that. On other occasions, the decision needed will required us to think much more carefully – we might think of this as the ‘hard case’. If this is a part of Kant’s concept of ‘negative instruction’, neither Rawls nor Dworkin had a problem with accepting it.

But there is a subtle point of difference here between O’Neill and Dworkin. In claiming that the debate is open-ended in the way O’Neill has, it would be consistent with her understanding of the indeterminacy of virtues that this ‘iteration’ be an on-going one taking place at some level removed from the reality of decision-making – perhaps at some second-order level. Dworkin’s understanding of the ‘debate’ is tempered by his understanding of the role of the ‘tribunal’. We must make a decision, form an opinion, carry out an action, and then, perhaps immediately commence consideration of the issues again for another decision, opinion or action. The principles are determined at the time of the decision, opinion or action, they are not left in any skeptical limbo.100

97 Ibid.
99 Law’s Empire, above n 2, 70-72.
100 See below ch 5.
(b) The Outcome of the Debate

O’Neill was particularly critical of Rawls’s contractarian aim that the reasoners should arrive at principles to which all ‘would’ agree.\textsuperscript{101} Both Dworkin and O’Neill disagreed with Rawls’s ideas that related to social contract theories because neither of them saw moral or ethical principles as capable of ‘agreement’ on a contractual model.

Utilising Kant’s idea that reason can only provide ‘negative instruction’, O’Neill forms an alternative view that reasoners can only aim for principles which all ‘could’ accept rather than ‘would’ accept. O’Neill states that her strategy here is ‘a strategy for avoiding principles of thinking, communicating, and acting that cannot be adopted by all members of a plurality. In referring to the ‘negative instruction’ implied by the Categorical Imperative, she says:

It claims only that agents cannot offer others reasons for using one rather than another principle to guide their action unless they think that the recommended principle is a possibility for those others. Practical reasoning begins by requiring us to reject principles which we cannot view as principles for those for whom the reasoning is to count. This rather stringent conception of universalizability [is] the core of practical reasoning ...

Clearly Dworkin would want to avoid O’Neill’s conclusion regarding the adoption of principles that everyone ‘could’ adopt because this position is consistent with O’Neill’s conclusion that the principles of justice are indeterminate. The very point of the idea of articulating various ‘conceptions’ or understandings of concepts is that many proffered conceptions ‘could’ be accepted by everyone. For Dworkin, however, acceptance by everyone is not a reason why any particular conception might be the right one. In any event, Dworkin held the view that, even if conceptions are articulated that ‘could’ be accepted by everyone in principle, they are not, in fact, accepted by everyone. People do disagree over what ‘justice’ and ‘friendship’ require, but this does not mean that multiple conceptions, even those that ‘could’ be accepted by everyone, are all acceptable. Utilising a scientific, theoretical model as his starting-point, Dworkin proposes a third solution here that is consistent with his views on the determinacy (even though they may require revision after reflection) of guiding principles of action. He argues instead that people choose the principle that they reason to be the ‘best’ one at the time from the possible options available to them.

For Dworkin the metaphor of the ‘debate’ does not override the metaphor of the ‘tribunal’. A tribunal has a need to establish action-guiding principles and to make a choice based on those


\textsuperscript{102} Towards Justice and Virtue, above n 1, 5-6.
principles. Dworkin proposes that a ‘tribunal’ of reasoners would choose the principle of ‘best fit’ and ‘acceptability’ at the time. This method provides Dworkin with the determinacy he needs for his opposition to the ‘no right answer’ thesis that, although O’Neill may not be directly proposing it, is, nevertheless, implied by her solution.103 Judges are not just looking for any possible solutions – they are looking for the ‘right one’, or the ‘best one’, as are all reasoners who engage in Dworkin’s constructive interpretation.

E Justice and/or Virtue

O’Neill puts her most stringent requirement for Kantian constructivism in the following terms:

Much contemporary writing on ethics and politics … depicts a focus on justice not only as distinct from but often as incompatible with serious concern for human virtue and excellence. Some leading advocates of justice now take pride in remaining ‘agnostic about the Good for Man’ and many more are carefully minimal about the good life. Staunch friends of the virtues claim that reliance on abstract principles of justice is inimical to virtue and so to good lives and good communities. Justice and virtue are now often discussed in quite different registers; they are depicted not as allies but as antagonists, whose philosophical champions skirmish over countless issues.104

In this regard, O’Neill discounts the ‘deontological’ position of many contemporary philosophers as deserving of the name ‘Kantian’. Her aim is to distinguish those deontological views that would separate and oppose the ‘justice’ of society (politics) from the ‘virtue’ of lives (ethics). She insists that concern for justice and virtue can not only be consistent, but also mutually supporting. Further, O’Neill insists that a ‘rigorous conception of reasoning about action will allow us to construct substantive accounts of both [justice and virtue] without the need to establish any metaphysics of the person, or of the Good.’105 This point of discussion is the focus of O’Neill’s book, Towards Justice and Virtue: A Constructive Account of Practical Reasoning. In providing a constructive account of virtue she separates, rather than builds in, motivation from justification, and consequentialism that relies on the preferences of communities. O’Neill’s primary target in this work is, therefore, on those philosophers who see ‘justice’ as distinct from, and incompatible with, serious concern for human virtue and excellence.

As I noted above, Rawls may have initially hoped that his construction of the Original Position would be sufficient to establish comprehensive principles, but ultimately he accepts that he is claiming only that his construction would result in principles of justice.106 No one could seem to be more on O’Neill’s firing line than Rawls since she argues that he has settled for a universalised

103 See below ch 5.
104 Towards Justice and Virtue, above n 1, 9.
105 Ibid.
version of justice and detached it from a particularist ethical system. In this brief section, I ask whether Dworkin also, prima facie, fits into this picture of ‘setting justice’ against ‘virtue’, as requiring different standards of reason, rather than the specific question of whether he is rightly or wrongly classified as a ‘particularist’.

O’Neill says that ‘universalists orient ethical reasoning and judgment by appeal to certain universal principles that are to hold for all lives across all situations’. They do this in different ways in terms of form, scope and content. But all are problematic in their appeal to unacceptable metaphysics or ‘extravagant epistemological’ claims. Her major argument is that her version of Kantian constructivism, provides an alternative to unsatisfactory forms of universalism. O’Neill claims that in following Aristotle and Wittgenstein, particularists view ethics quite differently. Instead of advocating for abstract, universal principles, particularists interpret virtue as a matter of judging and responding to particular situations and relationships. In O’Neill’s terms:

[Particularists] hope to orient ethical reasoning without appeal to universal principles of inclusive scope, or more generally without claims about what would be good, or right or obligatory for all human lives, or about ideals that are relevant for all. For the most part they seek to anchor ethical claims by appeal to the actual practices or traditions or patterns of judgment or particular communities or, more radically, without looking beyond the particular sensibilities, attachments or judgements of individuals in particular situations.

Dworkin includes consideration of local norms and practices within his theory of interpretation, via the notions of ‘fit’ and ‘acceptability’, however, his intention is always to avoid the cultural relativism, or conventionalism, that particularism as described here by O’Neill, would arguably entail. Without referring to his search as one of seeking ‘universal’ principles, Dworkin is at the same time committed to just such a search, but within a framework of ‘categorical reasons’. For Dworkin that there are categorical reasons (universal reasons) is a necessary assumption for all moral and ethical reasoning. He makes the point by his interrogative introduction:

Someone who sticks pins into babies for the fun of hearing them scream is morally depraved. Don’t you agree?

However, for Dworkin principles of justice clearly claim an importance that individual virtues (or personal ethics) do not. Principles of justice raise the question about the role of coercion by the state in the enforcement or support of those principles that individuals’ personal values cannot necessarily claim without interference with others’ autonomy. They also raise the question of

107 *Towards Justice and Virtue*, above n 1, 11.
108 Ibid.
110 See below ch 5.
111 Ibid.
112 *Justice for Hedgehogs*, above n 3, 26. See discussion below ch 5.

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collective responsibility for the carrying out of positive distributive obligations as opposed to the notion of individual charity. But does this necessarily imply that because Dworkin begins with a consideration of principles of justice, they need to be at odds with, or that they can be adopted apart from, let alone be seen as being incompatible with, principles of virtue?

O’Neill’s claim is that some contemporary writers see the two sets of principles as ‘incompatible’, and she asks whether they might not be compatible. Clearly, in treating ‘morality’ and ‘ethics’ as separate concepts, Dworkin provides prima facie support to O’Neill’s claim that he, as well as Rawls, has separated the two areas. Dworkin considers principles and categorical reasons within these two areas as involving two areas of interpretive responsibility: one of responsibility to others and one as involving responsibility to self. But from the beginning, Dworkin is always concerned with the coherence of a whole set of values – but also with the personal autonomy needed to determine what those values might be. Dworkin was only too aware that many sectors of a community might wish to impose their personal values on others and utilize the coercive powers of the state to do so. Both Rawls and Dworkin see this as contrary to the needs of (and incompatible with) individual autonomy.

However, Dworkin’s theory contains several important features that I believe allow his theory of interpretation to qualify as Kantian within O’Neill’s terms as she has expressed them here. Firstly, O’Neill sometimes refers to the ‘domain’ of universal or universalisable principles.113 Dworkin’s utilisation of the concept of ‘domain’ is at least as broad.114 There are for Dworkin two important domains for reason (and therefore for determinacy and objectivity): one for science that relies on empirical evidence, and one for value that is constructive and relies on justification by consistency and coherence with other values.115 Morality and ethics, like literature, art and law, all fall within this greater domain of value. While Rawls ultimately accepts that he will not argue for the comprehensive ethical nature of his Original Position, as noted above, Dworkin over time builds up to a comprehensive ethics of personal responsibility by using his theory of interpretation as appropriate to all areas within the domain of value - that is the ‘one big thing’ that the hedgehog

113 For examples, see Towards Justice and Virtue, above n 1, 125.
115 For Dworkin’s reliance on Hume’s principle that we cannot obtain an ‘ought’ from an ‘is’, see below ch 5; Justice for Hedgehogs, above n 3, 44-46.
The one big thing is simply the ‘unity of value’. It is never a matter of universal versus personal virtues with each virtue having its own domain.

There are certain themes that run throughout Dworkin’s work, whether he is concerned with morality (‘justice’) or personal ethics (‘virtue’), although they sometimes seem to be less important than at other times. One of these is the ongoing importance he places on the values of ‘equal concern and respect’. While O’Neill might argue that the virtues of ‘concern and respect’ are insufficient for a virtue theory, this cannot discount Dworkin’s intention that they provide a ‘universalisable’ linkage between morality on the one hand and ethics on the other. Dworkin begins, as we have seen in chapter three, with an emphasis on the guiding principle of justice being one of ‘equal concern’ and respect in Taking Rights Seriously and even in Law’s Empire the concept of ‘respect’ takes a prominent place. But in Justice for Hedgehogs he develops the values of ‘concern and respect’ into a full personal ethics of value.

In Law’s Empire where Dworkin was concerned with moral responsibility to others, he argues for a conception of ‘respect’ that involves ‘courtesy’. In Justice for Hedgehogs he argues for a different conception of ‘respect’ in relation to personal ethics. In the latter case, ‘respect’ requires is that we live with ‘dignity’ and he develops what he refers to as ‘Kant’s principle’. This is the theory that ‘ethical and moral values depend on one another’ but this theory requires a theory of ‘what living well is like and what, if we want to live well, we must do for, and not do to, other people’. Dworkin argues that:

Our moral judgments are interpretations of basic moral concepts, and we test those interpretations by placing them in a larger framework of value to see whether they fit with and are supported by what we take to be the best conceptions of other concepts. … Morality as a whole, and not just political morality, is an interpretive concept.

His larger argument is that our personal responsibilities to others flow from our responsibilities for our own lives. We find the value of living in the ‘meaning of life’. Dworkin relies in this claim on, as he puts it, ‘Immanuel Kant’s thesis that we cannot adequately respect our own humanity unless we respect humanity in others’. He puts this even more strongly when he says:

\[\text{\textsuperscript{116}} \text{Justice for Hedgehogs, above n 3.}\]
\[\text{\textsuperscript{117}} \text{Ibid 1.}\]
\[\text{\textsuperscript{118}} \text{For O’Neill’s criticism of Dworkin in this context, see Towards Justice and Virtue, above n 1, 16 n 9.}\]
\[\text{\textsuperscript{119}} \text{Law’s Empire, above n 2, 70-72.}\]
\[\text{\textsuperscript{120}} \text{Justice for Hedgehogs, above n 3, 1.}\]
\[\text{\textsuperscript{121}} \text{Ibid 12; Constructions of Reason, above n 6, 14.}\]
\[\text{\textsuperscript{122}} \text{Justice for Hedgehogs, above n 3, 13.}\]
\[\text{\textsuperscript{123}} \text{Ibid 14.}\]
The truly moral person ... is moved only by the moral law, only by laws or maxims he could rationally will to apply to everyone equally. No act is morally good that is motivate only by the agent’s interests or inclinations ... There seems no space in this account for the idea that an agent’s moral impulse can flow from his ambition to make something distinguished of his own life, to do a good job of living. Yet we can understand Kant to make exactly that claim: it is on the best understanding, the foundation of his entire moral theory.\textsuperscript{124}

Dworkin is referring here to Kant’s understanding of human autonomy. In what appears to be a sound rejection of O’Neill’s ‘negative instruction’ theory, Dworkin argues that through Kant’s idea of ‘freedom’ involving ‘dignity’, Kant’s morality of ‘abnegation’ becomes a morality of ‘self-affirmation’.\textsuperscript{125} Dworkin acknowledges that he is in some ways trying to ‘rescue’ Kant’s theory from its metaphysical problems and he restates Kant’s moral standpoint as ‘Kant’s principle’:

A person can achieve the dignity and self-respect that are indispensable to a successful life only if he shows respect for humanity itself in all its forms.\textsuperscript{126} This principle forms the basis of Dworkin’s unification and interdependence of ethics and morality. ‘Dignity’, which forms the very basis of Kant’s principle, in the sense used in personal ethics requires us to live with self-respect and authenticity. Self-respect requires living a life that has ‘product’ value rather than ‘subjective’ value, that is, one that places an emphasis on actions taken rather than achievements. Authenticity requires responsibility, ethical independence and objectivity.\textsuperscript{127}

While O’Neill correctly points out the difference produced by the division of ethical values in the broad sense between morality and personal ethics, Dworkin is always concerned with ‘reason’s’ objective in the domain of value as a whole, as one of unification and interdependence. O’Neill and Dworkin do have a different interpretation of the implications of Kant’s categorical imperative, and O’Neill’s interpretation may, no doubt, be more faithful to Kant. It is not my purpose to argue this point. My point is simply to claim that there is a reasonable interpretation of Dworkin’s theory on which it can be regarded as ‘Kantian’ and Dworkin’s understanding of the unity of value appears to be entirely consistent with O’Neill’s requirements.

F Conclusion

Dworkin distances himself from other versions of ‘Kantian constructivism’ by referring to his own theory as ‘interpretative’.\textsuperscript{128} His ‘interpretative theory’ depends in turn, as we shall see in the next chapter, on Hume’s principle that one cannot derive an ‘ought’ from an ‘is’. In that sense Dworkin

\textsuperscript{124} Ibid 19.
\textsuperscript{125} Ibid 19.
\textsuperscript{126} Ibid 19.
\textsuperscript{127} Ibid, ch 9.
\textsuperscript{128} See, eg, Law’s Empire, above n 2, 52-56.
is concerned through his theory of interpretation to provide a methodology for justifying, or vindicating to use O’Neill’s term, all value and opposed to scientific facts. Dworkin’s theory is as much about appropriate evidence and how we argue to the best theory based on the importance of making judgments and convictions that put an end to skeptical philosophical theorizing at the point of choice of action. This is to be so regardless of the fact that these conclusions, no less than scientific conclusions, might require review and revision from time to time.

I have argued that Dworkin’s theory of interpretation seems to satisfy many of the important aspects O’Neill requires of a Kantian constructivism. However, Dworkin’s version of constructivism differs sufficiently to O’Neill’s, particularly in relation to his conclusion that there are determinate value facts and that reason is essentially about concepts that are as much about language as they are about principles. Undoubtedly, Dworkin’s own utilisation of the constructive methodology he promotes is that moral and ethical theories are avowedly deontological in some sense, and therefore, Kantian. It appears to be equally certain that he was genuinely affected by Rawls’s own version of Kantian theory. However, I believe that Dworkin’s utilisation of the differentiation between ‘morality’ and ‘ethics’ does not justify his inclusion in O’Neill’s list of contemporary philosophers who want to see ‘justice’ and ‘virtue’ as proceeding in tandem and as being at odds with one another. Rather it might suggest a problem with O’Neill’s categorization of ‘universalism’ and ‘particularism’.

I have tried to show here that even on O’Neill’s understanding of ‘constructivism’, Dworkin satisfies many, if not all of her requirements, although he does not share her best negative interpretation of Kant’s categorical imperative. Certainly, she rejects the emphasis given by Dworkin (in his early work) to rights, to respect and to language, but that alone seems not to signify that Dworkin is not taking either a ‘constructive’ approach, nor that he is not endeavouring to adopt a Kantian moral deontological approach. What is ‘Kantian’ about Dworkin’s interpretivism is that it allows for the overriding importance of human autonomy for the unification and interdependency of moral and ethical principles under the goal of the unity, or integrity, of the domain of value – a domain that Dworkin understands as being critical to Kantian theory.

Being intended as a methodology for arguing toward the best interpretation of all of value areas: law, literature, art and morality, Dworkin’s theory of interpretation is broader than O’Neill’s emphasis on virtues. Dworkin’s emphasis on ‘dignity’ of the person, resonating with existentialist ideals such as ‘authenticity’, sits uncomfortably with O’Neill’s search for indeterminate personal
virtues that comprise the good life, but they sit quite comfortably within Dworkin’s ideal of an objective, integrated set of moral and ethical principles.

What is also essentially Kantian about Dworkin’s theory of interpretation is that it is essentially critical, at the same time as being constructive, which is a significant requirement for O’Neill’s concept of Kantian constructivism. Dworkin’s interpretive methodology of providing a value for a contested concept on which to build a theoretical understanding (conception) of that value, also provides the points of critical analyses. Each construction will provide multiple points to defend in any comprehensive moral theory.

One of the most significant points of difference between O’Neill and Dworkin is that Dworkin accepts that there are objective facts about value and this claim is the subject of the following chapter.
CHAPTER FIVE

V TRUTH

A Introduction

Dworkin began in the 1970s by asking what it was that made propositions of law true. In his early work in *Taking Rights Seriously*, his answer to this question was that moral principles, at least in hard cases, contributed to the truth of propositions of law. I have claimed in chapter four, that Dworkin established his theory as part of the philosophical era of the ‘interpretive turn’ and developed an epistemological coherence theory of meaning based around the idea of values as contested concepts and interpretation.

In this chapter, I return to Dworkin’s theory of truth. I will consider whether it follows from the ‘interpretive turn’ of his work in *Law’s Empire* that he changed his mind about his theory of truth as depending on ‘truth-conditions’ for propositions. If Dworkin’s theory is that there are truth conditions for propositions of law or morality, then it would seem, on the face of it, that Dworkin would need to have some theory of truth. In this chapter I ask whether Dworkin offers a ‘theory’ of truth at all beyond his theory of constructive interpretation that appears to be a theory of meaning. To do this I will examine briefly his ‘ordinary person’s view’ and his response to the ‘skeptics’.¹

As it was originally set out in ‘Objectivity and Truth: You’d Better Believe It!’ (‘Objectivity and Truth’), Dworkin’s theory of truth, such as it is, attracted the philosophical label of ‘quietism’, a label he disliked as sounding like ‘some dirty secret kept dark’² ‘because it suggests that some more “robust” sense of objectivity makes sense but is wrong’.³ As he pointed out at the time, he had, by then, been ‘arguing for the main theses of [his] article for twenty-five years …’.⁴ Over that time, he

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¹ A ‘skeptic’ in broad terms is one who rejects different aspects of the ordinary view. See Ronald Dworkin, *Justice for Hedgehogs*, (Harvard University Press, 2011) 29 (‘Justice for Hedgehogs’).
³ *Justice for Hedgehogs*, above n 1, 25, 67.
⁴ Ibid 67.
firmly maintained the view that the skeptical argument that there is ‘no right answer’ to
propositions about moral values is wrong and that it is in any event itself a moral argument. It
seems to follow from such an approach that such a view would require a positive theory of truth,
what ‘truth’ is, rather than simply an epistemological argument against the skeptics. If that is the
case, we are likely to be disappointed, as he suggests.6

Apart from his arguments against the ‘no right answer thesis’, his article ‘Objectivity and Truth’7
represented the only comprehensive outline of his view of ‘truth’ and he referred back to this article
as the need arose until he published Justice for Hedgehogs in 2011.8 That article is primarily
concerned to argue against various skeptical philosophical views about truth in value. In Justice for
Hedgehogs, among other things, he brought those same views together in an updated and more
comprehensive form, but with no major alterations to his arguments or philosophical position.
However, he does elaborate his constructive interpretation of moral truth.

B Truth

Dworkin’s original question related to the truth of propositions of law: what makes propositions of
law true? Put differently what are the truth conditions relevant to propositions of law? In Justice
for Hedgehogs, Dworkin asks a similar question about moral truths in general, of which he sees
‘legal truths’ as forming a part.9 Dworkin is right in thinking that we might find something deeply
unsatisfying about his theory of truth – if, indeed, it is one. I am inclined to think, at least as such
theories are commonly understood, that it is not. At best, Dworkin says:

What makes a moral judgment true? When are we justified in thinking a moral judgment true? My answer to
the first is that moral judgments are made true, when they are true, by an adequate moral argument for their
truth. Of course, that invites the further question: What makes a moral argument adequate? The answer must
be: a further moral argument for its adequacy. And so forth. … We can say nothing more helpful than what I
just said: a moral judgment is made true by an adequate case for its truth.10

Dworkin has consistently acknowledged the controversial nature of moral judgments and for that
reason he denies that there is no ‘right’ or ‘true’ answer (and it is significant that Dworkin
understands these to mean the same thing in the context of values). His argument is not that there is
only one answer, but rather that in the face of more than one answer, that one of them is preferable

6 Justice for Hedgehogs, above n 1, 37-9. There is a sense in which ‘quietism’ refers to the rejection of all
philosophy, including epistemological argument. For an interesting discussion of ‘quietism’ in the context of
Richard Rorty and Donald Davidson, see Hanne Andrea Kraugerud, and Bjorn Torgrim Ramberg, ‘The New
7 ‘Objectivity and Truth’, above n 2.
8 Justice for Hedgehogs, above n 1.
9 The connection between morality and politics is Kant’s. See above 52.
10 Justice for Hedgehogs, above n 1, 37. I think this is also evidence of Dworkin’s lack of concern to eliminate
the infinite regression, or the circularity. Note also that Dworkin refers to ‘judgments’ not to ‘facts’.

115
to the others. On this basis, his theory looks skeptical on the face of it. If there can be more than one possible answer, how does he then claim that there are objective moral truths, or reject the claim that there is ‘no right answer’ to moral problems?

His answer, as it is provided in both ‘Objectivity and Truth’ and Justice for Hedgehogs, appears in two parts: the first part argues for the ‘plain fact view’ or ‘ordinary person’s view’ of moral truth and explains what that entails; the second part dismisses various skeptical arguments about the possibility of there being objective moral truth. Dworkin begins with two basic assertions: firstly, that we do make value judgments that we think are true independently of our thinking them to be true, that faced with contrary views we often continue to hold those views as better than the others, and that all of these judgments are an inescapable part of human life. He then provides various arguments using a form of argument that is fundamentally based on a null hypothesis: that there are no arguments to rebut what we intuitively believe about moral judgments, or that successfully show that there are no moral truths.

C Kant’s Influence
I think it is helpful to revisit Kant’s theories briefly at this point. Kant asked us to draw a distinction between ‘things-in-themselves’ on which we could not comment and ‘appearances’ on which we could: that is, he asked us to understand that when we are commenting on the world, we are limited by our ‘experience’ in its broad sense. What Wittgenstein adds to this is that the language we use to express that experience, although it limits us, also guides us in expressing that experience. What both conclude is that philosophical speculation about ‘things’ that cannot be ‘shown’ is not helpful for solving human problems. This view obviously provides a problem for values that cannot be experienced by pointing to something in the external world at all. On the other hand, nor are values to be understood in that way. Kant recognized that our experience of values takes place in the practical decisions that we are required to make about what to do and that reason is equipped to cope with these situations. Although it was not his focus, Wittgenstein recognized that we are taught, inter alia, through language to express what it is we ‘ought to do’, as well as how to do it.

Kant said that there were some things we had to accept ‘a priori’ as being true. Significantly, he used mathematics as an example of ‘a priori’ synthetic, as opposed to analytic truths. Hume accepted that there are certain aspects to human language and activity that cannot be empirically proven but are, nevertheless, essential to all knowledge, and he offered a powerful methodology for
determining what can be shown in all probability to be true and what logically may follow from such proofs.\textsuperscript{11}

Arguing against speculative philosophy, Kant thought in relation to ‘noumena’ as opposed to ‘phenomena’, that we cannot make ‘positive’ conclusions, that is, offer positive ‘hypotheses’ because these are beyond our experience and we run into the problem of ‘antinomies’. The best we can do is offer ‘negative arguments’ – that is, say what they are not. Kant’s point here seemed obscure to me, until I compared it with Dworkin’s arguments about the truth of moral judgments, and also, with the later writing of Wittgenstein in relation to the existence of things.\textsuperscript{12} We can say a lot about what things are not. I believe that both Dworkin and Wittgenstein take Kant’s suggestion that we can only talk ‘negatively’ about ‘noumena’, very much to heart. What Dworkin offers about values is not a ‘positive’ hypothesis or conclusion at all. Both accept the logic that follows from there being a priori synthetic truths, but both accept the limitations outlined by Kant of proving their existence.

Wittgenstein refers to the problems of logic being used to justify existence as follows:

> The more closely we examine actual language, the greater becomes the conflict between it and our requirement. (For the crystalline purity of logic was, of course, not something I had discovered: it was a requirement.) The conflict becomes intolerable; the requirement (\textit{i.e.} the purity of logic)\textsuperscript{13} is now in danger of becoming vacuous. – We have got on to the slippery ice where there is no friction, and so, in a certain sense the conditions are ideal; but also, just because of that, we are unable to walk. We want to walk: so we need \textit{friction}. Back to the rough ground.\textsuperscript{14}

What Wittgenstein seems to be saying is that the further away we get from the practical use of language, the harder it is for logic to keep pace with itself.\textsuperscript{15} However, if we stay on the ‘rough ground’ of everyday language and everyday life and its problems, logic must be perfectly clear. Wittgenstein then suggests that ‘we turn our inquiry around’:

\begin{footnotesize}
\begin{enumerate}
\item See above 26
\item Ludwig Wittgenstein, \textit{On Certainty}, (Denis Paul and GEM Anscombe trans, Harper & Row, 1972) [trans of: \textit{Über Gewissheit} (first published 1969) (‘On Certainty’)]. There is something very Socratic about this form of argument: I will tell you why you are wrong. Now, next argument! It is only when the arguments are exhausted that I offer you my own. But double negatives are difficult to manage – for example, Dworkin’s claim is that there is no ‘no right answer’ thesis. The parentheses are mine.
\item John McDowell is also struck by this passage. He seems to associate the concept of ‘friction’ here as being with the need to be ‘content’ with our thoughts. See his use of it, John McDowell, \textit{Mind and World}, (Harvard University Press, 1996) 6.
\end{enumerate}
\end{footnotesize}
The sense in which philosophy of logic speaks of sentences and words is no different from that in which we speak of them in ordinary life when we say, for example, “What is written here is a Chinese sentence”, or “No, that only looks like writing; it’s actually just ornamental”, and so on.\footnote{Philosophical Investigations, above n 14, 51 [108].}

What we see here is an ordinary language example of the proposition and its negation. What both Dworkin and Wittgenstein seem to be saying is that there is nothing ornamental or difficult about our ordinary sentences or the propositions, or assertions, that they contain (when they do). Nor do either of them draw any particular distinction between these two types of statement – however, only ordinary language is used to express the propositions we are interested in making.

\section*{D The Ordinary Person’s View of Truth}

Dworkin began in Taking Rights Seriously by referring to ‘propositions’ and he still uses that term in 2011 in Justice for Hedgehogs. However, he there combines propositions with examples and references to ordinary assertions, judgments, convictions and beliefs. We never find him putting propositions in quotation marks or exclaiming what ‘p’ might or might not be. What is important to Dworkin is to separate the act of making an assertion, or declaring a proposition, or stating something as a fact. All are equally relevant and important and amount to the same thing.

It is clearly relevant to ask whether Dworkin is expressing some form of ‘deflationary’ theory of truth. The answer here might be uncertain. As with ‘quietism’, Dworkin is dismissive of ‘deflationary’ theories of truth. Pointing us to the entry in the Stanford Encyclopedia, he says:

\begin{quote}
If we look at [mundane uses of the concept of truth] we might be tempted by what has been called the “deflationary” theory of truth. This holds, roughly, that to claim that a proposition is true is just to repeat the proposition.\footnote{Justice for Hedgehogs, n 1, 173, n 15. Dworkin refers to Daniel Stoljar and Nic Damnjanovic, ‘The Deflationary Theory of Truth’ in Edward N Zalta (ed) The Stanford Encyclopedia of Philosophy (Fall 2013 ed) URL = http://plato.stanford.edu/archives/fall2013/entries/truth-deflationary/.
}
\end{quote}

In that article, Stoljar and Damnjanovic suggest that deflationary theories of truth have two potential characteristics: firstly, that deflationary theorists make no claim that ‘truth’ has any nature, beyond what is captured in claims ‘such as that ‘snow is white’ is true just in case snow is white’;\footnote{Stoljar and Damnjanovic, above n 17, 1.} and secondly, a further claim that the deflationary theory is often presented with the help of a schema, sometimes referred to as the ‘equivalence’ schema.\footnote{Ibid 2. For a complex recounting of two different forms of ‘deflationism’, see John Collins, ‘Truth or Meaning? A Question of Priority?’ (2202) 65(3) Philosophy and Phenomenological Research 497-536, 498-508.} While the authors acknowledge that there are some deflationists who do not employ a schema for their theories, they discuss these philosophers in terms of expressivists and set them aside. However, Dworkin is very clear in his

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rejection of ‘expressivism’, yet he cannot be said to rely on any ‘equivalence’ or any other kind of truth ‘schema’, at least for concepts that are not criterial or natural-kind concepts. After providing a critique of the problems of various types of schema and their difficulties, Stoljar and Damnjanovic interestingly conclude that ‘there is nothing in the schema that either implies deflationism or excludes it’, it might equally be applied to traditional substantive theories of truth and that ‘the defining negative thesis of deflationism is expressed in complete independence from the schema’. If this is the case, Dworkin might well present as a ‘deflationist’.

Even so, Stoljar and Damnjanovic note the many possible versions of deflationist theories, including minimalism, and there seems little doubt that Dworkin accepts the deflationists’ position that they are not committed to the predicate ‘is true’ expressing any substantive property that all sentences or propositions have in common. What Dworkin is reluctant to do is to put his theory in terms of philosophical ‘deflationism’ because this discussion removes itself from human practice and places it into philosophical jargon from which only antinomies can result – two cases neither of which can be shown to be better than the other, and that do not address the concrete problems at hand. In this way, discussion of deflationism seeks to remove the argument from being a first-order practical one, to an external first-order one. Dworkin’s claim is that any such attempt is unsuccessful. A deflationist’s understanding of ‘truth’ will still affect their answer to the question of what is true.

However, Dworkin’s notion of ‘objectivity in truth’ is still not a claim that ‘truth’ has any property. His puts his argument for the ‘ordinary view’ thus:

Someone who sticks pins into babies for the fun of hearing them scream is morally depraved. Don’t you agree? … You think that your opinions on [what is morally wrong] report the truth and that those who disagree with you are making a mistake, though you might perhaps find it more natural to say that your convictions are right or correct rather than true. … You might say, to make it plain that that is what you think, that torturing babies for fun is “really” or “objectively” wicked. This attitude to moral truth – that at least some moral opinions are objectively true in this way is very common. I shall call it the “ordinary” view.

He goes on to say that this ordinary view ‘is committed to taking moral judgment at face value’.

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20 Justice for Hedgehogs, above n 1, 56, 62.
21 Ibid 57.
22 Andrew Mills, ‘Deflationism and the Disquotational Schema: Letting the Air out of Wrights’s Argument against Minimal Truth’ (2000) XXIX (1) Philosophical Papers 43-59, 43. Mills also argues that a truth schema is neutral as to substantive truth theories or deflationist theories.
23 Justice for Hedgehogs, above n 1, 27.
24 Ibid 28.
Certainly, although Dworkin uses the term ‘proposition’, he does not suppose that, in order to claim to be a ‘true’ proposition or judgment, that it needs to be prefixed with the words ‘I think’, nor appended with the words ‘is true’. But nor does he make an issue of this difference in terms of a schema. A judgment or assertion has a special characteristic of its own that makes it a statement of the ‘truth’ from the perspective of the one who makes it. With moral judgments we remain concerned with the substantive part of the assertion: whether Sam’s scalp is bald, what is water’s behaviour and whether torture is bad. It adds nothing to the last assertion to say that it will be true if and only if moral assertions are true.

Dworkin accepts that a truth schema and a deflationary theory of truth might be applicable for criterial or natural-kind concepts, but it cannot apply to the concept of ‘truth’ because the concept of ‘truth’ is the subject of a philosophical controversy as to whether moral claims can be true – that is, it is the subject of a genuine and not an illusory dispute. In other words, for a deflationary theory of truth, we still need an understanding of what ‘truth’ is. In the ordinary view, there is no worry about what truth is. Dworkin says that it is of no help in determining the truth of a moral claim to say that ‘the sentence “Moral judgments can be true” is true if and only if moral judgments can be true.’ The issue here is that philosophers disagree about whether moral judgments can be true, because they disagree about what truth ‘is’.

Wittgenstein says:

Let’s examine the sentence “This is how things are”. – How can I say that this is the general form of propositions? -- It is first and foremost itself a sentence, an English sentence, for it has a subject and a predicate. But how is this sentence applied – that is, in our everyday language? For I got it from there and nowhere else. … still it gets used as a propositional variable. To say that it agrees (or does not agree) with reality would be obvious nonsense, and so it illustrates the fact that one feature of our concept of a proposition is sounding like one.

What Dworkin proposes is to rescue the concept of ‘truth’ from this philosophical dilemma by recognizing the concept of ‘truth’ as an interpretive concept. Under this proposal, the various

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25 It needs to be clearly understood that Dworkin neither refers to his work as ‘disquotational’ nor as ‘deflationary’. Both of these amount to philosophical jargon attempting at a second order perspective from which he recoils.
26 Justice for Hedgehogs, above n 1, 27-8.
27 Ibid 173. For Dworkin’s distinction between various kinds of concepts, see Ronald Dworkin, Justice in Robes (Harvard University Press, 2006) (‘Justice in Robes’) 9-12.
28 Justice for Hedgehogs, above n 1, 173.
29 Philosophical Investigations, above n 14, 57 [134] (Underline added).
30 Justice for Hedgehogs, above n 1, 173.
theories of truth proposed by philosophers can be understood as ‘interpretive claims’.

Dworkin’s claim is that there are a variety of practices in which ‘the pursuit and achievement of truth are treated as values’. These values will include accuracy, responsibility, sincerity and authenticity, as well as being interconnected with other concepts such as reality, belief, investigation, inquiry, assertion, argument, cognition, proposition, statement, and sentence. Dworkin refers to all of these concepts as a ‘family of truth concepts’, and as such need to be interpreted together, each making sense of the others, as well as with the standard conceptions of truth and truthfulness.

On this interpretive basis, other theories of truth are judged according to how well they interpret this network of values. Dworkin then argues that a correspondence theory of truth that treats truth conditions as correspondence with reality might be sufficient to apply to propositions about science, but the point he makes with such a proposed correspondence theory of truth is to ask whether it exhausts the possibilities of truth theories for other domains. Dworkin argues that to accept that the correspondence theory (as he has described it) states on its own the truth conditions for all domains would result in moral judgments being classified as not ‘truth-apt’, as it would for any other judgments in domains in which the chosen theory has no application.

Instead, in what appears to be his explanation of his theory, he proposes an alternative process:

Or we might … try to formulate some very abstract concept of truth, and of the associated ideas of reality, objectivity, responsibility, sincerity and the rest, that would allow us to construct different less abstract theories as candidates for explaining truth in the different domains in which claims of truth play a role.

On this basis, the proponent of a theory of truth who claims his theory as the best candidate for one domain, say science, need not claim it as the best for another, for example, for morality.

In what is a standard step in Dworkin’s constructive process, he then seeks to find a very abstract formulation of ‘truth’ that is independent of any intellectual domain that explains why the different standards that apply to different domains are still all standards for pursuing truth. Such an abstract

31 Ibid.
32 Ibid.
33 Ibid 174.
34 Ibid.
35 Ibid 174-5. He does this without making any claim that the correspondence theory of truth does this: at 174 n 17.
36 Brian Leiter notes, somewhat skeptically, the use by various philosophers, including Dworkin of the concept of ‘domain-specificity’ in connection with conceptions objectivity especially in ethics. See Brian Leiter, ‘Introduction’ in Brian Leiter (ed) Objectivity in Law and Morals (Cambridge University Press, 2001) 2. For another example of its use in this context, see David O Brink, ‘Legal Interpretation and Morality’ in Brian Leiter (ed) Objectivity in Law and Morals (Cambridge University Press, 2001) 12-65.
37 Justice for Hedgehogs, above n 1, 175.
38 Ibid 176.
theory would have to ‘fit and justify’ our truth seeking practices across all domains. What is critical about interpretive concepts, including ‘good’, ‘right’ and ‘duty’, is that we cannot find shared criteria for them, or one definition on which we might all agree. Dworkin, then, takes as this ‘supremely’ abstract theory, the idea that ‘truth’ and ‘inquiry’ are interwoven concepts, and proposes that we can ‘usefully characterize ‘truth’ as ‘the intrinsic goal of inquiry’. The constructive process then requires more concrete specifications of truth for different domains by finding ‘concrete accounts of success tailored to each domain.’

Dworkin utilises here, the concept of ‘thin’ and ‘thick’ moral concepts. The more abstract a moral, or interpretive, concept the more ‘thin’ it is and the more easily it can apply to all of our practices, such as the concept of ‘right’ or ‘good’. Other concepts, such as ‘friendship’ are ‘thick’ in that they apply to a much more restricted range of identifiable practices. ‘Thick’ concepts, including ‘brave’, ‘generous’ and ‘cruel’ can only be applied to a certain kind of act that is limited as being a candidate for that kind of commendation or condemnation.

Dworkin notes the difficulties that this distinction has provided and in particular rejects attempts to see ‘thick’ concepts, such as ‘cowardice’, as a hybrid form of criterial concept. Dworkin rejects the idea that we all agree about what conduct is factually described by ‘cowardice’, and only disagree about the extent of disapproval of the type of conduct. Dworkin rejects ideas that this type of conduct can be dissected into two parts: one containing some descriptive content and the other a negative emotional charge. He also rejects ideas that suggest that ‘thick’ moral concepts are sufficiently embedded in common practices to allow members of a community to have knowledge of them as opposed to ‘thin’ moral concepts that are too vague. For Dworkin both kinds of concepts are interrelated and interdependent in their functions and neither can be seen as more fundamental and the distinction is only one of degree. Importantly, Dworkin argues that we use ‘thick’ concepts to argue the case that ‘thin’ abstract concepts presuppose but do not supply.

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39 Ibid 177.
40 Ibid.
41 Ibid. Dworkin attributes this idea to Bernard Williams. Stoljar and Damnjanovic discuss ‘thick’ and ‘thin’ concepts in relation to Shapiro’s criticism of ‘thin’ concepts as insubstantial. ‘The Deflationary Theory of Truth’, above n 17, 22. Dworkin’s response would be that ‘thin’ in this context does not imply ‘insubstantial’ in the way suggested by Shapiro.
42 Justice for Hedgehogs, above n 1, 181.
44 Ibid.
45 Ibid.
46 Ibid.
What ‘thick’ and ‘thin’ concepts do is provide the idiom for more concrete or more abstract judgments respectively.\textsuperscript{47}

What is important here for Dworkin is that it is not a problem for the thin interpretive concepts that they require a focus in the first instance on thicker moral concepts by way of argument – we are simply using thicker concepts to provide ‘grounds’ for thinner ones.\textsuperscript{48}

1 \textit{Dworkin’s Tactics}

Interpretive concepts present an important and complex point of Dworkin’s understanding of ‘truth’. He appears to be presenting no more than a theory of meaning. \textsuperscript{49} It is as if he is saying ‘reasons’ are what makes my value judgments true, or one better than another. But the reasons required to satisfy the case for an interpretive moral, or legal, judgment include other moral arguments. At the same time, he is claiming that for any particular subject or person, value judgments, or any other judgments, might be true irrespective of our reasons, that is, just because ‘we see that they are true’, as for example in the case of ‘torturing babies for fun’. His point here is that although we might just react in the manner of just ‘seeing’ that torturing babies for fun is wrong, we do not think that it is our ‘seeing’ it is so that is what makes it wrong. \textsuperscript{50} We may not, at least on the moment without reflection, be able to offer detailed reasons. We may, nevertheless, believe it. We may or may not change our view after a comprehensive argument from ourselves or someone else to the effect that we are wrong in this view.

There is, however, a way of viewing this form of argument as indicating a duality between our thoughts and the external world that perhaps Dworkin does not really resolve so much as accept within his semantic notion of relevant ‘domains’. But to resolve this as a metaphysical issue, would require that he offer a more precise ‘theory’ of truth or mind, or cognition, than he has already done through his theory of meaning, and he sees no value in offering such arguments because they can only be discussed in the negative. He cannot prove his claims are true if you do not accept his position and you can only address his arguments in the negative – that is, tell him why you think he is wrong. By moving away from the practical problems, we only become involved in more philosophical speculation.

\begin{itemize}
\item \textsuperscript{47} Ibid 183.
\item \textsuperscript{48} Ibid 184.
\item \textsuperscript{49} See Stoljar and Damnjanovic, above n 17, 3. They suggest that this is one of the attractions of ‘Deflationism’ in that viewing ‘truth’ as a semantic concept avoids ‘a profound scepticism of metaphysics’.
\item \textsuperscript{50} \textit{Justice for Hedgehogs}, above n 1, 27.
\end{itemize}
The most important point, then, is to engage others in the practice by way of showing that moral practice, like any other human activity, cannot be avoided. Dworkin does this with his simple statement about torturing babies for fun and he suggests that you will agree with him that he is wrong.51

Someone who sticks pins into babies for the fun of hearing them scream is morally depraved. Don’t you agree?52

And later:

We can’t really believe that there is nothing morally objectionable about suicide bombers or genocide or racial discrimination or forced clitoridectomy.53

Thin and thick concepts help Dworkin to explain why there is no way of moving out of morality to survey it through philosophical theories of truth. Theories like ‘deflationism’, and internal skeptical theories, just remain moral theories.

It seems fair to say that Dworkin does not give us a ‘theory’ of truth as it is conceived by substantive theories of truth at all and there seems, therefore, to be little point in trying to find Dworkin’s theory among other realist theories of truth. At the same time, there is no doubt that Dworkin considers himself to be a ‘realist’ about truth, and particularly about moral truths. He has argued against the theory that there is no right answer to moral or legal questions since he first published his argument against the ‘No Right Answer’;54

The only sensible argument for the “realist” view that some moral claims are objectively true is therefore a substantive moral argument that some particular claim – that tax cheating is wrong, say – is true and would still be true even in no one ever disapproved of cheating on taxes. If we think that our reasons for accepting any such moral claim are good ones, then we must also thing that we are “in touch with” the truth of the matter and that its truth is no accident.55

In what seems to be very reminiscent of Hume, Dworkin seems to start from the perspective that ‘moral truths’ are just what is ‘given’. It is something we do that we make moral assumptions, and form moral judgments, and that disagreement about some of those judgments invites censure. He seems to avoid the whole ontological question as to whether ‘truth’ is something that exists – just as

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51 This idea about the marshaling of ‘supporters’, as well as opponents, in this way may also be attributable to Kant. See Onora O’Neill, Constructions of Reason: Explorations of Kant’s Practical Philosophy, (Cambridge University Press: 1989, reprinted 1995) 7, 10.
52 Justice for Hedgehogs, above n 1, 26.
53 Ibid 36.
55 Justice for Hedgehogs, above n 1, 99.
Wittgenstein says the question is ‘nonsense’,\(^{56}\) and Kant suggests that that this is something we can only comment about in a negative way. If that is the case, then the issue becomes not whether there are moral truths, but rather what constitutes a moral truth, or what evidence can we provide for any particular claim, and that will be a matter of controversy. The issue becomes one of content, not existence. The question becomes an epistemological matter and not a metaphysical, or an ontological one. We are asking rather how we know some assertion is true, rather than what ‘truth’ itself is. Realist, idealist and skeptical philosophical positions exist in regard to both of these issues. Epistemology is no less concerned with what constitutes ‘justified, true, beliefs’. Is Dworkin suggesting that all we require, at least in relation to moral truths, are simply ‘justified beliefs’?

Haldane describes ‘ontological realism’ as the thesis that ‘there is a world, independent of thought and language’, and ‘epistemological realism’ as the view that ‘in thought we may have knowledge of this mind-independent reality and that in utterance we speak truly of it.’\(^{57}\) It seems to me that it is clear that Dworkin accepts both of these definitions although he does not argue for the first. It might be argued that he is just taking moral truths as ‘given’ because epistemological realism in some sense presupposes ontological realism.\(^{58}\) It is this aspect of Dworkin’s work, this avoidance of the ontological issue that appears to bring upon him the title of a ‘quietist’.\(^{59}\) However, Dworkin is not so much avoiding the topic (he would admit its relevance to criterial or natural-kind concepts) as claiming that there is no metaphysical, or ontological position to take on value claims that can be demonstrated in the manner of natural-kinds, or agreed to in the manner of criterial concepts. These claims simply do not carry the same content as scientific claims. There are, after all, no ‘things’ out there that represent ‘truths’ – no ‘morons’ floating in space. These are purely concepts of one kind or another. He says:

I must summarize what might seem philosophically the most radical view I defend: the metaphysical independence of value. It is a familiar, perfectly ordinary idea that some acts – torturing babies for fun – are

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58 Ibid.
59 Quietism is often associated with Wittgenstein and theory of meaning, as a way of avoiding reduction. See for example, Claudine Verheggen, ‘The Meaningfulness of Meaning Questions’, (2000) 123 *Synthese*, 195-216. Verheggen is responding to John McDowell, ‘Wittgenstein on Following a Rule’, (1984) 58 *Synthese*, 325-363. See also David M Finklestein, *Wittgensteinian Quietism* (PhD Dissertation, University of Pittsburg, 2000). I agree with Finklestein, that Dworkin does not seem, at least on the face of it, to be a Wittgensteinian quietiest, although perhaps for different reasons, one of which is that Dworkin is just as committed as Wittgenstein to the idea of philosophy as therapy. In which case, the Wittgensteinian or Dworkinian philosopher would avoid ‘meaningless’ philosophical ‘isms’ that do no more than invite further controversy and that only indirectly and in the abstract contribute to solving concrete human problems.
wrong in themselves, not just because people think them wrong. They would still be wrong even if, incredibly, no one thought so. You might not believe that; some form of moral subjectivism might seem more plausible to you. But whether it is true is a matter of moral judgment and argument. Most moral philosophers think on the contrary, that the idea of what they call “mind-independent” moral truth takes us outside morality into metaphysics, that it urges us to consider whether there are chimerical properties or entities “in the world” that are half moral – how else could they make mind-independent moral claims true? – but also half non-moral – how else could they “ground” moral claims or make them objectively true? They urge a colonial philosophy: setting up embassies and garrisons of science within value discourse to govern it properly.60

Once you agree or disagree with Dworkin’s assertion about the torturing of babies for fun, you are immediately drawn into a first-order moral discussion in which you have, just by entering into it, thereby acknowledged (or denied) at least one basic moral truth. If you deny that it is wrong, you need a first order, and not a second order, moral argument as to why your denial should be accepted. The proposition that a moral assertion is not true, or not the case, cannot be established, at least according to Hume’s principle, by any discoveries of logic or facts about the basic structure of the universe.

Dworkin’s argument is that Hume’s principle that an ‘ought’ cannot be obtained from an ‘is’, when properly understood, supports not a skepticism about moral truth, but the ‘independence of morality as a separate department of knowledge with its own standards of inquiry and justification.’61 Dworkin’s argument is part of a broader argument, consistent with his view that judgments made within a contested discourse are made true by adequate arguments or reasons, where the adequacy of those arguments depends on the domain in which the contest occurs.62

Dworkin’s second point is along similar lines. It is an inescapable consequence that there are truths about value that we require when we have decisions to make about what to do that we can only make by noticing reasons for acting one way or the other. Dworkin never states much more directly than this that what he is dealing with, in Kant’s terminology, is ‘practical reason’. Dworkin seeks not to make the distinction between two types of reason, but between types of concepts. He is just as aware as Kant that he is limited to the realm of phenomena and that we can ask metaphysical questions about what ‘is’ only from our experience of that ‘external world’, but those questions require the same processes of reasoning. The reasoning he uses for moral propositions is the same as for natural-kind propositions but the evidence required to support natural-kind claims, or criterial

60 Justice for Hedgehogs, above n 1, 9.
61 Ibid 44-46.
62 See above n 37.
claims is not. The reasons that make an assertion ‘true’ will depend on the ‘domain’ in which the assertions lie.

Decisions about what to do, what decisions to make, call for reasons about what to do. Dworkin’s acknowledges that some people argue that there is never a ‘best’ thing to do – but he argues that is also a substantive, first-order, moral claim needing justification in the same way as any other moral decision. Clearly Dworkin is making some sort of claim that links our moral beliefs to our actions, but he denies that it is necessary to claim that moral beliefs are of themselves motivating of our actions. Dworkin says that ‘thinking an act wrong is not the same thing as not wanting to do it: a thought is a judgment, not a motive.’

Another positive point to be made about Dworkin’s ordinary person’s view of the truth is that when we make moral assertions that some things, like torturing babies for fun is wrong, or genocide is wrong, we do not think that our believing those assertions, or thinking them to be true, is any ‘ground’ for them. In other words, we do not think that our thinking a moral truth to be true makes it true. This point is critically important because it contains within it Dworkin’s negative understanding of the concept of ‘objectivity’ when it is used in connection with the assertion of moral truths.

At no point does Dworkin use the term ‘objectivity’ in regard to values as indicating that they are ‘objects’ or that they ‘correspond’ to objects with properties, or ‘reference’ objects as entities. Indeed, it is a strong part of his case against error skeptics, like Mackie, that there are no such things as ‘morons’ floating around in space, so that their denial is of no consequence to belief in moral truths. That something is ‘water’ or a ‘giraffe’ is a natural-kind assertion of fact, which requires different, and empirical, evidence. Dworkin’s claim is rather that if we use the term ‘objectivity’ in connection with our assertions of moral truth it indicates — contrary to Descartes — that we do not think moral truths, any more than natural kind truths, are true because we think them so. We do not offer either our own belief, or the beliefs of any others, as evidence that our moral views are the right or best ones. We can only offer other moral argument and Dworkin is not short of theories to offer in respect to how might go about moral or legal argument.

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63 Justice for Hedgehogs, above n 1, 28.
64 This point was the subject of a critique by Dworkin of the work of Christine Korsgaard in symposium paper he gave as part of his preparation for Justice for Hedgehogs. Ronald Dworkin, ‘Internal Realism’ (Speech delivered at The Program in Law, Philosophy & Social Theory) New York University School of Law, 6 September 2001.
It seems clear that this position about truth skirts around, or leaves out, any metaphysical or ontological theory of the nature of truth, just as much as Dworkin never discusses directly the nature of law. Both natural-kind concepts and interpretive concepts aim to reflect a reality whose content is independent of us, but because of the kind of concepts that interpretive concepts are, that is, essentially contested concepts, they inevitably raise problems of doubt or skepticism.

E The Mind-World Problem

It is not easy, then, to find where Dworkin fits into other ‘realist’ theories of truth or how he addresses, or would address, what is known as the ‘mind-world’ problem that characterizes the difference between philosophers committed to a form of rationalism and those committed to some form of empiricism. Dworkin’s response, that the truth of moral values lies in the argument for those truths, would seem to put him on the side of the ‘rationalists’, and as we have seen he seems to decline any attempt at placing moral thoughts into the fabric of the universe (which becomes just an emphatic way of saying something is ‘really true’).

Haldane and Wright might offer some assistance here. They suggest that Michael Dummett’s theory, developed as a form of anti-realism (or idealism), contains the modern paradigm of the debate about truth and the mind-world problem. According to Haldane and Wright, Dummett argued, claiming to follow the logical positivists and the later Wittgenstein, that:

the most fruitful formulation of the dispute between the realist and anti-realist lies within the theory of meaning, being focused on the question: what is the proper theoretical description of an understanding of the declarative sentences of a contested area of discourse? … Dummett proposes that for the realist such an understanding should consist in possessing an idea of what it is for any particular sentence to be, respectively, true or false, independently of any capacity we may have to verify it as true or false, or to gather relevant evidence either way.

Dummett took a skeptical and anti-realist opposition to this view, but it holds within it the idea that the realist is looking for ‘truth-conditions’ that Dummett says cannot, at least in the case of moral truths, be found. Dummett’s realist, according to Haldane and Wright, is committed to ‘a distinction between what confers acceptability on such a statement, in the light of whatever standards inform the discourse to which it belongs, and what makes it actually true.’ Realism is

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66 See in particular, Justice for Hedgehogs, above n 1, 428, n 6(2).
68 Haldane argues that Dummett’s anti-realism really is not substantively different from idealism. See Haldane, above n 57, 15-37.
69 Haldane and Wright, above n 67, 5.
70 Ibid 6.
then, in Dummett’s terms, about ‘one semantical preparation for the idea that our thoughts aim to reflect a reality whose character is independent of us’.71

Dworkin’s view is not quite synonymous with Dummett’s, however, because in relation to moral claims, there is nothing external to make them true. For Dworkin, there is only the issue of what makes these assertions justifiable. This is an ‘internal’ and not an ‘external’ standard.

Haldane and Wright attribute to Dummett the making of a paradigm shift in the understanding of what cognition is from that of the mediaeval period and the seventeenth and eighteenth centuries. They claim that Dummett moves the understanding of cognition from the idea of obtaining an intellectual grasp, or perception of, external objects of an appropriate sort, to the contemporary conception as that of ‘first and foremost being a matter of believing and saying the true, of acquiring for the right kind of reason, states of appropriate propositional content’.72

The issue this raises, as Haldane and Wright point out, is that this new paradigm by-passes the previous ‘object’ directed debate. It is this ‘passing-by’ of the metaphysical debate about the correspondence of morality to properties and entities to which Dworkin appears to commit and it is this ‘passing by’ of the metaphysical debate, particularly associated with the later Wittgenstein, that is often referred to as ‘quietism’. It is with this in mind, then, that we find Dworkin’s next step is to engage directly with the various arguments of the moral skeptics. His strategy is to prove that their arguments are not satisfactory as proof against the claim that there are moral truths, rather than to prove that there are, in fact, moral truths – that there are moral truths, or a better answer to moral questions, is taken as a given. It is a negative argument against a negative position. If the skeptics fail to prove their case, then it leaves open the possibility that the other view is correct. The argument clearly applies either way.

F Addressing the Skeptics

It is the second, or negative, part of Dworkin’s theory of truth that carries the weight of his argument for moral truth and that is his arguments against the skeptics. While we may see traces of Pyrrhonian skepticism within the arguments of those addressed by Dworkin’s internal skepticism,73 skeptical theses take many forms, and include Dummettian anti-realist theories.74 In both

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71 Ibid.
72 Ibid.
74 Haldane and Wright conceive of skepticism in two forms: ‘deference’ and ‘self-assurance’. These two characteristics relate closely to Dworkin’s characterisation of ‘error’ and ‘status’ skeptics. But as a
‘Objectivity and Truth’ and *Justice for Hedgehogs* Dworkin does his best to respond to most of the major forms of philosophical skepticism about the truth of moral facts. This is the critical part to Dworkin’s argument.

Dworkin’s strategy against skeptics is quite simple. He assumes ‘that people’s moral convictions form at least a loose set or system of interconnected propositions with a distinct subject matter’. Further, he acknowledges that in making any decision about what to do, people bring a variety of convictions to bear on the problem and that some of these reflections will take account of non-moral, as well as moral, facts but only so far as they bear on other more general moral claims. He also acknowledges that there are various levels of abstraction of moral argument from the concrete to the very abstract.

With these assumptions in mind, Dworkin argues that there are two basic categories of skeptics: external and internal. The ‘external’ distinction can be made about any body of ideas. The idea is that it is possible to talk ‘about’ morality, or, for example, mathematics, from outside that domain, and that these arguments lie ‘externally’ to the domain and not within it. These discussions it is argued, therefore, do not carry any substantive force toward any concrete problems within the domain. From the perspective of moral truth, external, or ‘Archimedean’, skeptics purport to argue about moral truth from such a second-order, non-substantive position, that is, they purport to step back and argue about moral truths without drawing any substantive conclusions. Some external skeptics attempt to rely on social facts to show that there are no moral truths, others rely on arguments that there are no moral ‘entities’ in the universe for moral facts to correspond to. Realist and anti-realist argument usually takes place on this basis.

Internal skeptics, on the other hand, argue from an abstract position within morality itself. Their arguments assume that there are moral facts at least at a very abstract level, otherwise their own arguments self-destruct. They may either argue that some particular moral facts are not true, or from a ‘global’ position of some form that they might be true, for example if there was a god, but that since there is no god, there are no moral facts. Dworkin treats this as a conditional argument that is internal to morality. Dworkin notes the popularity of internally skeptical views because they

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75 *Justice for Hedgehogs*, above n 1, 30
76 Ibid 31.
allow people to hold their convictions, while at the same time denying those convictions have any substance or superiority over other views.\textsuperscript{77}

External skeptics divide into two further categories: error skeptics and status skeptics. Dworkin’s strategy for both of these categories is the same, but the arguments differ. The strategy is to show that there is no external position from which to argue about moral values. If he can show that none of these arguments can maintain an independent, external perspective, but that they amount to substantive moral arguments, then they fail to be ‘external’ and independent of morality itself, and therefore require moral arguments for their support. If this is the case, then they fall not within external skepticism, but internal skepticism and they then require and utilise the very same moral arguments that they claim to reject.

1 \textit{External error skeptics}

External error skeptics argue that all moral judgments are false.\textsuperscript{78} An external error skeptic might argue that genocide is neither right nor wrong because there are no moral entities in the world ‘whose configuration’ might make such a proposition true. External status skeptics acknowledge that ordinary people make moral claims to truth, but they deny that moral claims can have the status of truth for some reason or other. Dworkin is particularly concerned with these skeptics because they are, in effect, trying to have their cake and eat it to too.\textsuperscript{79} This category of external status skeptics includes “noncognitivists”, “expressivists”, “projectivists”, and “quasi-realists” and what they all have in common is that they allow that people may sensibly claim that moral judgments are true or false, but argue that these claims do not have the status of moral fact, because they do not describe how things are.\textsuperscript{80}

There are no internal error skeptics because at some level all internal skeptics rely on substantive moral claims. Some of these skeptics focus on particular substantive issues: for example, they might say that all judgments that condemn sexual choices are false, or they might deny that morality has any place in a nation’s trade policy.\textsuperscript{81} Some might be global internal skeptics, but they all rely at some level on the fact of substantive moral claims.

\begin{footnotes}
\item[77] Ibid 36.
\item[78] Ibid 47-51. Dworkin argues against John Mackie’s error skepticism because he considers it to be paradigmatic of error skepticism. See Mackie, above n 65.
\item[79] Status skepticism is epitomised by AJ Ayer’s theory that judgments are a form of people venting their emotions. The theory is sometimes known as the ‘boo hurrah’ theory of truth. See A J Ayer, \textit{Language, Truth and Logic}, (Gollancz, 1936).
\item[80] \textit{Justice for Hedgehogs}, above n 1, 33.
\item[81] Ibid.
\end{footnotes}
Dworkin, therefore, needs to deal separately with external error skeptics, and external status skeptics by showing that they cannot stand outside morality to comment on it, so that they then become just other forms of internal skepticism, and then he needs to deal collectively with all internal skeptics.

His strategy with external skepticism is quite simple. Error skeptics argue that all moral claims are false because there are no such things as moral entities in the world. Dworkin’s strategy is that if he can show that their own claims are moral judgments, then their arguments defeat themselves. If each argument on its own is a moral judgment, then they must claim truth, at least, for their own position.

Dworkin compares the domain of cosmology with the domain of morality.\textsuperscript{82} While it might be possible to get outside of astrology and religion (depending on the definition you give to them), it is not possible once you are discussing what astrology or religion consists of, to deny that you are in the domain of cosmology. Morality, he argues, is also a domain and its topics include what categorical responsibilities people have – where categorical responsibilities are those that do not depend on what people want or think.\textsuperscript{83} Someone takes a position on this question when they claim, for example, that the rich have a duty to help the poor. This position continues through to claims that no one ever has a moral obligation because moral obligations are set by god and there is no god (the type of claim of an internal global skeptic), or that no one ever has that obligation because there are no queer entities that could constitute a moral obligation. What is relevant to all these skeptical claims is the content of the claims. Whatever the level of abstraction, all these arguments make a moral claim in themselves, so these philosophers cannot consistently claim that no moral claim can be true.\textsuperscript{84} Philosophers have tried to distinguish between philosophical and moral claims but, according to Dworkin, there is no distinction to be made. If this is true, then it is an argument of some significance.\textsuperscript{85} Dworkin’s point is quite succinct:

\begin{quote}
When you make a statement about what moral responsibilities people have, you are declaring how things stand – morally speaking. There is no way out of or around the independence of value.\textsuperscript{86}
\end{quote}

Dworkin is not claiming that sociologists and anthropologists cannot stand outside philosophy and morality and comment on people’s actions. We have seen in relation to Law’s Empire, however, that Dworkin rejects the relevance of such external views to the question of determining

\textsuperscript{82} Ibid 41.
\textsuperscript{83} Ibid.
\textsuperscript{85} Shafer-Landau, above n 84.
\textsuperscript{86} Justice for Hedgehogs, above n 1, 42.
responsibilities. The moral responsibilities of any community, for Dworkin, can only be determined from ‘within’ that community’s understanding. It is an internal and not an external issue. Dworkin might be offering this argument in 2011, but it is entirely consistent with his early position in Taking Rights Seriously and Law’s Empire that jurisprudential theories provide a response to the question what makes propositions of law true whether they intend to do so or not.87

2  External status skeptics

Dworkin’s response to external status skepticism is more complex and it is here that he utilizes what could be said to be a deflationary technique in his arguments against the various hypotheses of the status skeptics. His argument is that status skeptics have a claim requiring an answer only if there is a distinction between the two following judgments:

[Status skepticism] is available, … only if we can establish a distinction between what the two following judgments mean or come to: first, that torture is always wrong, and second, that the wrongness of torture is a matter of objective truth that does not depend on anyone’s attitudes.88

The deflationary argument is that if the second statement is only a more wordy form of the first, which is conceded to be a moral one, then the second is also a moral position that cannot be taken without also embracing the first proposition. Dworkin responds to two separate forms of status skepticism: speech-act skepticism and the two language-games version. He then goes on to list all the possible claims that a person might make in their ordinary (and not so ordinary) speech claims about the wrongness of abortion. Each claim incorporates the type of statement alleged not to be a substantive moral claim by variously styled status skeptics.

Because of its importance, I will set out this passage with all of Dworkin’s further claims in full. He says:

I am speaking at length about abortion. I begin: “Abortion is morally wrong.” Then, drawing breath, I add a variety of other claims set out in the rest of this paragraph. “What I just said about abortion was not just venting my emotions or describing or expressing my own or anyone else’s attitudes or my own or anyone else’s commitment to rules or plans. My claims about the immorality of abortion are really, objectively true. They describe what morality, quite apart from anyone’s impulses and emotions, really demands. They would still be true, that is, even if no one but me thought them true, indeed, even if I didn’t think them true. They are universal and they are absolute. They are part of the fabric of the universe, resting, as they do, on timeless, universal truths about what is fundamentally and intrinsically right or wrong. They are reports, that is, of how things really are out there in an independent moral reality. They describe, in short, real moral facts.”89

87  See above ch 2.
88  Justice for Hedgehogs, above n 1, 52.
89  Ibid 53.
One by one Dworkin takes these ‘further claims’ and argues that they are just more emphatic, or more particular expressions of the first claim, and why they add nothing to that claim that distinguishes it from the first moral claim. If that is the case, then the external skeptic cannot deny them without also denying his own claim.

Of particular importance here again is Dworkin’s argument that ‘objectivity’ in this context is intended to express the idea of being ‘not subjective’, that is, not true because my thinking it makes it true; and not just a matter of instinctive response, or taste, or personal preference. The external status skeptic contradicts his own skepticism if he denies any of these further claims – because he is drawn into a moral argument. Dworkin brings his argument together by saying that what the status skeptic here requires to make his point are the ‘twin conditions’ of ‘semantic independence’ and ‘skeptical pertinence’, which, in effect, cannot both be satisfied.

This is not a direct argument for the truth of moral claims. It is a negative proof. Dworkin is denying that there is an ‘external’ place for skeptics to hide. If they want to argue there are no moral truths from these two external positions they find themselves arguing against substantive positions from which their positions cannot simply be extracted. If this is the case, then Dworkin might be suggesting that they should either address the substantive position itself if they are to add any value, or remain silent – but he says neither of these. Certainly, if the philosophical problem is reduced to the substantive issue, then his arguments make no sense in that context. Dworkin is content to knock down their arguments that there is no substantive position to hold rather than prove there is one. If he proves there are no arguments to show that there are no substantive positions to hold, then it leaves the possibility that there are substantive positions to hold. To put this another way: if the skeptics cannot prove there is no case to answer (that they are not ‘candidates for objective proof’), when the moral assertion is made – then it is possible that there is a case to answer. The burden of proof that there is not one, at any event, shifts back into the skeptics’ court.

3 Use of the negative argument

Nothing highlights Dworkin’s effective use of the ‘negative argument’ more than his argument against the external error skeptic’s denial that there are any such things as ‘categorical reasons’ why

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90 Ibid 54.
91 Ibid 55.
92 Ibid 59.
93 The skeptic usually rejects the idea that he has a case to answer, and claims that it is for the realist to make his case. It needs to be noted that Dworkin does not care, because if he is correct, the skeptic has taken up a substantive moral position that claims that all positive or negative moral claims are false.
a person ought to act in any given way; or as Dworkin puts it that the ‘wrongness of an act gives people a categorical reason – a reason that does not depend on their own desires or preferences – to avoid it.’\textsuperscript{94} Just following this argument is a challenge for anyone who regularly relies on positive assertions and simple negations.

D is an error skeptic responding to three previous assertions: the first assertion is by A who claims that there are categorical reasons why abortion is always wrong; B argues that there are some cases where abortion is always required; C argues that both A & B are wrong because abortion is neither morally required nor morally forbidden, no one has a categorical reason either way.\textsuperscript{95}

Dworkin relies on a connection between morals and reasons in arguing his case against the error skeptic D. D argues that ‘[A, B and C] are all three wrong. Abortion is never either morally forbidden or morally required or morally permissible’. Even though D seems to be making no moral claim, Dworkin argues that D is disagreeing with the statement of the person who claims that abortion is always wrong. The upshot of D’s argument is that he believes, like C, that there are no categorical reasons for acting one way or the other. A is wrong.

One argument for this result is that it follows just from ‘what it is to have a reason’, because there is an essential connection between having a reason and having a desire. The idea is that you can’t have a reason to do something unless you also have a desire to do it. Alternatively, as Dworkin puts it, ‘[i]f someone has a reason to do something, that reason must be at least potentially capable of explaining how he behaves.’\textsuperscript{96} It follows that this position is also a denial that there could be ‘categorical reasons’ not to do something that you desire to do – in one respect the argument is that ‘categorical reasons’ make no sense. In any event, Dworkin’s argument is that the external skeptic, in this case Bernard Williams, is effectively arguing that I can have reasons to do something only when I desire to do it. But without categorical reasons not to do something I desire to do, I end up in a strange place. Dworkin concludes:

Because Stalin had no desire to spare his former colleagues, we couldn’t explain any of his actions by attributing to him any reason to spare them. So on Williams’s view, we must concede that he had no reason not to murder them.\textsuperscript{97}

\textsuperscript{94} Justice for Hedgehogs, above n 1, 49.

\textsuperscript{95} Ibid 42.


\textsuperscript{97} Justice for Hedgehogs, above n 1, 50.
That is, in the absence of any categorical reasons (for example, to show mercy) not to spare his colleagues, Stalin had no reason not to kill them. This is a masterful, if somewhat confusing use of the negative argument.

Dworkin has not proven here anything about the truth of ‘categorical reasons’. He has simply argued that Williams’s view is inadequate as an ‘external’ theory. D, whose statement represents this argument, is denying the truth of A’s claim: that amounts to a substantive moral claim.

4 Internal skepticism

If we cannot prove that there are no such things as moral truths and if the ordinary person’s view is that there are moral truths or categorical reasons – or at the very least that the idea is required in determining what we do and what decisions we make, then we are left being skeptical from an internal perspective – asking what it is, or might be, that makes our moral assertions right or wrong.

Internal skepticism may be partial or global. Global internal skepticism, according to Dworkin, is ‘a despairing conviction, particularly when it is trained on ethics’ when ‘it holds that life itself has no value or meaning, and … no value of any other kind can survive that dismal conclusion’.\textsuperscript{98} It is a significant part of Dworkin’s argument that there is no refutation for that kind of skepticism. It may leave a person, just as it took a hold of him, but there is no antidote for it. Dworkin’s own answer is to posit an ethics of ‘adverbial value’ but this is not to argue that it is a refutation against global internal realism.\textsuperscript{99}

There are two major forms of internal skepticism. Firstly, there is the negative moral argument, that regarding some position, such as sexual conduct between consenting adults, morality neither requires nor condemns some moral act or other. Secondly, there is the argument that there is no correct answer to that question – that the answer is indeterminate because no right answer can be found either way.

But these skeptical doubts are internal. They take issue with a concrete issue and, in Dworkin’s opinion, they each provide an answer to that issue. Here we find ourselves concerned with the very issue that Dworkin has consistently argued over forty years, and it is again a negative thesis and it is a logical one. If you cannot prove that there is ‘no right answer’, then it leaves the possibility that there is a right answer. It is important to notice that Dworkin never argues that there is ‘one right

\textsuperscript{98} Ibid 88.
\textsuperscript{99} Ibid.
answer’ as is sometimes claimed. What he argues is that we will think we have the ‘right answer’ when we have reflected on the possible reasons in light of his theory of meaning as a form of constructive interpretation, and can find no more reasons to change our view at that time. Where we are uncertain about what is true or right, there may be a burden to reflect on what reasons provide the greater weight. But what we must appreciate is that the ship sails on while the captain dithers about changing direction.\textsuperscript{100} By doing nothing, the captain is still making a choice of direction.

The argument against the ‘no right answer’ thesis is primarily a logical one. If there is a choice to be made between two alternatives and these sit at each end of a spectrum with Option A at one end and Option B at the other, somewhere between the two options is a point at which the arguments become stronger in one direction or the other.\textsuperscript{101} It is possible that someone might be uncertain, that is be unconvinced by either side, and according to Dworkin ‘uncertainty’ is the default position, not indeterminacy. If someone wants to argue that there is a better option C, and that options A & B do not provide the appropriate answer, in other words argue that the answer is indeterminate in some way, that itself is a substantive moral argument that requires moral arguments in its support. Dworkin’s example of the latter in \textit{Justice for Hedgehogs} is whether Picasso or Beethoven is the greater artist. One might find the question indeterminate for the reason that the two are not comparable since they operated in different fields of art, but this is a substantive answer to the initial question.\textsuperscript{102}

Dworkin does not deny that our morality is influenced through our experiences, because it is only through our experiences (as Kant required) that we are able to reason at all. We are humans in a world. Both the world around us and the things in it, and our ideals are part of who we are within that world. Those circumstances will influence the way we think about both the world and our roles within it and, therefore, we will arrive at different answers. We can only understand our experience as rational beings, as beings who are a part of that world with all is history and cultural influences, on which we depend for our ‘knowing’ anything at all. But Dworkin argues that this is so for all knowledge, not just our moral values but including our scientific knowledge - depending on where and when we were born, we would have sworn that the world was flat – and that this was true for those that held that view. All concepts are internal to each of us and depend on our own

\textsuperscript{100} The point is that we make a decision by not making an alternative decision.
\textsuperscript{101} Dworkin, \textit{Taking Rights Seriously}, above n 54, ch 13. There is something of Hume’s idea of Academic skepticism in this argument that we accept the result that is ‘most probable’ after reflection. See Ainslie, above n 73, 267.
\textsuperscript{102} \textit{Justice for Hedgehogs}, above n 1, 92-3.
understanding of them (whether they are ultimately true or not). But the empirical fact that our moral opinions are brought about by our past experiences, or our desires or predispositions, does not, on the basis of Hume’s principle, argue on its own for the truth of any particular moral fact.103

The issue of ‘truth’ then, contains three different dimensions. The first dimension involves a question about the ‘nature of truth’ itself — that is a metaphysical, or, at least, an ontological question about the nature of truth. Dworkin rejects the relevance of this ontological question because ‘truth’ is a value concept, not an entity. He is not looking at the ‘nature’ of truth, or law, he is always looking at ‘truth’ and ‘right’, ‘good’ and ‘reason’ as concepts and therefore at their ‘meaning’ — his question is what conditions make a moral, or legal, assertion true in that sense. His answer, in accordance with Hume’s principle, is ‘other moral (or legal) arguments’. The second dimension is an epistemological question that concerns how we know something is true when we assert it to be so because we do make assertions as to the truth of value-laden matters — under what conditions? It is third and further question whether we do, or must, act on those beliefs — the question of determinism as opposed to free-will. Both the holding of the conviction and acting on it seem to Dworkin to be a matter of free-will. The point of ‘reflection’ is to check our convictions and change them if necessary, and people clearly act against their stated convictions. While we might be considered to be irrational if we do not act in accordance with our beliefs, it is always a possibility that we will drink from a cup that we know contains poison.

Dworkin is firmly Kantian in the area of free will. In his view, our considered moral judgments are not just the result of projections of our emotions or expressions. We do not take a considered action on our values, that is, after reflection on what action to take, in the same way as we respond to a hot flame on the arm. We can also act in spite of the best reason we have for acting in a particular way. Nor are our moral decisions taken in the same vein as our tastes and desires.

We do assert that ‘abortion is wrong’ or ‘torturing babies for fun is wrong’, or that it is wrong for a government to wage war in certain circumstances. For Dworkin, the important question is an epistemological one: how do we know these actions or activities are wrong? Whatever else the answer requires, it will require arguments that will need to include, via Hume’s principle, other value-laden argument.

103 He distinguishes his view in this respect from that of Thomas Nagel, The View from Nowhere, (Oxford University Press: 1986), see Justice for Hedgehogs, above n 1, 439-441, n 6.
Can we place Dworkin’s ‘ordinary person’s view’ and his response to the skeptics within a more general line of philosophical views about truth? The answer is: only perhaps with a lot of difficulty. We would need to start, as he recognized, by rejecting the idea that he is a skeptic himself, an argument supported not only by his acceptance that there is more than one possible answer to moral dilemmas, but also by his argument that there is no antidote for ‘global internal skepticism’. Such an argument might be mounted by using an argument based around Hume’s idea of ‘mitigated’ skepticism that we need to recognize the limitations of philosophy as providing an ultimate answer to how we know the truth.

However, clearly Dworkin rejects skepticism about knowledge, at least for moral truths, because of the way he defines skepticism (skeptics believe that all (or some) moral claims are false in some respect), and his argument that all external skeptics of moral truths still take up an internal moral position, albeit an internal one. There is also an argument that Dworkin appears to adopt a Stoic understanding that the truth can be found through reason (even if this is only through a sage, such as Hercules).

Further, in his Colloquium Paper entitled ‘Internal Realism’ delivered while writing Justice for Hedgehogs, Dworkin specifically refers to his views as being those of an ‘internal realist’ (a rare direct philosophical reference on his position). In this paper, he quite specifically suggests that we cease the search for the ‘grounds’ of moral belief and castigates Christine Korsgaard from not doing so. It is interesting that this terminology (internal realism) does not survive into Justice for Hedgehogs. My view is that the concept of ‘internal realism’ invites further metaphysical discussion that it is Dworkin’s intention in Justice for Hedgehogs to avoid. Instead he adopts the concept of free will as judgmental responsibility.

Another approach might be to argue that Dworkin actually proposes a coherentist theory of truth arising from his coherentist epistemology. In his epistemology, Dworkin seeks to provide a
methodology through the use of which we may arrive at the right moral, or legal, decision. That methodology relies on the ideas of fit, consistency, coherence and justification of one moral, or legal, belief, or argument, with other beliefs or arguments from within a set of such beliefs. Moreover, Dworkin has been insistent that in some way a moral belief is ‘made true’ by the arguments for it.

What makes a moral judgment true? When are we justified in thinking a moral judgment true? My answer to the first is that moral judgments are made true, when they are true, by an adequate moral argument for their truth. …

When are we justified in supposing a moral judgment true. My answer: when we are justified in thinking our arguments for holding it true are adequate arguments.110

Some philosophers would argue that where a philosopher does not provide an ontological theory of truth, their epistemological conclusions as to what comprises true belief will provide the substance of their ontological theory of what ‘truth’ is: in other words, that a coherentist ontology follows from a coherentist epistemology.111 Donald Davidson is known for arguing for both a coherentist epistemology and a coherentist theory of truth.112 Dworkin lists Davidson as being among the pragmatists whose skepticism he is busy avoiding.113 When Coleman suggests that Dworkin borrowed the principle of charity from Donaldson, Dworkin specifically rejects reliance on the principle, but also distances himself from Donaldson’s philosophy.114 Even if this rejection of Donaldson does not include a reference to his coherentist theory of truth, the ordinary person’s view of truth and Dworkin’s subsequent response to the skeptics do not fit comfortably with this default account of a metaphysical coherentist view of ‘truth’.

We have seen above that Dworkin does appear to utilize a deflationary method in responding to status skeptics although, again he rejects the title, at least, due to its metaphysical connections and potential associations with equivalence schema that he claims do not hold for moral truth.115 Dworkin specifically states:

110 Ibid 37.
111 Haldane makes this argument. See Haldane, above n 57, 16.
113 Justice in Robes, above n 27, 36.
114 Ibid 220.
115 In Justice for Hedgehogs, above n 1, at 455, n 15, Dworkin refers readers to the Stanford Encyclopedia for ‘an excellent article on Deflationary Theories of Truth’. For the Stanford Encyclopedia article, see Stoljar and Damnjanovic, above n 17.
It might be useful to point out … though I relied on the platitude of repetition in my discussion of external status skepticism … I did not commit myself to the deflationary theory, which holds that repetition exhausts truth, or to any other philosophical theory of truth.\textsuperscript{116}

Repetition itself cannot make moral propositions true if it is, as Dworkin says, moral argument that makes moral propositions true. These repetitious platitudes do not count for Dworkin as moral argument.

In light of this declaration, it seems pointless to speculate about Dworkin and theories of truth. However, there are two lines of philosophical thought that I believe provide more positive lines of enquiry in understanding Dworkin’s position. These are ‘quietism’ and ‘identity’ theories of truth.

Quietism can be seen as a negative place to be. The claim by some that Dworkin is a ‘quietist’ ‘quietist’ arises from his claim that the metaphysical, or ontological, question of truth can be avoided. Dworkin suggested that the view of quietism radically misunderstands what value judgments are. But its modern popularity means that something of a struggle is needed to free ourselves from its influence and to accept what should be obvious: that some answer to the question what to do must be the right one, even if this is that nothing is any better than anything else. The live question is not whether moral or ethical judgments can be true, but which are true.\textsuperscript{117}

Dworkin attempted this struggle through his arguments against external skepticism.

It is interesting that whereas Dworkin did not mind being called a ‘naturalist’, he did mind being referred to as a ‘quietist’. Indeed, his rejection of the idea is very strong. ‘Quietism’ sounds, he says, like ‘some dirty secret kept dark’.\textsuperscript{118} Quietism in the sense utilized against Dworkin is primarily a reference to his avoidance of the metaphysical issue of the truth of morality by arguing that all moral discussion must be first order and that no second order discussion is available without it producing a first order result. Quietist arguments are likely to take the form of an argument against these claims.\textsuperscript{119}

Dworkin laments the ‘bestiary of isms’ produced in philosophy in the latter part of the 20\textsuperscript{th} century that he believes has been even larger in moral philosophy than other areas. He says:

\begin{quote}
Just for a start, contemporary texts on moral philosophy discuss intuitionism, realism, emotivism, expressivism, projectivism, reductive naturalism, nonreductive naturalism, quasi-realism, minimalism, Kantian
\end{quote}

\textsuperscript{116} Justice for Hedgehogs, above n 1, 445 n 17.
\textsuperscript{117} Ibid 25.
\textsuperscript{118} Ibid 67. For a discussion of Wittgenstein’s suggested ‘quietism’ see Finkelstein above n 59. Finkelstein’s solution is to see Wittgenstein’s comments as a form of ‘anti-foundationalism’.
constructivism, and Humean constructivism. I have something to say about each of these theories in Part One [of *Justice for Hedgehogs*], but not always by name.¹²⁰

He sees the discussion of quietism as arising from the result of a suggestion by Wittgenstein that something has ‘gone wrong’ with philosophy and that domains like mathematics and morality need something more to ‘prop them up’.¹²¹ Dworkin’s claim is (and has been) consistently, that metaphysics, certainly as seen through the eyes of science, has no relevance to the domains of morality, mathematics, aesthetics and law. Science is different from these domains, not because it is in need of ‘support’, but because of its content.¹²² Science, including astrology and theology, make claims that can causally affect our own experience, therefore it makes sense to count evidence of how they do so. But for Dworkin, judgments in the areas of morality, mathematics, aesthetics and law make no such claim and they need ‘support’ in other ways. Again, this is a rejection of the relevance of the search for the ‘unconditioned’, at least when our claims are situated in the domain of morality.¹²³

While ‘quietism’ is often used in discussions about Wittgenstein’s text in *Philosophical Investigations* concerning rule following,¹²⁴ it is also used in this broader sense to refer to ontological reflection more generally. McPherson, for example, takes ‘quietism’ as being related to the metaphysical question asked in normative domains, such as ethics or epistemology, about how our practices of ‘normative judgment and discourse fit within our best general account of the world.’¹²⁵

The problem for ‘quietism’ is that the very discussion of the idea proceeds at once against the point that it is apparently making. The very point of a quietist approach is, if anything, that such ontological discussions are ‘pointless’, or nonsense or ‘something gone wrong’ in Wittgenstein’s terms, and unnecessary in Dworkin’s. The discussion will lead only to further ‘antinomies’. There seems to me to be something almost contradictory about an argument (say, for example, Finkelstein’s) that Wittgenstein favoured a form of ‘anti-foundationalism’ rather than a form of ‘quietism’. Both philosophical terms, ‘quietism’ and ‘anti-foundationalism’, appear to represent examples of what Wittgenstein and Dworkin seem to be warning against.¹²⁶

¹²⁰ *Justice for Hedgehogs*, above n 1, 426 n 2.
¹²¹ See Dworkin, ‘Reply to Zangwill’, above n 5.
¹²² Ibid. McDowell reminds us of the importance to Kant of ‘content’: ‘thoughts without content are empty, … intuitions without concepts are blind’. McDowell, above n 15, 4.
¹²³ Finkelstein may be right about Wittgenstein’s appeal to ‘anti-foundationalism’. See Finkelstein, above n 59.
¹²⁴ Ibid. In this context, Finkelstein rejects Dworkin’s position as that of a Wittgensteinian quietist.
¹²⁵ McPherson, above n 116, 223.
¹²⁶ Garver makes this point most emphatically in regard to Wittgenstein. See Garver, *This Complicated Form of Life* (Open Court, 1994) 269.
The answer here, I think, in relation to Dworkin, is that he is quite possibly a ‘quietist’, and his positive rejection of the search for the ‘grounds’ of belief, rather than for its justification is some evidence of this, but for the reason I have expressed, we are unlikely to see him argue this point in other than a negative form as a simple rebuttal.

Another positive avenue for placing Dworkin into a positive theory of truth, given his own admission (albeit a brief one) as to ‘internal realism’, would appear to be try to ‘fit’ him into an ‘internal realist’ theory such as an identity theory of truth. Haldane offers just such a theory in relation to the existence of things in the world, rather than to specifically moral values, but I think the possibility of extension into that area is available. The major points of Haldane’s theory is that everything we ‘know’ is based on some ‘concept’ or other. The mind has its own way of ‘classifying’ concepts and it is this ‘classification’ that provides them with their truth and also with the range of evidence that will provide those truths with their justification. The classification of concepts, for Haldane, seems to bear a resemblance to Wittgenstein’s idea that concepts belong within a ‘family’ of concepts. Whatever we know about a cat relates to the concept of its ‘catness’. Your own empirical evidence provides the proof as to whether there is a cat, or whether there is one or more as to whether my pointing at a cat is correct. We will both have ‘catness’ in mind in this discovery. The point of ‘truth’ for the identity theorist is that it is separated by being situated entirely in the mind, from the world which it observes and which ultimately holds the absolute truth of the otherwise internal belief.

It is this separation of ‘mind’ and ‘world’ that provides this theory with its major difficulty. John McDowell is noted for his efforts at trying to bring this ‘mind-world’ problem together in a positive theory, rather than a negative approach such as Dworkin’s. McDowell provides a very sophisticated argument for a ‘second nature’ operating within the mind. In spite of the sophistication of McDowell’s argument, it is Haldane’s version that, in my view, resonates more strongly with Dworkin’s. What tells against McDowell’s version is that nothing could be more philosophically removed from Dworkin’s views than McDowell’s detailed, if erudite, philosophical arguments.

This exercise may have been what Dworkin wanted to avoid by removing reference to ‘internal realism’ in Justice for Hedgehogs.

See Haldane, above n 57.

McDowell, above n 15.
The major problem for the association of ‘identity’ theories such as Haldane’s is that Dworkin denies that his moral claims can be made true by anything in the external world as these realists would claim. This leaves a lot of work for Haldane’s theory that the thinker becomes one and the same with what he thinks, and that different types of thought differ intrinsically because they are informed by expressly different concepts. The concepts themselves determine the character of the mental activity. However, concepts, for Haldane, are the ‘means’ rather than the contents of thought and this would seem to direct us away from Kant and Dworkin, which seems to count against its relevance for Dworkin rather than for Haldane’s view.

Finally, it seems easy to reject Dworkin’s association with the correspondence theory of truth. Certainly, it is a distinct part of Dworkin’s philosophy that our value concepts have no analytic, definitional, truth to find. Value concepts are ‘essentially contested’ or ‘interpretive’ concepts and this is just what it is to ‘be’ a value concept. But that does not completely dismiss the relevance of ‘fit’ or correspondence completely. The interpretation of a contested concept is to be elaborated by placing it alongside, or characterizing it with another value concept and so securing it within a set of beliefs as a whole. Dworkin’s list of associated values for truth is quite extensive.

Dworkin claims that the concept of truth has more than one usage or sense. It has a mundane use, such as ‘abortion is wrong is true’, in which it is meaningless or superfluous, because the use of the assertion or proposition, provides the same meaning. But it has a different sense when used in the philosophical arena where its meaning is highly contested. In its mundane use ‘truth’ is unnecessary, and in its philosophical use ‘truth’ is an interpretive concept. Dworkin goes on to characterise truth in two different senses: firstly as the activity of discovering truth in ‘truth as the goal of inquiry’; and secondly, in terms of moral values ‘truth as responsibility’ – these being two ‘values’ that form a part of his argument for an ethics of ‘respect’, in which the characterization of ‘truth as responsibility’, no doubt, makes perfect sense.

But it is the first, rather than the second, characterisation that seems to be the most relevant to his ontological arguments about the truth of assertions of moral values - to the extent that they can be seen as positive arguments. However, when Dworkin is using the term truth in relation to his response to the skeptics, I believe that his most meaningful characterisation of ‘truth’ is captured in a statement that he takes, almost verbatim, from ‘Objectivity and Truth’ and repeats in *Justice for Hedgehogs*:

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130 *Justice for Hedgehogs*, above n 1, 173.
If you can’t help believing something, steadily and wholeheartedly, you’d better believe it, not of course because the fact of your belief argues for its truth but because you cannot think any argument a decisive refutation of a belief it does not loosen. In the beginning and in the end is the conviction. The struggle for integrity lies in between.\textsuperscript{131}

In this passage, Dworkin’s concept of ‘objectivity’ is characterised by the idea ‘is not true just because I think it so’ or ‘is true even if I did not think it so’. It is not a reference to ‘objects’ or entities that there are in the world, but a denial of that reference. His notion of ‘objectivity’ is clearly one of ‘conviction’. Objective truth as conviction is the very basis of Dworkin’s understanding of its philosophical, as well as its ‘mundane’ use. It is this characterisation that is required before ‘truth’, or ‘responsibility’, or any other value can be utilised in an ethical theory. In any philosophical contemplation of Dworkin’s theory of truth the idea that it is no more, or no less, than conviction must have centre stage.

There is little doubt that the arguments in Justice for Hedgehogs also lead us to the conclusion that a ‘justified true belief’, at least in the epistemological sense, for Dworkin looks very close to a ‘justified conviction’.

\textsuperscript{131} Ibid 86.
CHAPTER SIX

VI  TOWARDS A NATURALIST RECONSTRUCTION OF RONALD DWORKIN

A  Introduction

The term ‘naturalism’ may date back to Aristotle, but its present relevance reflects a philosophical movement arising from the desire, particularly in the early 20th century on the part of some American philosophers, to eliminate ‘speculative’ philosophy and bring philosophy instead into line with the several centuries of development in the physical, and particularly, natural sciences. Like Hume and Kant before them, philosophers like John Dewey had no particular desire to reject issues of ‘morality’ as being relevant to human purposes, but they did seek a reconstruction of philosophy that removed the existence of speculative beings, such as ‘God’ and the ‘soul’, belief in which gave rise to theories about the world that were patently in contradiction to the widely accepted evidence of the natural sciences.

There are as many definitions for ‘naturalism’ as there are papers written on the topic. In its weak versions ‘naturalism’ generally requires in its metaphysical sense that the world is composed of natural entities whose properties determine all the properties of the things in it and that those properties are properly studied within the natural sciences, if not within the physical sciences. In its epistemological sense the weak version holds that acceptable methods of justification and explanation are in some sense continuous with those of the natural sciences. In its extreme version ‘naturalism’ reflects the view that ‘philosophy’ just is continuous with ‘science’ and its methods.

This chapter does not adopt a strong version of ‘scientistic’ naturalism. Instead, it will rely on Garver’s definition of metaphysical naturalism as referring to ‘the doctrine that nothing is real other

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3 Ibid.
5 Newton Garver, This Complicated Form of Life: Essays on Wittgenstein (Open Court, 1994) ch 16, 269-87 (‘This Complicated Form of Life’). Garver recognizes that Wittgenstein cannot be seen as providing an answer to naturalism if it is to be identified with scientism and argues against the need for this position. He cites Peter F Strawson, Scepticism and Naturalism: Some Varieties. The Woodbridge Lectures at Columbia University (Columbia University Press, 1985) using precedent based on Hume and Wittgenstein.
than that which is found in the natural world.’\(^6\) Of course, as indicated, naturalism has the potential for creating a profoundly negative influence on the study of morality or ethics if moral truths must satisfy a requirement that they are reducible to properties of some ‘natural’ kind. One way of avoiding this issue would be not to focus on metaphysics or ontology at all, but to seek to understand the world and its morality through a form of methodological or epistemological naturalism that in some sense relies on the methods of the natural sciences as opposed to speculative reason.

Dworkin’s work seems to be clearly within this latter category. He vigorously argued several relevant points: firstly, in what appears to be a form of dualism, that the moral world of values contains no moral properties in the same sense that ‘natural kind’ concepts have properties, for example, as tigers have DNA.\(^7\) There are for Dworkin no ‘morons’ floating about in the world or atmosphere that can produce the kind of results, causal or otherwise, that physical things do, or that can be reduced by way of examination or observation, to a reductionist analytic type of proof.\(^8\)

Nevertheless, he held to the view that ‘what the law is depends in some way on what the law should be’\(^9\) and he rejected the argument that there is no right answer to legal or moral propositions. In doing so he said:

> If the crude description of natural law that I just gave is correct, that any theory which makes the content of law sometimes depend on the correct answer to some moral question is a natural law theory, then I am guilty of natural law.\(^10\)

He then went on in that article to draw a distinction between ‘natural law’ and ‘naturalism’ by giving his ‘picture of adjudication’ the name of ‘naturalism’. He also accepted that there are ‘categorical reasons’ why we should or should not take some actions.\(^11\) He does not make the claim that there are no ‘unjust laws’, indeed, he is quite clear that unjust laws exist and cites the example of some taxation laws. However, in drawing the distinction he did between ‘natural law’ and ‘naturalism’, he suggested that his theory of adjudication was a form of ‘naturalism’. If that is the case, it would seem to be a form of methodological naturalism under which he argued that judges should decide hard cases by interpreting the political structure of the community in the following, perhaps special way: by trying to find the best justification they can find, in principles of political morality.

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\(^6\) *This Complicated Form of Life*, above n 3, 271.


\(^10\) Ibid.

\(^11\) *Justice for Hedgehogs*, above n 8, 49-51.
for the structure as a whole, from the most profound constitutional arrangements to the details of, for example, the private law of tort or contract.’

In this article, ‘Natural Law Revisited’, Dworkin controversially likened ‘adjudication’ to a ‘chain novel’ when he claimed that a ‘judge should decide fresh cases in the spirit of a novelist in the chain [of different novelists] writing a fresh chapter’ for the same book. The partially scientific, and evolutionary nature of the claim is clear. His theory of adjudication does not depend on reaching into the imagination of some previous author/s, but rather is a current process based on the best evidence available: evidence that will, according to the justificatory requirements for moral inferences, require moral factual input or evidence. It also embraces the scientific goal of finding general principles to guide future human action, at least until those principles are found, as in science, to be no longer valid.

Undoubtedly, given his claim here and his description of his understanding of it, the most profitable direction for considering Dworkin’s form of ‘naturalism’ would be to analyse it from the perspective of its providing an epistemological theory based around a coherentist model, which he arguably saw as the defining principle of the methodology of natural science. But since Dworkin insisted on the possibility of finding a right, or at least better, answer to propositions of law, he necessarily found himself involved in questions arising from metaphysics – particularly the problems of free choice or determinism, and causality. These questions involve the nature of human beings themselves and the extent to which science alone provides all the answers for human behaviour and human morality.

One metaphysical approach to naturalism, that does not follow strict scientism, might be to follow the argument that what is ‘natural’ about moral facts is something observable about humans themselves, about human behaviour observed just as one of the natural sciences: something about humans that is intrinsic to humanity and therefore, something that must be taken as presupposed by all human activities including both science and philosophy. It is just such a theory that is the concern of this chapter.

The primary focus of this chapter, therefore, is not on Dworkin’s attempts at a version of methodological ‘naturalism’. It is rather about how we might achieve a naturalist metaphysical theory from Dworkin’s theory of adjudication as interpretation by using a reconstruction based on Wittgenstein’s later writings. The aim is not to provide an analysis of Wittgenstein’s work, but to

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12 Natural Law Revisited, above n 9, 165.
13 Ibid 168.
compare one such reconstruction of his work as containing a form of metaphysical naturalism outlined by Newton Garver in a series of essays contained in his book, *This Complicated Form of Life: Essays on Wittgenstein*.14

Both Dworkin and Wittgenstein eschewed ‘speculative’ philosophy, but both could be said to have held to the view that that the world was not composed entirely of ‘things’. The task is to examine the extent to which Garver’s arguments might provide a platform for a similar argument concerning a theory of metaphysical naturalism in relation to Dworkin, where neither philosopher makes any commitment to ‘abstract entities’ but both place an importance on ‘facts’.

1 Linking Wittgenstein’s and Dworkin’s positions on Naturalism

It needs to be said at the beginning that Wittgenstein did not use the term ‘naturalism’ since he, like Dworkin, was committed to using ‘ordinary’ language. Although Dworkin at one point called his theory of adjudication a form of naturalism,15 he did not bring this claim over into *Law’s Empire* when he developed the same theory into a full theory of doctrinal law as ‘law as integrity’. What both philosophers have primarily in common were general philosophical considerations. Both were concerned with what was ‘real’ from a human perspective and with what could, therefore, be considered either as existing in the world or as being seen as true within that world. Both were primarily concerned with human activity, and both use ordinary language as the medium for their philosophical perspective.

This last point is of particular importance to the focus of this chapter. What Wittgenstein and Dworkin do have in common is that they took differing, and in a sense external, perspectives to British analytic philosophy and attempted to accommodate that external perspective with the more traditional British analytical approach. In Wittgenstein’s case, he came from Germany, where the Continental influence of Kant and Critical philosophy prevailed, although he had also studied under Bertrand Russell at Cambridge in the United Kingdom. Dworkin moved from the profound influence of the American Legal Realism to the foundations of legal positivism at Oxford. Perhaps both were influenced by the ordinary language philosophy of Gilbert Ryle,16 but whether this is so or not, both were involved in the philosophical movement to ordinary language philosophy that occurred simultaneously throughout analytic and Continental philosophy. More interestingly,
Garver, analysing Wittgenstein’s work, makes the specific point of linking Wittgenstein’s achievements with the critical philosophy of Kant. While Kant’s primary influence on Dworkin was, no doubt, concerned with his deontological approach to ethics, the linkage with Kant’s critical philosophy, through Wittgenstein, given their joint general philosophical approaches is one of interest in studying Dworkin’s work. This is so particularly if one takes the view, as I do, that Dworkin was always concerned to integrate philosophical approaches.

As noted, Wittgenstein’s interest lay in metaphysics, or at least in the question of how we know what there is that is ‘real’ in the world. Dworkin’s focus on the other hand remains reminiscent of Kant’s interest in epistemology and in the particularly Kantian question of what makes propositions true. Dworkin simply equates philosophy with ‘theory’ although the theory to which he refers is entirely practical, rather than empirical, in its nature. For Dworkin, philosophy is not so much about ‘therapy’ as Wittgenstein saw it, as about guidance for human decision-making, and particularly moral or ethical decision-making. For Dworkin, philosophy is about clarifying the case for the argument that follows inevitably from the nature of contested concepts: what Wittgenstein might have seen as the ‘language-game’ associated with those concepts.

However differently they approach the role of philosophy, the focus of both Wittgenstein and Dworkin from their respective philosophical positions is on language and its meaning for human activity.

2 Chapter Outline

Garver makes extensive linkages for his theory in various essays, and it is difficult to do justice to these within the short space available. I have chosen three major themes from his work that I believe represent the most important aspects of his argument that Wittgenstein’s understanding of ‘philosophy as grammar’ forms the basis of a metaphysical naturalism. Firstly, it is necessary to note the important distinction Garver found in Wittgenstein’s later work between ‘natural history’ and ‘natural science’. Secondly, the chapter will outline some of the concepts developed by Wittgenstein chosen by Garver to support his argument for a naturalism based on ‘natural history’. These concepts are language-games, grammar, and the complicated human form of life. Lastly, the chapter will look briefly at the connection Garver drew between Wittgenstein’s use of these concepts and Kant’s understanding of the role of critical philosophy, by showing how these concepts provide the criteria for a successful ‘starting point’ for critical philosophy: the nature of what must be taken as ‘given’. By way of conclusion, I will attempt to identify whether
Wittgenstein’s ‘naturalism’, as outlined by Garver, assists in providing a metaphysical starting point for Dworkin’s work.

B Philosophy and Science

1 Distinguishing Philosophy from Science

Wittgenstein often used the term ‘natural science’ to distinguish science from philosophy. In the *Tractatus logico-philosophicus* (‘*Tractatus*’) he said:

The totality of true propositions is the whole of natural science (or the whole corpus of the natural sciences).

Philosophy is not one of the natural sciences.

(The word ‘philosophy’ must mean something whose place is above or below the natural sciences, not beside them.)

At that time, he also thought that:

Philosophy aims at the logical clarification of thoughts.

Philosophy is not a body of doctrine but an activity.

Philosophy does not result in ‘philosophical propositions’, but rather in the clarification of propositions.

While Wittgenstein maintained a clear distinction between philosophy and science from the *Tractatus* to his later work, the *Tractatus* was concerned only with logic and with propositions – those true and false propositions that make up the world – a contingent world of natural science.

Throughout Wittgenstein’s work the world consists of ‘facts’ not ‘things’.

The world is all that is the case.

The world is the totality of facts, not of things.

And,

These concepts: propositions, language, thought, world, stand in line one behind the other, each equivalent to each.

In the *Tractatus*, Wittgenstein was concerned with symbols and language, the main purpose of which he concluded is to state facts, resulting for Wittgenstein in a ‘picture theory’ of meaning. In the *Tractatus*, every proposition presents a picture whose truth or falsity we ascertain by laying that picture against the world to see if it matches reality. Garver concludes that, in this context, the

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17 *This Complicated Form of Life*, above n 5, ch 9.
19 Ibid [4.112].
20 For a list of contingencies, see ibid 232.
21 Ibid 5 [1-1.11].
domain of natural science is confined to ‘saying what is the case’ and it is excluded from saying anything about ‘possibility, or necessity or value or meaning or sense or logical form’, because it is limited to what can be ‘shown’ (that is, shown in science).

In the Tractatus philosophy is an activity that does not result in propositions but in clarifications and the modality of a thought is shown by the logical status of the proposition. So that a proposition is possible if it is contingent, necessary if a tautology, and impossible if it is a contradiction. But this formulation was necessarily very restrictive on science because of problems about limits and totalities.

Garver argues that in his Philosophical Investigations Wittgenstein continued with his distinction between philosophy and science but that he modified his understanding of both. In the Philosophical Investigations philosophy becomes associated with grammar in a broad sense rather than logic in a narrow sense, and Wittgenstein uses the concept of natural history to describe uses of language. It is this latter change that forces a change in his conception of science.

2 Natural History

Garver argues that this change from ‘logic’ to ‘grammar’ drove a change in Wittgenstein’s conception of science beginning with the use of the concept of ‘natural history’, rather than ‘natural science’, as a way of distinguishing between the study of humans and the study of animals. Wittgenstein wrote:

It is sometimes said: animals do not talk because they lack the mental abilities. And this means: “They do not think, and that is why they do not talk.” But — they simply do not talk. Or better: they do not use language — if we disregard the most primitive forms of language. — Giving orders, asking questions telling stories, having a chat, are as much a part of our natural history as walking, eating, drinking, playing.

And:

In the sense in which there are processes (including mental processes) which are characteristic of understanding, understanding is not a mental process.

Wittgenstein’s claim, then, is that certain uses of languages are characteristic of humans – just as some other behaviours are characteristic of other particular animals. Wittgenstein needs the

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23 This Complicated Form of Life, above n 5, 152.
24 Ibid.
25 Ibid 152-3.
26 Ibid.
27 Ibid 154-5.
28 Ibid.
29 Ibid.
30 Philosophical Investigations, above n 22, 16 [25].
31 Ibid, 66 [154].
distinction between natural history and natural science because the behaviours of humans and other animals are observable without science. They do not need to be shown, provided that no explanations are drawn from those observations: their activities are just taken as given.\textsuperscript{32}

Wittgenstein would previously have considered these statements about human language as claims within ‘natural science’ in the \textit{Tractatus} – they are claims of fact, of contingent fact – belonging to a description of the world as it is. Garver’s claim is that this move, between the \textit{Tractatus} and the \textit{Philosophical Investigations}, does not mean that Wittgenstein abandoned his distinction between philosophy and science, but rather that he adopted new conceptions of both. Particularly, by developing the sharp distinction between ‘natural history’ that could be encompassed by philosophy, he radically revised his conception of ‘natural science’.\textsuperscript{33} Doing philosophy cannot be just the same thing as doing natural science, but doing ‘natural history’ can be part of ‘doing philosophy’. Natural history is just about observation of common behaviour of various animals, including humans, it need contain no explanations or proofs.

In the \textit{Philosophical Investigations} it is natural history that consists of simple statements of plain facts and not necessarily ‘esoteric’ ones, rather these facts are statements that escape our notice because they are so familiar to us.\textsuperscript{34}

The aspects of things that are most important for us are hidden because of their simplicity and familiarity. (One is unable to notice something — because it is always before one’s eyes.) The real foundations of their enquiry do not strike people at all. Unless that fact has at some time struck them. — And this means: we fail to be struck by what, once seen, is most striking and most powerful.\textsuperscript{35}

And again:

What we are supplying are really remarks on the natural history of human beings; not curiosities, however, but facts that no one has doubted, which have escaped notice only because they are always before our eyes.\textsuperscript{36}

Wittgenstein’s plain statements about humans differ from science because ‘they are purely descriptive: they avoid all necessity, all explanation, all hypothesis, and all proof.’\textsuperscript{37} Wittgenstein says about his previous views in the \textit{Tractatus}:

\begin{quote}
It was correct that our considerations must not be scientific ones. The feeling ‘that it is possible, contrary to our preconceived ideas, to think this or that’ — whatever that may mean — could be of no interest to us. (The
\end{quote}

\textsuperscript{32} \textit{This Complicated Form of Life}, above n 5, 154-5.
\textsuperscript{33} Ibid.
\textsuperscript{34} Ibid 155.
\textsuperscript{35} \textit{Philosophical Investigations}, above n 22, 56 [129]
\textsuperscript{36} Ibid 132 [415].
\textsuperscript{37} \textit{This Complicated Form of Life}, above n 5, 155.
pneumatic conception of thinking.) And we may not advance any kind of theory. There must not be anything hypothetical in our considerations. All explanation must disappear, and description alone must take its place.\textsuperscript{38}

What Wittgenstein appears to be saying is that in ‘doing philosophy’ statements about ‘empirical possibility’ or ‘necessity’, ‘theory’, and ‘explanation’ must all be eschewed, except for explanations of ‘meaning’, which remain in the domain, or language game of metaphysics. For Wittgenstein this meant explanations that clarify rather than justify, that convey how things are, rather than how they must be.

Garver points out that there are other sorts of explanations which might remain in the realm of philosophy that are neither of meaning, nor of facts: for example, in law, in morals and in politics.\textsuperscript{39} Wittgenstein assigns to the domain of science rather than philosophy: explanations or predictions of fact or events as necessary or relative to some law or theory; as well as doubt; evidence; confirmation and falsification; and experimenting.\textsuperscript{40} In relation to these latter matters, Wittgenstein absorbs his distinction between science and philosophy into his wider distinction between ‘certainty’ and ‘knowledge’. ‘Certainty’ and ‘knowledge’ belong to different categories.\textsuperscript{41}

Wittgenstein says:

And here the strange thing is that when I am quite certain of how the words are used, have no doubt about it, I can still give no grounds for my way of going on. If I tried I could give a thousand, but none as certain as the very thing they were supposed to be grounds for.

‘Knowledge’ and ‘certainty’ belong to different categories. They are not two ‘mental states’ like, say ‘surmising’ and ‘being sure’. … What interests us now is not being sure but knowledge. That is we are interested in the fact that about certain empirical propositions no doubt can exist if making judgments is to be possible at all. Or again: I am inclined to think that not everything that has the form of an empirical proposition is one.\textsuperscript{42}

3 Language-Games and their Grammar

Wittgenstein, in his ‘Notes on Logic’, says that ‘Philosophy consists of grammar and metaphysics: the former is its basis.’\textsuperscript{43} From this, Garver asks what Wittgenstein meant by ‘grammar’ and how

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\textsuperscript{38} *Philosophical Investigations*, above n 22, 52 [109].

\textsuperscript{39} *This Complicated Form of Life*, above n 5, 156.

\textsuperscript{40} Ibid 157. Wittgenstein’s assignation of all evidence here might prove problematic for Dworkin.

\textsuperscript{41} Garver makes a point of aligning Aristotle’s categories, Kant’s schemata, Ryle’s failed categories, and Wittgenstein’s categories. Stefan Rummens looks at suggestions that, although Wittgenstein never took the step himself, that his approach to ‘fact’ and ‘certainty’ can be extrapolated to moral facts. See Stefan Rummens, ‘On the Possibility of a Wittgensteinian Account of Moral Certainty’ (2013) 44(2) *The Philosophical Forum* 125-147.


\textsuperscript{43} Ibid 221-2.
this takes us to ‘metaphysics’. Wittgenstein was not concerned with the creation of an ‘ideal language’ – he was always concerned with ‘actual language’ - with human behaviour and language as it is.\textsuperscript{44}

Garver notes that the word ‘grammar’ allows for multiple uses and even with a definition is still conceptually difficult to grasp.\textsuperscript{45} However, he argues that it is commonly seen as something descriptive and is often associated with the scientific or modern linguistic processes of morphology, syntax and phonology. Garver says quite simply: ‘Modern linguistics is a science, and hence is normative as well as descriptive’.\textsuperscript{46} Grammar is often used in the sense of ‘grammars’ or grammar relating to a particular language. Grammar, then, in one sense, reflects a science of how to construct ‘grammars’, that is the systematic presentation of features and rules as it relates to a particular language.\textsuperscript{47}

Initially Wittgenstein does not seem to be using the term ‘grammar’ in a ‘linguistic’ sense, nor in a sense applicable to any one particular language but rather to what holds for all languages. But Garver argues that ‘[t]he first criterion for judging grammars is whether they accurately represent established usage’ and in order to find the sense in which Wittgenstein might be seen as using the word ‘grammar’, he examines in some detail what it is that linguists do.\textsuperscript{48}

Linguistic studies begin with the articulation of particular sounds – phonology – the sounds that relate to a particular language and these can be seen as differing from language to language. The concept of ‘phonemes’ leads Garver to four different levels of linguistic study. He says that

\begin{quote}
[P]honemes are distinct things, not just “sounds”; words are distinct things, not just clusters of phonemes; sentences are distinct expressions, not just random strings of words; and speech-acts are distinct sayings or doings, not just utterings of sentences.\textsuperscript{49}
\end{quote}

Wittgenstein’s grammar concerns this last activity – the study of sayings and doings as one of the linguistic levels of articulation.

The word “language-game” is used here to emphasize the fact that the speaking of language is part of an activity, or of a form of life.\textsuperscript{50}

Garver concludes that Wittgenstein is using the word in its common sense and that what Wittgenstein means by ‘grammar’ is that ‘it describes language by showing how it is articulated …

\textsuperscript{44} Ibid.
\textsuperscript{45} Dworkin would no doubt argue that this ‘grammars’ is an interpretive concept.
\textsuperscript{46} This Complicated Form of Life, above n 5, 224.
\textsuperscript{47} Ibid.
\textsuperscript{48} Ibid 224. For his study of the linguistics of Saussure, and comparison with Wittgenstein, see Philosophy as Grammar, above n 14.
\textsuperscript{49} This Complicated Form of Life, above n 5, 227.
\textsuperscript{50} Philosophical Investigations, above n 22, 15 [23].
both the construction of expressions (in terms of shapes, arrangements, distributions and contrasts, and transformations) and also their significance (in terms of contrasts and inclusions).’

There are certain circumstances in which it makes sense to say things and makes, or does not make, sense to make certain replies. And Wittgenstein concluded that in spite of variations in human action and human customs, the same basic language-games or uses of language, belong to ‘common human behaviour’.

4  Lebensform – Getting from Grammar to Metaphysics

If Wittgenstein is using the word ‘grammar’ in its usual ‘descriptive’ sense, Garver argues it follows that Wittgenstein’s grammar is related to metaphysics in three ways.

Firstly, if ‘grammar’ is descriptive it presupposes that there is something to describe – that something is a world of human beings who are doing things. Wittgenstein makes his point about this world in terms of the concepts of ‘natural history’, ‘common human behaviour’ and to ‘forms of life as what has to be accepted, the given’ and the human form is one complicated example of what just has to be accepted.

It was evidently a common saying of Wittgenstein that ‘in the beginning was the deed or action’, and his language-games are primarily descriptions of actions or patterns of activity made by him from empirical observation alone. Garver argues that this amounts to a ‘naturalism’ consistent with Wittgenstein’s original view that the ‘world is a totality of facts’.

Secondly, Wittgenstein’s ‘grammar’ is a response to questions about the nature or essence of things:

\[ \text{Essence is expressed by grammar.} \]

\[ \ldots \]

\[ \text{Grammar tells us what kind of object anything is. (Theology as grammar.)} \]

One of Wittgenstein’s numerous examples of a particular language-game is of the use of the word ‘pain’. His point is that is makes no sense to say ‘I know I am in pain’ or of someone ‘that she knows she is in pain’. Adding the word ‘know’ here simply turns the statement into nonsense. This

51  This Complicated Form of Life, above n 5, 227.
52  Ibid 228-9.
53  Ibid.
54  It appears in On Certainty, above n 42, 51 [402]. The German Wittgenstein used is ‘Im Anfang war die Tat’ is taken from Goethe’s Faust.
55  Philosophical Investigations, above n 22, 15 [23].
56  This Complicated Form of Life, above n 5, 229.
57  Philosophical Investigations, above n 22, 123 [371].
58  Ibid 123 [373].
remark has no use as a ‘knowledge claim’ – not because of any regulative rules prohibiting it from being said – but because doubting and confirming are associated with knowledge claims, and the language here has no such appropriate response.\(^{59}\)

Thirdly, Garver argues that Wittgenstein’s grammar provides a kind of Kantian ‘transcendental’. I will return to this important point after a brief consideration of Wittgenstein’s concept of the ‘complicated’ human ‘form of life’.

5  This Complicated Form of Life\(^{60}\)

Garver’s theory about Wittgenstein’s use of the expression ‘Lebensform’ or ‘form of life’ is probably not essential to his overall theory that Wittgenstein was purporting to observe what it is that is essential to all humans via the medium that he called ‘natural history’ by way of a distinction from ‘natural science’. However, incorporating the concept clearly offers completeness and provides a unity to his interpretation of Wittgenstein’s overall approach. It also provides a conceptual framework for what it is that is ‘natural’ about humans in terms of what is common to them: their language-games and the grammar associated with them.

The expression ‘form of life’ (Lebensform) was not widely used by Wittgenstein and Garver tells us that there are only five references to it in the Philosophical Investigations and the Philosophy of Psychology – A Fragment plus another four in other works and he agrees that these ‘are a bit cryptic’.\(^{61}\) In addition, there is no consensus among philosophers as to what meaning Wittgenstein intended Lebensform to have.\(^{62}\) The most significant difficulty this produces for Garver is whether Wittgenstein intended to refer to cultural or racial differences among humans, or whether it was a reference to one human form of life and much of Garver’s argument is given to defending the latter of these two approaches, where the plural usage Lebensformen then refers to human and other animal forms of life.

\(^{59}\) This Complicated Form of Life, above n 5, 230.

\(^{60}\) Ibid ch 15.

\(^{61}\) This Complicated Form of Life, above n 5, 238. In the edition of Philosophical Investigations, above n 20, used here, the second part of the Philosophical Investigations is separately entitled ‘Philosophy of Psychology – A Fragment’. Garver provided his own translation but takes this section as an untitled, and unnumbered addendum to the Philosophical Investigations.

\(^{62}\) According to Finlayson, the expression ‘lifeworld’ (Lebensfelt) was first used by Husserl in reference to his phenomenology, but it was also later adopted by Habermas. James Gordon Finlayson, Habermas: A Very Short Introduction (Oxford University Press, 2005) 51. Finlayson says that “… Husserl used the term in order to contrast the natural, pre-theoretical attitude of ordinary people to the world with the theoretical, objectifying, and mathematizing perspective of natural science.’ The concept lies at the heart of Habermas’s theory: at 51.
Garver begins by noting that the idea of ‘form’ in the philosophical sense derives, at least, from Plato and is used to indicate ‘that within which a significant range of possibilities is contained’ and he suggests that the idea of human possibilities underlies, at least to some extent, Wittgenstein’s use of the term.\textsuperscript{63} Wittgenstein said:

\begin{quote}
Form is the possibility of structure.\textsuperscript{64}
\end{quote}

Garver argues that it is characteristic of Wittgenstein to draw attention to the nature or essence of something, by disclosing more fully the range of its possibilities. So, for example, it is not any one particular ‘mode’ of expression, like hoping, that is important to the human form of life, but the phenomenon of being capable of learning multiple modes, such as forecasting, regretting, counting, naming colours, and so on.\textsuperscript{65}

Garver examines in detail each of Wittgenstein’s uses of the terms ‘form of life’ and ‘forms of life’ in turn, including critical argument of alternative interpretations. Having done so, he rejects the idea that Wittgenstein used the term ‘form of life’ to refer to culturally variant patterns of living, and that he intended it to refer to an activity. He finds that the form of life to which Wittgenstein refers is to those animals in nature that can talk, as opposed to those animals that cannot.\textsuperscript{66} The distinction being made by Wittgenstein is between forms of life such as: bovine, piscine, canine, reptilian, human, feline, and so on. It is not between different human cultural or racial uses of language. Although Wittgenstein appears to acknowledge that we could imagine languages that could belong to different forms of life, natural languages all determine the same form of life: human.\textsuperscript{67}

It is the mastery of language that determines this one human form of life from another and it is a ‘complicated’ form of life because it involves ‘countless’ different kinds of language-games – that is, a form of life whose language-games offer that form of life countless possibilities.\textsuperscript{68} The significance of these language-games being countless is what is representative of the possibilities inherent in the word ‘form’. But ‘form of life’ is not identified with these language-games or activities per se, because this would be a wasteful duplication.

Garver argues that Wittgenstein’s form of life refers to what is common about human beings and that what is common to human beings is that they go on using language and applying the rules of

\begin{footnotes}
\item[63] This Complicated Form of Life, above n 5, 238.
\item[64] Tractatus, above n 18, 8 [2.033].
\item[65] This Complicated Form of Life, above n 5, 253-4.
\item[66] Ibid.
\item[67] Ibid.
\item[68] Ibid.
\end{footnotes}
grammar in endless new cases without any guidance other than past training and there is no explanation for this. This capacity of ‘speaking’ is presupposed by the human form of life, and it is presupposed by the activities of those speakers.\(^\text{69}\) Certainly, breakdowns occur in the use of language between speakers and these breakdowns can cause speakers to be a ‘complete enigma’ to one-another. Wittgenstein attributes just such breakdowns to philosophers who hear a word ‘… put a false interpretation on it, and then draw the oddest conclusions from this.’\(^\text{70}\) Following rules like those of language, or understanding, so Wittgenstein tells us (in a notorious section about rule following), requires there be more than one occasion being followed, and depends, as he says, on ‘customs’ usages, institutions. To understand a sentence means to understand a language. To understand a language means to have mastered a technique.\(^\text{71}\)

Garver’s argument is that Wittgenstein is linking ‘forms of life’ with what is essential about human nature. Forms of life are neither transient nor variable.\(^\text{72}\) It is because they are vague concepts that forms of life can provide certainty. For Wittgenstein, analysis, precision and definition are scientific procedures, and he saw science as providing knowledge, but science also provides doubt and variability that are excluded with the concept of certainty. Garver then connects ‘forms of life’ with this certainty through Wittgenstein’s image of the ‘hinges on which our ordinary thought swings back and forth’.\(^\text{73}\) This certainty, which implies not ‘absence of dubitability’ but absence of doubt, that exists in a form of life is something ‘animal’ and it is beyond being justified or unjustified.\(^\text{74}\)

Garver stresses that Wittgenstein’s ‘forms of life’ are not given to us by abstraction or science. Forms of life are just found in the natural world as facts of natural history.\(^\text{75}\) Garver notes the importance of this finding in the example that there is no more explanation for logical necessity than that it is an aspect or component of our complicated form of life – logical necessity is just one of the rules of grammar.\(^\text{76}\) According to Wittgenstein, the differences between humans and dogs cannot be explained, they can only be observed, and those differences are just what are accepted as

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\(^\text{69}\) Ibid 247.
\(^\text{70}\) *Philosophical Investigations*, above n 22, 85 [194].
\(^\text{71}\) Ibid 87 [199].
\(^\text{72}\) *This Complicated Form of Life*, above n 5, 255-6.
\(^\text{73}\) On Certainty, above n 42, 44 [343].
\(^\text{74}\) *This Complicated Form of Life*, above n 5, 255-6.
\(^\text{75}\) Ibid.
\(^\text{76}\) Ibid. Wittgenstein is noted for the discussion that followed on the possibility of ‘rule-following’ in the use of language. For a critical comment on why this is not possible, see, eg, Crispin Wright, ‘Rule-Following Without Reasons: Wittgenstein’s Quietism and the Constitutive Question’ (2007) XX(4) Ratio (new series) 481-502. It is not my intention to enter the debate which revolves, in any event, on the need to an explanation of the rule-following phenomenon, something Wittgenstein conceded was not forthcoming.
part of the common behaviour of humankind. These are non-controversial observations of fact that go unremarked because they are right before our eyes.\textsuperscript{77}

Garver’s conclusion is that ‘it is beyond dispute that Wittgenstein is neither a mentalist nor a behaviourist.’\textsuperscript{78} The human life is determined by its capacity to use language, and the status of that fact is given by reference to the common behaviour of humankind that is to our form of life.\textsuperscript{79}

Garver observes that Wittgenstein was not alone in drawing the conclusion that our ‘form of life is determined by its capacity to use language’ and that these ‘uses of language which structure our lives can only be accepted, not justified or explained’\textsuperscript{80} He also observes that others, including ‘Ibn Khaldun, Condillac, Peirce, Dewey’, also came to a similar conclusion.\textsuperscript{81} However, it is the link to Kant that Garver finds most compelling in Wittgenstein’s work and I return to that point here.

\section*{C Wittgenstein, Kant and the Critical Connection}

\subsection*{1 Kant’s Critical Philosophy}

While Garver suggests a long list of factors that provide linkages between the philosophy of Wittgenstein and Kant,\textsuperscript{82} not all of these are relevant to his argument. What he did find of significance is that Kant and Wittgenstein had the same ‘critical’ philosophical purpose: how to find critical principles or standards which show how something (knowledge, speech, meaning, etc.) is possible at all?\textsuperscript{83} While Leiter might be correct in stating that there is no obvious division between analytic and critical philosophy at the turn of the century, and that critical philosophy has nine distinct overlapping traditions,\textsuperscript{84} it seems fair to say that this may not have been the case in the middle of the twentieth century. If there is no such division in the twenty-first century, then in part that is likely due to the work of philosophers, such as Wittgenstein and Dworkin, who at the time they began writing appeared intentionally, among other things, to cross the boundary of both forms of philosophy.

\begin{flushright}
\textsuperscript{77} \textit{This Complicated Form of Life}, above n 5, 258-264. Science, of course, can offer theories as to why particular animals do particular things as part of their survival mechanisms (possibilities).
\textsuperscript{78} Ibid 265.
\textsuperscript{79} Ibid.
\textsuperscript{80} Ibid.
\textsuperscript{81} Ibid.
\textsuperscript{82} Ibid 17.
\textsuperscript{83} Ibid 8.
\end{flushright}
Garver accepts that all philosophy is to some extent critical and that for Western philosophy the practice extends back to Socrates, Plato and Aristotle.\textsuperscript{85} However, for Kant and Hume at the time they were writing, the practices of ‘speculative metaphysics’ were out of hand, while at the same time, criticism itself had become problematic and as dogmatic as the speculative theory itself. Garver explains the goal of critical philosophy as envisaged by Kant as being to find critical standards for philosophical criticism that would solve those problems, so that criticism could be critical of itself.\textsuperscript{86} For that to occur, those critical standards would need to be presupposed by anything in the domain.

Garver identifies four major problems facing the philosopher who tries to identify such critical standards. Firstly, a critical standard can also be criticised as a standard, then that criticism can also be criticised and so on, leading to an endless regress. This problem might be avoided by finding a starting point which all sides to an issue can accept. However, this solution leads to a further problem because asserting standards that are not, or cannot, be accepted as given, or that are themselves ‘speculative’ or ‘other-wordly’, simply lead to the development of further dogma. It was the two dogmas of empiricism and rationalism that Kant was keen to avoid. At the same time, a solution would hardly want to reject existing standards that have proven to be of critical value, such as those standards set by empiricism and rationalism. Therefore, another aspect for adopting critical standards is to find standards that are relevant to the domain they certify.\textsuperscript{87} To solve these problems, Garver argues that these critical principles, or standards, need to be self-validating or ‘self-referential’\textsuperscript{88}

Kant’s various self-referential starting points had by the middle of the twentieth century come under significant attack and had largely proven unsatisfactory. These starting points included his analytic/synthetic distinction and his taking for granted Aristotelian logic, Euclidean geometry and Newtonian physics. But according Garver the most problematic starting point was that Kant took the ‘rather plebeian’ assumption that there are external objects.\textsuperscript{89}

Garver argues that Wittgenstein’s intention was similar to that of Kant: to find self-referential standards of philosophical criticism and that Wittgenstein made two separate attempts to do so: the first represented in his early work, the \textit{Tractatus}, and the second in his later work, the \textit{Philosophical

\textsuperscript{85} This Complicated Form of Life, above n 5, 3. 
\textsuperscript{86} Ibid 5. 
\textsuperscript{87} Ibid 1-9, 230. 
\textsuperscript{88} Ibid 6, 231. 
\textsuperscript{89} Ibid 9. 

161
Investigations. The point Garver is making in relation to Wittgenstein’s choice of ‘grammar’ in the *Philosophical Investigations*, is that unlike the ‘logic’ solution of the *Tractatus* – which he, himself, concluded was nonsense, ‘grammar’ is self-referential in this sense required by Kant.\textsuperscript{90} Wittgenstein not only shows how sentences are possible, he shows in the very process of doing so, how his own inquiries and revelations are possible and free from the scrutiny and skepticism of science.\textsuperscript{91}

2 **Naturalism and the Transcendental\textsuperscript{92}**

At this point, I want to return to Garver’s third point about Wittgenstein’s use of the concept of ‘grammar’, in that it not only provided him with a link between semantics and metaphysics, but that it also offered a kind of ‘Kantian transcendental’.\textsuperscript{93}

Wittgenstein would not have used either the term ‘naturalism’ or ‘transcendental’ because these are philosophical concepts that do not relate to the ordinary language or activities of humans or what is real about the natural world. As philosophical terms, Wittgenstein would have thought them to be ‘hopelessly confused’.\textsuperscript{94} Garver, however, suggests that both terms are bound to epistemological assumptions, and it is difficult to separate their specifically metaphysical importance, although that separation must be tackled to see the importance of Wittgenstein’s challenge. It is part of Garver’s thesis that Wittgenstein was not interested in epistemology, but rather that he was concerned with overcoming the hegemony that epistemology had over metaphysics for the last 300 years.\textsuperscript{95} Because of this claim, Garver needed to separate the metaphysical and epistemological components of Kant’s work.

Like Kant Wittgenstein appears to have taken the existence of an external world for granted:

> It is not *how* things are in the world that is mystical, but *that* it exists.\textsuperscript{96}

Garver argues that the very idea of critical philosophy requires this assumption, but unlike Kant, Wittgenstein never tries to prove it.\textsuperscript{97}

\textsuperscript{90} Ibid, see especially ch 1.
\textsuperscript{91} Ibid 271.
\textsuperscript{92} Garver uses this word to describe a characteristic of Wittgenstein’s metaphysical naturalism perhaps to distinguish it from Kant’s transcendental idealism.
\textsuperscript{93} Above 155.
\textsuperscript{94} *This Complicated Form of Life*, above n 5, 270.
\textsuperscript{95} Ibid 84.
\textsuperscript{96} *Tractatus*, above n 18, 73 [6.44].
\textsuperscript{97} *This Complicated Form of Life*, above n 5, 11.
The concept of ‘naturalism’ itself dates back as far as Aristotle and there have been many naturalistic approaches to philosophy since then. It was probably not until the first half of the 20th century, however, that American philosophy made claims about naturalism that inextricably linked its metaphysical idea that all that is real is part of the natural world with the epistemological doctrine that ‘every question about life or the world, or even about their meaning is amenable to scientific inquiry if it is meaningful at all, and that any meaningful statement must in principle be scientifically certifiable.’ There is no doubt that Wittgenstein’s naturalism cannot be situated within a strict, reductionist, or scientistic statement of naturalism that includes that epistemological assumption.

Garver takes it as critically important to Wittgenstein’s work that he viewed the world as the totality of facts, not of things, and the substance of the world as determining the ‘possibility’ rather than the ‘fact’ and that these concepts ‘world’ and ‘substance’ belong to entirely different categories. From this concept of differing ‘categories’, according to Garver, it was Wittgenstein’s intention to exclude epistemological claims, including those of science, and he provides three major arguments to this effect. The first was to link Wittgenstein’s ‘uses of language or language-games’ to Aristotle’s attempts at categories. The point is that Wittgenstein substitutes ‘language-games’, which are countless, for Aristotle’s limited and specifiable categories. The term ‘language-game’, Wittgenstein says, is ‘meant to bring into prominence the fact that speaking a language is part of an activity, or of a form of life.’

As we have already seen, Wittgenstein’s emphasis is practical, and directed to doing, rather than thinking or intending. In his later work, Wittgenstein refers to grammar as the description of these language-games, or of the rules implicit in them. The concept of grammar in turn lead him to metaphysics:

\[\text{Essence is expressed by grammar.}\]

and

\[\text{Grammar tells what kind of object anything is. (Theology as grammar)}\]

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98 Ibid 270.
99 Garver also argues that Wittgenstein ought not be identified with ‘logical atomism’. Ibid 77.
100 Ibid 12.
101 61-68. I have not included Garver’s arguments relating to this aspect, but I mention them for completion only.
102 \textit{Philosophical Investigations}, above n 22, 15 [23].
103 \textit{This Complicated Form of Life}, above n 5, 69.
104 Ibid.
105 \textit{Philosophical Investigations}, above n 22, 123 [371].
106 Ibid [373].
Garver suggests that categories are *transcendental* requirements upon the objects of our knowledge, whether those objects are psychological or material. Nothing can ‘just exist’ without falling under a category.\(^{107}\) Language-games, then, are Wittgenstein’s categories, and they are part of what it is to be a human being, they are inescapable, they cannot be justified or unjustified, and therefore they go beyond science.\(^{108}\)

Garver’s second and more important argument is taken from the distinction he claims Wittgenstein has drawn between ‘natural history’ and ‘natural science’.\(^{109}\) What is important here is that Wittgenstein drew a distinction between what we are doing in philosophy, and what we are doing in science. Initially, he described science in terms of ‘natural science’. In the *Philosophical Investigations* he associates philosophy with *grammar* rather than *logic*, and with the use of natural history to describe uses of language.\(^{110}\) Natural history takes a position of observation alone, description without explanation, of humans and their activities. The observation of humans then as part of ‘natural history’ suggests that for Wittgenstein language, and the grammar that is inextricably linked to language-use, are just what are presupposed by science.\(^{111}\) Scientific inquiry then came to be about empirical possibility or necessity, about theory and explanation.\(^{112}\) Science is also about doubt, evidence, confirmation, falsification and experimentation. Science is about *knowledge* and philosophy is about *certainty*.\(^{113}\)

Of all our concepts, ‘knowledge’, and therefore the ‘language-game of science’ has its own quite complex and changing grammar.\(^{114}\) For Wittgenstein nothing can be ‘known’ without the ‘knowing’ language-game and its associated grammar. That grammar might well reflect, at least for some, the scientific dogma of epistemological naturalism, but Wittgenstein’s point is that human language goes well beyond the limitations of science and language, not science, is essential to the human form of life. Garver’s claim is that insofar as science presupposes language there is something transcendental about it.

Further, Garver points out that to imagine a language, a person needs to know how it is employed. This implies not only imagining the language but how it is integral to certain activities and the lives

\(^{107}\) *This Complicated Form of Life*, above n 5, 72.
\(^{108}\) Ibid 72, 279.
\(^{109}\) See Garver’s argument on Wittgenstein’s distinction between ‘natural history’ and ‘natural science’, above 150-152.
\(^{110}\) Ibid.
\(^{111}\) Ibid.
\(^{112}\) *This Complicated Form of Life*, above n 5, 156.
\(^{113}\) Ibid 156-7.
\(^{114}\) Ibid.
of the speakers, to their form of life. These activities lack a precise criterion or definition, but the characteristic of common behaviour is the reference system by which we can interpret an unknown language. Grammar and forms of life, therefore, are transcendental in the sense that they are requirements of our understanding anything at all. These features do not belong to an independent reality, but emerge from our acting in and on the world around us rather than merely from observation of it.

Garver’s third argument is that if language-games and their associated grammar, rather than scientific knowledge, are needed to begin any inquiry, then language-games and grammar are what must be taken as ‘given’, language itself provides the self-referential criteria for that inquiry. This is consistent with Wittgenstein’s claim that the world is the ‘totality of facts’. Humans can and do respond to those facts in different ways that involve methods besides those of science. What is important here is that language provides humans with possibilities without the need for the confirmation or skepticism of science.

According to Garver what is ‘transcendental’ about Wittgenstein’s metaphysical naturalism is that its derivation from ‘natural history’ rather than ‘natural science’ immediately gives it a sense that it transcends the claims of science, without being non-natural or supernatural. Unlike Kant, Wittgenstein is not making any epistemological claim that there are any a priori general or universal principles that must be taken as given for epistemological inquiry. Garver’s claim is that Wittgenstein is very much opposed to generalization or explanation because these fall within, and are relevant to, the domain of science.

3 The Transcendental and Critical Philosophy

Garver’s argument about critical philosophy is that one of its aims is to overcome philosophical controversies by renouncing critical criteria that cannot be shown to have been justified in favour of criteria that do not need to be justified, that can be taken as given. The problem has been how to do this without those criteria being self-certifying and so being viciously circular. Garver argues that the idea of critical philosophy is to take something wholly non-philosophical but distinctively human, such as factual judgments, moral judgments, everyday language, etc and derive the critical criterion from a description of how these things are possible. His claim is that while Wittgenstein

\[115\] Ibid 281.
\[116\] Ibid.
\[117\] Ibid.
\[118\] Ibid.
\[119\] Ibid.
\[120\] Ibid 271-3.
failed to find this criterion in the logic of the *Tractatus*, he succeeded in his later work and specifically in the *Philosophical Investigations*.

Garver’s argument has been that what Wittgenstein takes for granted as ‘distinctively human’ is that the human form of life *speaks*. It is essential to the human form of life to learn a language and that involves mastering ‘countless’ language-games and the constitutive rules that make those language-games possible. The making of grammatical remarks is *universal* in that sense. What is transcendental, in Garver’s understanding of Wittgenstein’s argument, is not something supernatural or other-worldly, but something that lies within the natural world, rather than what is merely in the world and amenable to science, that is in the sense that it is not amenable to experiential knowledge, scientific proof, experimental refutation, empirical justification, and so on.

In this way, Garver makes his linkage between Wittgenstein and Kant in that they both seek to restrict ‘knowledge’ to make room in the case of Kant for belief, and in the case of Wittgenstein for certainty. For Wittgenstein ‘knowledge’ and ‘certainty’ belong to different ‘categories’,¹²¹ that is to different language-games. Wittgenstein’s grammar and forms of life are analogues of Kant’s objects of transcendental knowledge, that is space, time and causality.¹²²

### D Summary

Garver’s claim is that Wittgenstein offers a theory that begins with the world being comprised of facts, not of objects; draws a critical distinction between doing ‘science’ and doing ‘philosophy’; and utilises the concepts of language-use combined with its grammar, natural history and the complicated form of human life as a rival to Kant’s critical philosophy. However, he argues that Wittgenstein wanted to avoid epistemological explanations, and offers these concepts as a form of metaphysical naturalism in that Wittgenstein’s claim is that language-use is transcendental in the sense of lying beyond scientific challenge, and beyond being justified or unjustified. Natural history and the grammar that accompanies language-use are just what needs to be taken as ‘given’, as beyond doubt. Science may provide explanations, for example as to why different animals do different things, but it cannot override the fact of our observations: that cobblestones and oak planks are not really solid.¹²³ This is because the certainties of grammar and natural history do not clash with ‘the defeasible hypotheses of science’.¹²⁴ Indeed, science presupposes all of these concepts.

¹²¹ *On Certainty*, above n 42, 39 [308].
¹²² *This Complicated Form of Life*, above n 5, 274.
¹²³ Ibid 280.
¹²⁴ Ibid.
Whatever, external explanation science offers, it does not overrule observations about our language use. In the sense that science presupposes all of these concepts, it is connected not only with the idea of what is ‘given’ but also with what is ‘internal’ to humanity: with what it is that humans do. Human lives are filled with meanings, possibilities and necessities that go beyond contingent facts and cannot possibly be inferred from them. In a connection with American pragmatism, Garver argues that these features of Wittgenstein’s naturalism emerge from the way humans act in and on the world, rather than from merely observing it.

In an important connection with Kant’s own aims, Garver has argued that Wittgenstein’s grammar and forms of life are self-referential in that they ‘constitute a requirement for understanding in general, which is at the same time also a requirement for themselves’. This self-reference seems to come from the certainty that humans obtain from their form of life: not an absence of dubitability, but a contentment, ‘comfortable certainty’, to accept many things. One of the things that humans accept is certainty about the language they are speaking. Grammar tells us what kind of an object something is, but it also tells us what grammar is, making grammatical remarks is among the countless language-games that make up language itself.

Finally, Garver makes the point that Wittgenstein made no attempt to generalize from his observations. He never provided definitions. He was interested in the possibilities that individual cases disclose, not in drawing general principles from those observations. Wittgenstein was not pointing to differences between human languages, or groups of humans, but to what was common among them. The differences in language that he observes are those that occur within human activities and uses of language, they are not cultural or divisive between humans, but about what it is that links or unites the human form of life.

Garver argues that it is not just Wittgenstein’s text, but his whole approach to philosophy that is transcendental. He argues that it is a central conviction of Wittgenstein that meaning requires an entirely different language-game to that of science and it is the ‘meaning’ game that is the province of philosophy. He emphasises that the move that Wittgenstein made from ‘natural science’ in his

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125 Ibid.
126 Ibid.
127 Ibid 282.
128 Ibid.
129 Ibid 283.
130 Ibid.
131 Ibid.
early work, to ‘natural history’ in his later work, distinguishes Wittgenstein’s later philosophy from his own early work, from analytic philosophy in general, from Kant, and from standard forms of American naturalism as represented by Dewey and Quine.132

E Linking Wittgenstein’s Naturalism and Dworkin

1 Some General Observations

Garver lists Dworkin as being among the American philosophers who were familiar with Wittgenstein’s work, but on whom Wittgenstein had little impact.133 I think that this is probably unfair as a summary of Wittgenstein’s overall influence on Dworkin. To the extent that it has been suggested that Dworkin is a ‘quietist’, Wittgenstein may clearly have influenced him. Those philosophers who believe, particularly from the Tractatus, that Wittgenstein was advocating a form of ‘quietism’ might well consider that influence.134 That we do not find a discussion of Garver’s suggestion about Wittgenstein’s metaphysics is not inconsistent with Dworkin having been significantly influenced by Wittgenstein. Further, if we observe Garver’s summary of Wittgenstein’s approach to philosophy as being entirely different to that of science and as being a ‘meaning game’, it is difficult to avoid the suggestion that they have a certain likeness in their views of philosophy. Dworkin appears to find legal, moral and political philosophy just what Wittgenstein states of philosophy in general: a meaning game.135

If we were looking for references to Wittgenstein in Dworkin’s work, support would be difficult to find particularly in his early work, but then, as I have already noted, there is nothing unusual in this. There are however, acknowledgements of Wittgenstein dotted throughout his work.136 Part of this apparent lack of ‘impact’ is due to the fact that Dworkin remained true to Kant’s interest in epistemology, and what makes certain propositions, that is claims of fact, true. Like Wittgenstein, he rejected the idea that analytic truths apply for all of our concepts and like Wittgenstein, Dworkin rejected any ‘speculative metaphysics’ that attempted to give values ‘properties’ or turn them into

133 Ibid 73.
134 Indeed this is the thrust of the thesis by David Finklestein. See David M Finklestein, Wittgensteinian Quietism (PhD Dissertation, University of Pittsburg, 2000).
135 Apologies to Dworkin here. Dworkin disliked the use of the term ‘language-game’ although he acknowledged and used it on occasion. While he never quite says why (that I can find), I suspect that this is because in the context of Dworkin’s writing, ‘meaning’ is no ‘game’, and secondly because disagreed with how it was being used. For an example of the latter, see Justice for Hedgehogs, above n 8, 59-63. Dworkin dismisses Richard Rorty’s attempt at putting metaphysics into a different language-game from morality. See, eg, Richard Rorty, ‘Naturalism and Quietism’, in Mario de Caro and David Macarthur (eds) Naturalism and Normativity (Columbia University Press, 2010).
136 Dworkin refers to Wittgenstein on six occasions in Justice for Hedgehogs, above n 8, at 37, 60, 124, 160, 436, n 22, 450 n 1; four in Justice in Robes, above n 7, at 36, 58, 197, 286 n 10; and three in Law’s Empire (Belknap Press, 1986) (‘Law’s Empire’) at 63, 69-70, 315.
‘entities’ of some sort. For Dworkin there simply are no metaphysical arguments about ‘value concepts’ that can remove them from the language-game of making propositions of moral or ethical fact. Any such arguments are simply a more abstract way of providing a concrete answer to a value-laden proposition. Dworkin rejected the idea that metaphysics could add anything (other than emphasis) to the problems facing the legal, or moral or ethical philosopher and the population they are trying to assist.

Dworkin did not reject the possibility that someone could stand outside human activity and make observations about it, such as an anthropologist, or psychologist, might do. But he saw very limited assistance being given by this process to those needing to make legal, moral and ethical decisions. If moral philosophers, as opposed to natural scientists, are to be of assistance in these areas, then Dworkin argued they must engage in the process – the business of making legal, or moral or ethical propositions. Any worthwhile contribution, Dworkin thought, would require the onlooker to be ‘internal’ to the process and the language used to describe it. Once they are internal to the way of life and the language under observation, there is simply no way of avoiding engagement with it. It is interesting that in Law’s Empire, Dworkin uses Wittgenstein to explain this ‘internal’ requirement. Referring to the citizens of Courtesy, he says:

They must understand the world in sufficiently similar ways and have interests and convictions sufficiently similar to recognize the sense in each other’s claims, to treat these as claims rather than just noises. That means not just using the same dictionary, but sharing what Wittgenstein called a form of life sufficiently concrete so that the one can recognize sense and purpose in what the other says and does.

The existence or otherwise of moral entities to support those judgments becomes irrelevant to the human process being observed or assisted. As a result, it is quite true that Dworkin’s metaphysical stance, if he can be said to have one at all, would be a form of ‘internal realism’ that may not, at least not on the face of it, immediately resonate with Wittgenstein’s ‘natural history’, or ‘grammar’. However, there are evident and meaningful linkages, extending beyond their mutual interest in language and meaning, between the two philosophers.

It does not follow from Dworkin’s attitude to metaphysics that Wittgenstein’s attempt at a metaphysical naturalism, as proposed by Garver, does not integrate with Dworkin’s approach, nor that Wittgenstein’s naturalism is not, potentially, helpful as a way of envisaging Dworkin’s own metaphysics. Dworkin’s observation about ‘external observation’ is not so much that it adds nothing to his case, as that what it does add is not helpful. However, Dworkin does look for what is

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137 Law’s Empire, above n 136, 68-76.
138 Ibid 63.
139 See also, above ch 5.
held in common about a concept by those using it: he looks for a common ground of understanding as his starting point. Therefore, it might be argued that what Wittgenstein’s naturalism does is provide Dworkin with a naturalistic basis for his ‘starting point’, that is with what must be taken as ‘given’. Dworkin’s starting point is not with propositions, so much as with ‘interpretive concepts’. Wittgenstein arguably provides Dworkin with the metaphysical justification, and a naturalistic one at that, for this starting point. The concepts involved in doctrinal law, as with any moral or political human activity, simply are a form of ‘grammar’ of a particular language-game and a very complex one at that. There is no point, from Wittgenstein’s perspective in denying the occurrence of these concepts. The concepts may involve their own ‘grammar’, or be part of the grammar of human action. However, the meaning of interpretive concepts (and for Wittgenstein, perhaps, all concepts) will not be purely analytical.

If this is the case, then Dworkin’s epistemological naturalism, such as he seems to have claimed for his theory of adjudication as a form of ‘naturalism’, might be said to complement Wittgenstein’s metaphysical naturalism in a way that provides a full philosophical form of naturalism. Dworkin’s epistemological naturalism also leaves out the experimental aspect of science except insofar as it has already been shown by past practice and past judgments. Dworkin rejects the idea of ‘experimenting’ in a forward-looking context – that is, via some sort of consequentialist approach. While not rejecting the relevance of outcomes, he does not find these, by themselves, sufficient justification for a legal result. Past experience, must be considered in finding common ground.

The primary linkage, I believe, is that both philosophers saw the world from the perspective of the individual as being comprised of facts, rather than objects – facts determined, and determinable, by language alone. Both were ordinary language philosophers concerned to understand the meaning of language; and both thought that our ‘ordinary language’ should suffice to make the points we need to make in philosophy. Both accepted that ‘philosophical language’, such as ‘quietism’, rarely clarified issues for human activities and often added unnecessarily to their complexity, while at the same time not adding substance to the problem.

Wittgenstein appears to avoid discussions of morality as part of what could not be said, however he saw his Tractatus as being important in that respect, and would certainly have seen moral discussions as a category of language-games. Garver sees this as part of the point of Wittgenstein’s selection of the ‘world of fact’ rather than ‘objects’. He says:

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140 See above n 9.
141 This Complicated Form of Life, above n 5, 76-7.
With respect to the dichotomies that dominate the metaphysics of the *Tractatus* and Wittgenstein’s early work in general, the first thing to say is that there is only one reality, the reality of the factual world. Set against this reality are things vital to our human efforts to come to terms with reality: meanings …, sense …, logic and logical forms, significance, good and evil, will, happiness, beauty, and so on. These things are transcendental, since they do not belong to the world of fact.\textsuperscript{142}

They are a part of the activity of philosophy.\textsuperscript{143}

Dworkin certainly perfected his ordinary language approach over time. Wittgenstein on the other hand, while using ordinary language, and being concerned only with the observations of language-games without explanation, used an almost artificial format, that continues in the *Philosophical Investigations* and again, even more so, in *On Certainty*. While Dworkin is always engaged in critical analysis with his audience, Wittgenstein uses a form of artificial conversation (a conversation that often seems to be with himself). The difference between the philosophers in their understanding of what is ‘ordinary’ in this sense seems to confirm that they were not engaged in the same task: Wittgenstein was trying to observe language-games, while Dworkin was fully engaged in them. Wittgenstein cannot discuss moral truths, about which he must remain silent, because to do so he must engage in them and ceases to be merely an observer. To that extent, Wittgenstein provides only a ‘starting point ‘ or ‘given’; he offers little to human conversation itself other than the nature of its contingency.

Both philosophers rejected the goal of analytic philosophy to find a definition for all our concepts that would clarify their use in terms of some ideal language. Dworkin’s whole thesis is based on the assumption that some of our concepts are contested by their very nature as values. Whatever the goal of science might be, this cannot be extended to the final definition of concepts such as equality, freedom, justice and so on. Both Dworkin and Wittgenstein accept the very contingent nature of our language and the changing nature of its grammar (or rules of use) over time. In place of definition, Dworkin settles on a form of construction of value concepts, accepting Hume’s argument that one of the grammatical rules of logic associated with value concepts, is that their justification must involve other value concepts.

Another important point of linkage between Wittgenstein and Dworkin has to be in the relevance to both of them of human activity. Garver repeatedly refers to Wittgenstein’s insistence on the importance of the ‘deed’, quoting Wittgenstein’s use of a line from Goethe’s *Faust: Im Anfang wir

\textsuperscript{142} Ibid 101.
die Tat (in the beginning was the deed).\textsuperscript{144} Both philosophers, although from different continents, bring a strong, pragmatic, approach to their philosophy, and combine it with observation. Wittgenstein may have thought the function of philosophy was to eliminate the confusions brought about by philosophical language and Dworkin would have agreed with this. However, Dworkin never tried to confine himself to Wittgenstein’s observer approach to law or morality. This must be the single most difficult aspect to reconcile between the two philosophers.

Garver’s argument appears to be that Wittgenstein was not a skeptic and advocated instead a version of naturalism. This position is not without its opponents.\textsuperscript{145} Dworkin’s position on skepticism is quite clear. Consistently with Wittgenstein’s observations about language-games and their grammar, he did not think that a person can similarly stand ‘outside’ morality and comment on it, without taking an ‘internal’ stand.\textsuperscript{146} Dworkin would have had no cause to criticize Wittgenstein’s position as that of an external skeptic who claimed to stand outside and above morality. Wittgenstein is making the same point as Dworkin. Wittgenstein did not see himself, and I think nor would Dworkin have, as being equivalent to the anthropologist because he drew no conclusions from his observations.

If Wittgenstein’s claim that we can imagine a primitive language-game like that of the builders or woodworkers was correct then this might lend weight to an argument that humans could avoid, like Wittgenstein, making any claim from an internal perspective about law, morality or politics. But Garver rejects the idea that we can imagine such a limited kind of language.\textsuperscript{147} Garver’s argument is that it is mastery of a whole language that is essential to the human form of life. A whole language would, in accordance with Dworkin’s argument about the impossibility of taking a totally external metaphysical stance, include all of the grammar associated with normativity. We simply cannot eradicate normative concepts. They exist within language and its grammar and cannot be eradicated without offending against that language and grammar.

Dworkin’s position was that we cannot take an external metaphysical position on and stand on the outside of all our linguistic problems and look on as an impartial observer, without hypotheses and explanations, because the position we take involves an internal attitude. If Wittgenstein achieves a external second-order impartial position, he does so only by using an entirely artificial language construction: a construction that does not deny the dubitability of language, but does deny doubt as

\textsuperscript{144} See above 154, n 54.
\textsuperscript{145} Stern, above n 143, 40-55.
\textsuperscript{146} See above ch 4.
\textsuperscript{147} This Complicated Form of Life, above n 5, 243, 253.
to the existence of language-games and their grammar. As such, it seems that the logical (grammatical) conclusion to Wittgenstein’s naturalism is that he was neither an external, nor a global internal skeptic. Some things just have to be taken for granted. Facts making up the world must include all the facts of the world. They include normative claims of fact. From Dworkin’s perspective, Wittgenstein would have had to accede to this point. A point that is not, for Wittgenstein about ‘knowledge’, but rather about ‘certainty’ – what we just have to take as ‘given’. If Dworkin and Garver are correct in their own hypotheses, then Wittgenstein’s naturalism includes the language-games of value and morality, and where human activity provides for it, of law, and this will include the grammar that accompanies that language, including its logic.

The two philosophers appear to have taken a totally different approach to ‘theory’. In accordance with his metaphysical approach, Wittgenstein eschewed ‘speculative’ theory and attempted to avoid hypotheses and explanation because such language is part of the language-game associated with ‘knowledge’ and knowledge in turn is connected with science. Wittgenstein was interested in ‘certainty’: what it is the human form of life must take as ‘given’. Certainty has to do with belief. Both Wittgenstein and Kant were, in a sense, denying knowledge to make room for belief.

Dworkin, I believe, is doing something similar, however, he was concerned with the language of ‘knowledge’ as a way of expressing belief. We make statements and these appear to be about what we know and we believe what we take to be ‘facts’. But we also believe in the findings of science, that is ‘scientific’ facts. Instead, Dworkin, using a similar distinction, where Wittgenstein divided the world into a world of fact and a world of substance, Dworkin divides our propositions, our statements of fact, into more than one kind. On the one hand, we have statements (and their knowledge and grammar) that relate to ‘natural kind’ concepts, and on the other, we have statements that belong to interpretive concepts (with their knowledge and grammar). It is clear that for Dworkin, although he does not put it in these terms, that he holds these two forms of propositions as belonging to two different forms of ‘language-games’ or human activities, and as a consequence the respective facts require different forms of evidence – or, we might say have different rules of ‘grammar’.148 This seems to be just what Wittgenstein is asserting by suggesting that we would expect the two language-games of ‘certainty’ and ‘knowledge’ to have different rules of grammar – rules that would suggest different types of justification to the question ‘how do you know’.

148 Wittgenstein excluded ‘evidence’ from the world of fact, because evidence is related to substance and science. See above 154 n 54.
Dworkin, being always engaged in first-order conversation rather than metaphysical observation, believed that all judgments require ‘theory’, even if we are not aware we are applying it. Indeed, his understanding of philosophy might be characterised as ‘philosophy as theory’. But Dworkin’s idea of philosophy is a practical one: it has both a constructive as well as a critical or negative function. However, its constructive function is limited to, and limited by, assisting humans in what they do through the use of ordinary language. Wittgenstein’s work lacks a constitutive theoretical side to it.

The idea of language being connected with human activity, and purpose, is an important one that Dworkin identifies as being the same for scientific activities – scientists do not count grains of sand on the beach because there is no point to doing so: there is nothing to be achieved by this. So philosophers should also be concerned with clarifying issues that will make a positive difference to humans. For Dworkin, theory is an inevitable activity of all human intention.

F Conclusion

To sum up, and return to the point made at the commencement of this chapter, what makes Wittgenstein and Dworkin most alike in their ‘naturalism’ is their common understanding that the world consists of just what is the case. Wittgenstein perhaps puts this idea best:

The world is all that is the case.

The world is the totality of facts, not of things.149

This is a difficult concept to grasp. However, if we place Wittgenstein’s metaphysics together with Dworkin’s epistemology, we find two approaches that sit remarkably well with one-another. Any philosophical or scientific conversation assumes the human form of life and that form of life must be taken with its capacity to learn and master language with all of its countless possibilities, and the challenges that this achievement entails. We cannot ignore what is there, right before our eyes. Both would agree that challenge is presented in the context of human activities. Both seem to accept philosophy as providing either ‘therapy’ or at least ‘assistance’ with understanding humans with their language and its ‘grammar’.

Both Dworkin and Wittgenstein accept the limitations of philosophy as regards ‘objects’, that realm must be left for science. Where Dworkin must be distinguished from Wittgenstein, is that he believes that the realm of ‘value’ can be taken as ‘given’, as a legitimate, and inexorable language-game or human activity and that assistance in the realm of value can best be given only from within that realm itself. In Dworkin’s terms, we cannot reflect on what there is in the world to the

149 Tractatus, above n 18, [1-1.1].
exclusion of value and then express a proposition in terms of value. This is the very substance of
Dworkin’s theory of truth.
CHAPTER SEVEN

VII CONCLUSION

This thesis has three sections: the first contains an attempt to outline some traditional philosophical views within which Dworkin’s theories might be placed. The second section examines Dworkin’s theoretical work in three separate stages, and the third looks at Dworkin’s theory of truth in value as a form of metaphysical realism based on a theory concerning the work of Ludwig Wittgenstein.

A Section One

Influenced by the highly controversial, and often quite dismissive nature, of the academic responses to Dworkin’s work, I began this thesis by providing some theoretical background to Dworkin’s theories through a brief examination of the influential late enlightenment works of David Hume and Immanuel Kant. My intention was to place Dworkin within a sound, or legitimate, school of philosophical thought. I concluded that Dworkin’s work resonates with a Kantian philosophical approach, not only because of the immediate and acknowledged influence from John Rawls, but because Dworkin’s work uses themes from most aspects of Kant’s lengthy work. Although it is difficult, though not impossible to find references to Kant in Dworkin’s early work, he directly acknowledges Kant’s influence in the development of his ethical theory of responsibility, as well he might. Because acknowledgements of others’ contributions were not common in Dworkin’s early work, this is not an issue.

In spite of significant problems associated with Kant’s transcendental idealism, it is not difficult to find positive associations with Kant’s Critique of Pure Reason in Dworkin’s constructivism, and in particular in Dworkin’s signature character ‘Hercules’. Also, we find in Dworkin Kant’s acceptance of the positive possibilities for reason through a refocusing of philosophy from the metaphysics of the object to the epistemological issues of the conscious subject and the issues of freedom and autonomy associated with that shift in focus.

As a separate matter, Kant also established a particular place for practical reason that he developed in the Groundwork for the Metaphysic of Morals, and the Critique of Practical Reason into a deontological theory of ethical behaviour that we also find in Dworkin’s work. Dworkin prefers not to refer to practical reason. Instead, in common with other pragmatists, he looks to the practical nature of the purpose of the reasoning to which Kant referred. Perhaps, more controversially,
Dworkin initially attempted to turn Kant’s theory of obligation and responsibility into a theory of rights, although this linkage remained controversial, even for Kant’s supporters.¹

Of importance here, however, is not the success or otherwise of Dworkin’s views on rights or deontology, but his view, following Kant, that the law is inescapably political and, therefore, moral. The law is inescapably value-laden. The essence of his ‘rights as trumps’ approach lies in his identification that the law has a wider selection of ethical possibilities than utilitarianism, and that any moral approach, including utilitarianism, requires substantive moral argument by way of justification in any particular case. Whatever else the concept of law means for us, it cannot be a morality free zone.

But a more subtle connection with Kant’s later work, an example of which I have taken from the *Critique of Pure Judgment*, lies in the connections Kant made between aesthetics in the sense of appreciation of nature, art and literature and the purpose of practical reason. Together with Kant’s ideas of the conscious subject and the freedom and autonomy of individuals to determine their own outcomes, these themes were taken up by Continental philosophers through German Idealism, and then into twentieth century existentialism and phenomenology. I believe that Dworkin’s selection of ‘law as literature’ reflects, and is evidence of, these aesthetic issues of self-conscious human behaviour; as is the importance Dworkin places on responsibility and authenticity in his mature ethical theory in *Justice for Hedgehogs*. Further evidence of the influence of Kant’s later work might be found in Dworkin’s 2011 *Einstein Lectures* published posthumously in *Religion Without God*.² In those lectures Dworkin argues for constitutional recognition of a fundamental atheistic rival to theism that relies on commitment to an independent reality of value that flows from the splendour of the natural world around us.

I have argued that these various connections provide sufficient evidence for the strong Kantian and Continental pragmatic tone that informs the balance of the thesis. This is not to suppose that Hume did not influence Dworkin, and I return to this below. There seems to be little doubt that Hume’s influence can be seen in the connection I have made between Dworkin and Wittgenstein and in their understanding of the outcome of inquiry.

There is an eclectic element evident in Dworkin’s theoretical work. It is, in some ways, a necessary part of a critical approach not only to identify those arguments that provide problems to one’s own argument, but also to utilise arguments that contribute to one’s own theoretical network, albeit that they may have originated in what seem to be opposing positions. In chapter three, I began with a discussion of the school of analytic philosophy in which Dworkin appears to begin his writing and the development of the ordinary language idea of philosophy that he retains and perfects over time. Ordinary language philosophy belies its philosophical complexity. By removing the ‘bestiary of isms’ and other philosophical jargon that might direct a non-philosophical law student to an established, logical train of thought or argument, ordinary language enables the usage of multiple ideas from varied philosophical points of view to be brought together in what sometimes appears to be a hotchpotch of theories. Dworkin’s theory of truth, which I examine in chapter five, is just such an example of this tendency.

As a result, in spite of Kant’s dominant influence, Dworkin’s work is not without the influence of other philosophers. Leaving aside Hume’s heritage to empirical and analytic philosophy, three instances of Hume’s influence stand out and I have referred, in particular, to Hume’s methodological approach to knowledge in his requirements for reason to be both coherent and consistent. However, underlying this is Hume’s approach to belief as something passive, and the act of reflection itself as something equally passive. Beliefs might be something we just have forced on us, or given to us, by external influences so that we might ‘just see’ that some things are correct. But that does not suppose that this leaves us there, unable to reason deliberately towards better outcomes. These ideas are evident in Dworkin’s work and I think warrant more attention in relation to his theory of truth and his differentiation between explanation and justification. Thirdly, Hume also developed the concept of the ‘ideal’, as a matter of showing objective impartiality, that could be said to have led Adam Smith and others towards what is known as ideal observer theory of which Hercules might be seen to be an example. Here I can do no more than to note the apparent synthesis that lies behind Dworkin’s work and purpose and leave this connection for development beyond the limits of this thesis.

B Section Two

Like any lifetime of philosophical writing, it is difficult to determine the optimal way of examining Dworkin’s work as whole especially when many critiques of Dworkin tend to focus on individual conceptual points. Just as Kant’s did, Dworkin’s work divides into two distinct parts: firstly, his

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constructive legal and political theory; and secondly, the practical application of that theory to legal cases and political or moral issues, particularly those most relevant to the United States. Each of these two aspects of his work is accompanied by critical analysis of other theories or applications. In chapters two, three and four, I have attempted to examine Dworkin’s broader contribution to philosophy of which he clearly considers jurisprudence to be an integral part. At the same time his legal philosophy is also connected with his political and moral point of view. All these theories are part of one whole at some level of abstraction. I have interpreted Dworkin as favouring a broader approach to his theory that endeavours to see smaller theoretical issues within the broader philosophy into which they inevitably need to be integrated.

As a consequence, I have taken Dworkin’s jurisprudence, and philosophy, as exhibiting three stages of progress. The first stage undoubtedly has to be his original sortie into legal philosophy in the articles subsequently published in Taking Rights Seriously, and particularly its first four chapters. In this early work Dworkin found a prominent place among legal philosophers for his approach to ‘rights’ as ‘trumps’, his criticism of the popular legal philosophy of HLA Hart, and in spite of the clear influence of American Legal Realism in his work, on his insistent denial of the skeptical ‘no right answer’ thesis. The second stage of importance, I believe, is found in his specifically written book, Law’s Empire. It is there where we find Dworkin’s mature thesis of ‘law as integrity’ as a form of constructive interpretation and his revised characterisation of legal positivism as ‘conventionalism’. We also find a renewed focus on what appears to be an epistemological coherence theory, a clear association of legal interpretation with the arts, and a continued insistence on denial of the ‘no right answer’ thesis.

The third stage of his work, his theory of truth, was notable for a long time by the paucity of his writing explicitly on this topic. Contained primarily in one long and difficult article, ‘Objectivity and Truth: You’d Better Believe It’, his rejection of moral skepticism was clear but his response seemed to lack a positive (or at least an identifiable) theory of truth and to require something more. His views on the subject of truth in value are brought together again in his last major work, Justice for Hedgehogs, published in 2011. When this was published, his ‘plain fact’ view of truth had become the ‘ordinary person’s view’ of truth, where truth might be characterised, perhaps, as ‘truth as conviction’. He observed that this theory might seem to be a disappointment to some, and to some extent I think it is. What clarification of his theory of truth was provided in Justice for

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Hedgehogs was accompanied by a more detailed attack on skepticism, and a mature version of his original understanding of the right of each individual to equal concern and respect. The last was contained, as might be expected, in a full moral and ethical theory of responsibility for others coupled with a responsibility for self.

I began by dealing with the first stage of Dworkin’s work in chapter three, where I have provided some detail of Dworkin’s theory of ‘rights as trumps’. Rights, principles and policies have an emphasis here that they do not seem to have in his mature work, at least in the same form. His ‘rights’ claim established his jurisprudence, but in my view, does not adequately represent his mature view, although he maintains a connection, or correspondence, between ‘rights’ and ‘responsibilities’. Certainly, his attack on pragmatism continues as does his attack on legal positivism, although in Justice for Robes this latter appears to have become more personal as academic legal positivists split into two camps, one of which appears to take on a very Dworkinian aspect.6

The importance of this early work lies in Dworkin’s focus, through the idea of ‘rights as trumps’ on the inevitable and integral part that rights have within the legal system as matters of value within the law. Each legal case forms a part of a political system, and each expresses a political outcome. In hard cases, judges are responsible for finding the ‘right’ or ‘correct’ outcome. For Dworkin this question is a political, and therefore, a moral one in which judges are not limited to taking a utilitarian approach. Indeed, it is the point of this section that judges are neither free to follow their own view, nor bound by conventions of the past (although they must take them into account). According to Dworkin, judges must look at the underlying principles discernible within the law, not restricted just to directly analogous cases, but more widely to the law as a whole. They must determine what those principles are, and what weight should be given to them in light of current understanding and practice. For Dworkin, all of this should be guided by one particular principle that each citizen deserves equal concern and respect from the political establishment, but particularly from the legal one. Finally, political principles and political outcomes just are moral principles and moral outcomes. For Dworkin any successful argument will identify the political issues at stake, however abstract, and the relevant decisions will be supported by other moral argument, just as Hume has suggested it needs to be.

6 The interpretive theory of David O Brink, represents a part of that split with a decidedly Dworkian appearance, see David O Brink, ‘Legal Interpretation and Morality’ in Brian Leiter (ed) Objectivity in Law and Morals (Cambridge University Press, 2001).
Undoubtedly, Dworkin’s important philosophical contribution lies in his mature thesis, developed over many years, but detailed in *Law’s Empire*. Dworkin subsequently never moves far away from these ideas. In chapter four, I have taken a rather different approach to discussing Dworkin’s theory of ‘constructive interpretation’ as outlined in that volume. Using the models of John Rawls, and Onora O’Neill, I consider Dworkin’s mature theory as a form of Kantian constructivism. Following O’Neill’s criticisms of Rawls’s version, and her own outline of what a Kantian version of constructivism would need to look like, I conclude that Dworkin has established a version of constructivism that is, even more so than Rawls’s, deserving of the title ‘Kantian’. Dworkin’s theory is not only Kantian in its ethical approach, but also in its broader philosophical approach.

In spite of Dworkin meeting most of the challenges to Rawls’s work that O’Neill makes and the requirements that a theory would need to make it truly Kantian, one issue separates Dworkin from O’Neill, as it separates his work from so many others, and that is his denial that propositions of value, as a result of this methodology, are thereby indeterminate. This issue leads me to consider Dworkin’s theory of truth, if it is one, in chapter five. This third stage of Dworkin’s theoretical work is perhaps the most eclectic of all his theoretical work. While Dworkin’s use of ordinary language provides the law student or practitioner with a disarmingly easy read, *Justice for Hedgehogs*, with its lack of philosophical jargon, remains deeply philosophical and the lack of jargon that makes it easy to read also makes it extremely difficult to place Dworkin’s theory of truth among other philosophical theories.

The overriding question must be: does Dworkin provide a theory of truth as commonly philosophically conceived at all? The answer must be that if it is necessary for a theory of truth to offer a definition of what it is that any fact requires for it to be true – then it is not a theory of truth. Here the importance of Dworkin’s rejection of the relevance of metaphysics to value concepts, and the adoption of constructive interpretation in its place, shows its light, because ‘truth’ also becomes just such an interpretive concept with all that that entails. Metaphysics, as such, is not relevant to the question of what makes a proposition of value true – truth does not have properties that connect all true propositions. Truth is the goal of inquiry and an understanding of what truth requires concerning any particular value concept is a constructive characterisation that takes into account the corresponding conceptual family of values. In the case of ‘truth’ this will include the values of responsibility, authenticity, sincerity, reason and so on. The issue of truth becomes part of a theory of meaning – a matter of constructive interpretation.
Does it follow from Dworkin’s use of a theory of meaning, and the form of his arguments that he is a quietist, or a deflationist? His protestations would suggest that he rejected such an idea. However, these protestations need to be seen in the light of what it is to take a ‘quietist’ approach. There is a problem here. Once we discuss ‘quietism’, we are doing what it suggests we ought not do. We invite ourselves into needless speculative antinomies long associated with metaphysics. Perhaps Dworkin is one of the very few real quietists. What would it achieve to be a deflationist? The point of a deflationary approach is in its argument that certain inflations of an assertion or judgment, add nothing to the original judgment, and providing this exercise with a name does not add to what is really required – are the arguments that they add nothing sound, if not why not?

The point of a quietist approach is that it avoids the metaphysical question of whether ‘truth’ exists as a separate property, or entity, or not, because that is a pointless discussion – focusing, as it does, on talking about the existence of something that clearly does not exist. This is the very sort of speculative reason Kant sought to avoid. For Dworkin, there is no avoidance of the issue. Truth is a concept, not an entity. The concept of ‘truth’ is part of ordinary linguistic practice, and our active daily lives: as a matter of simple observation, we hold convictions and beliefs and believe them to be true independently of our believing them to be true, and this is the case with moral facts as with any other facts. We rely on those truths for our decisions, our actions and especially our judgments of the actions of others. Asking the question about whether moral truths exist does not detract from the need to provide answers to the question – what is it that we ought to do? Moreover, Dworkin’s faithful reliance on Hume’s principle establishes for him that those decisions cannot be argued without reliance on other moral argument. Somewhere in the logic, or in the conclusion, of a moral argument there will be lurking another moral principle. It is far better to acknowledge this and argue the point until we find we can go no further. A point we will find in our ordinary every day activities. There is no suggestion of any Pyrrhonian skepticism there.

Dworkin’s most important response to the moral skeptic is found in his arguments in opposition to all forms of skepticism, but in particular to external skepticism. His point is that metaphysical discussion of truth is pointless because one simply cannot get outside of morality to a second-order point of view from which to discuss it, and that is simply because ‘truth’ and ‘morality’ are not ‘morons’ to be discussed in that manner. Values do not represent moral particles. They cannot be observed in the manner of the scientist or the anthropologist, that is, from an external point of view. Further, any discussion that purports to take such a position is itself suggesting a solution to moral issues. When applied to a practical problem, the finding that there is ‘truth’ or is not ‘truth’ suggests a solution to concrete moral problems. This is the very point we found in Taking Rights
Seriously. You cannot discuss a legal theory without at the same time suggesting the conclusion to a hard case – following convention, making up your own mind, or finding the principles and working out the right answer from those principles in a constructive fashion. Perhaps there are other options, but as Dworkin reminds us, those options will need substantive argument, which will involve other moral arguments.

The most important issue that arises from Dworkin’s interpretive approach and his attitude to the metaphysical question of truth is that he insists that, notwithstanding there are no ‘morons’, the ‘no right answer’ thesis is wrong: put differently, he argues that there are categorical reasons why we should or should not do certain things. On the one hand he acknowledges that because people have different backgrounds, and because they reason differently giving different weights to different values, they will come up with different answers – as the various second-order discussions show. On the other hand, he insists that there can be one answer that is better than another in any situation. His argument is essentially that we may be uncertain until pushed to make a decision as to which ‘side’ has the better argument, but the alternative is not indeterminacy. To claim that there is no right answer to a particular question is itself a substantive argument and this is no less the case with morality than with any other domain.

There is a sense in which Dworkin presents as an ultimate skeptic. While he, like Wittgenstein, rejects Pyrrhonian skepticism – there is no way of just sitting on the fence because that is itself a decision – he never refutes the possibility of a total form of skepticism – that nothing is real, nothing has value. There are no arguments, he says, against such a form of skepticism, other than going on with everyday human practice and finding in it the need to make, or to not make, everyday decisions.

C Section Three

If the ‘truth’ of legal and moral propositions is possible, as Dworkin claims, and this is made possible by some form of ‘internal realism’, it remains to ask just what are the metaphysical implications of Dworkin’s claim. Can his views be rationalized as a form of naturalism? Just as it is a contradiction of Dworkin’s rejection of other philosophical ‘isms’, such as ‘constructivism’, so it seems equally as contrary to ask whether he was a ‘quietist’, or a ‘naturalist’.

In chapter two, I drew attention to some of the dichotomies seen in Hume’s work and, in particular, to the understanding of Hume’s theories as either being skeptical on the one hand, or a form of Scottish or epistemological naturalism on the other. I observed that HO Mounce is among those philosophers who saw Hume as not being able to distance himself completely from a form of
naturalism that is necessarily at odds with the empiricism and skepticism for which he is famous. I do not doubt that a similar case could be made for Dworkin’s theory of interpretation as a form of epistemological naturalism and this may have been what Dworkin was referring to when he suggested his theory might be seen as a form of naturalism.

We find an even livelier dichotomy in Wittgenstein’s work with the suggestion that he was a metaphysical ‘quietist’ on the one hand, or a metaphysical ‘naturalist’ on the other. Among interpretations of Wittgenstein, I found Newton Garver making a similar but I think more profound, as well as more difficult, claim that Wittgenstein could be read, instead of as either a quietist or as the ultimate skeptic, as having supported a form of metaphysical naturalism that relies on language as it is used. Moreover, this approach does not require the rejection or alteration of language-use as some pragmatists might have us do. There seemed to me to be something in the unity of Dworkin’s world view that provides a case that his work might also support some form of metaphysical naturalism, particularly as he does not start from, nor arguably ever evidence, a skeptical stance. However, it is the fact that Dworkin’s theory mirrors the work of other ‘would be’ skeptics that sets his work apart from other constructive theories.

In my final chapter, I ask whether Garver’s view that Wittgenstein’s work expressed a form of metaphysical naturalism might help us understand Dworkin in a similar naturalistic light – not as an epistemological naturalist, although I think that would be the easier task, but as a metaphysical naturalist. I examined briefly the stages of Garver’s argument: firstly, noting Wittgenstein’s distinction between ‘natural history’ and ‘natural science’; and secondly, moving from there to the development of Wittgenstein’s proposal of philosophy as grammar. By way of these arguments, Garver suggests that Wittgenstein actually laid out a theory of metaphysical naturalism that provides a better understanding of his work than does either quietism or skepticism. In drawing his conclusions, Garver draws on similarities between Wittgenstein and Kant and what appears to be a similar motive to confine ‘knowledge’ in order to make room for ‘faith’, or one might say conviction, belief or certainty.

I then attempted to set the major elements of Garver’s argument alongside Dworkin’s work. I found strong resemblances between Wittgenstein’s and Dworkin’s understanding of the human world, as a world of facts, or concepts, rather than objects, in the use of language as what defines humans as part of one particular, and complicated form of life within, and as a part of, the world in which they exist, and particularly in recognizing the ‘family resemblances’ between certain
concepts of that language as essential for our understanding of them. In Dworkin’s hands, constructive interpretation of interpretive concepts is all about ‘family resemblances’.

Their differing attitudes to philosophy distinguish the two philosophers. While identifying what is important about ‘internal’ certainty, Wittgenstein thought that philosophy was an activity that should be kept to observation alone, assuming, so it would seem, that he could differentiate the activity of philosophy from the activity of ‘natural science’. Garver characterises Wittgenstein’s approach to philosophy as ‘grammar’, but it seems more like ‘observation’. The result of that observation led Wittgenstein to the conclusion that language with its associated ‘grammar’ is distinctive of human life.

Dworkin accepts this as a valid conclusion for metaphysics, but not as a limitation on the role of the philosopher. For Dworkin you cannot take ‘theory’ out of ‘philosophy’, any more than you can take belief out of morality, and this would be even more so if philosophy was to be in any way ‘therapeutic’ as Wittgenstein intended. But what Wittgenstein’s observations suggest is that we cannot avoid language, and the respective ‘language-games’ that surely embrace the language-games of philosophy, and of morality. Dworkin’s arguments would suggest that he thought Wittgenstein misconceived the role, function and limitations of philosophy.

For Dworkin, in the world humans inhabit, morality is a particular language-game from which retreating to philosophy does not, and cannot, disengage humans. Wittgenstein tried to do this, but once he returned to the world he inhabited he could not, and did not, remain external to the realm of value. In doing so he would have become something ‘less than human’ and perhaps there are some who see Wittgenstein’s cryptic style in that light. Insofar as Wittgenstein intended the *Tractatus* to have an ethical impact, in Dworkin’s terms, he would have needed to offer ethical reasons as to why that should be so.

In different ways, both philosophers take language, and its ‘grammar’, or its ‘interpretation’ in Dworkin’s hands, as their starting point, as the self-referential standard for critical analysis. What Dworkin adds to Wittgenstein is that the language of value contributes to the moral character of our human activity, and both are inextricable, equally observable, and inexorable parts of this complicated form of human life that we have. Both need to be taken as given.
**VIII REFERENCE LIST**


----, *Language, Truth and Logic*, (Gollancz, 1936)


Dewey, John, ‘Logical Method and Law’ (1924) 10 *Cornell Law Quarterly* 17-27


Dworkin, Ronald, *A Bill of Rights for Britain* (Chatto & Windus, 1990)
-----, A Matter of Principle (Oxford University Press, 1985)
-----, ‘Internal Realism’ (Speech delivered at The Program in Law, Philosophy & Social Theory) New York University School of Law, 6 September 2001
-----, Justice for Hedgehogs, (Belknap Press, 2011)
-----, Justice in Robes (Belknap Press, 2006)
-----, Law’s Empire (Belknap Press, 1986)
-----, Life’s Dominion (Vintage Books, 1994)
-----, Religion Without God, (Harvard University Press, 2013)
-----, Taking Rights Seriously (Harvard, 1977/78)
Ellis, Brian, ‘Internal Realism’ (1988) 76(3) Synthese 409-434
Ewing, AC, A Short Commentary on Kant’s Critique of Pure Reason, (University of Chicago Press, 1967)
Finnis, John, Natural Law and Natural Rights (Clarendon Press, 1980)
Freeman, Samuel, John Rawls: Collected Papers, (Harvard University Press, 1999)
Fuller, Lon L, The Morality of Law (Yale, revised ed, 1969)
-----, This Complicated Form of Life: Essays on Wittgenstein (Open Court, 1994)

Guest, Stephen, Ronald Dworkin (Stanford University Press, 1991)


-----, Kant (Routledge, 2006)


Haldane, John and Crispin Wright (eds), Reality, Representation, and Projection (Oxford, 1993)


Honeyball, Simon, and James Walter, Integrity, Community and Interpretation (Ashgate, 1998)


-----, An Enquiry Concerning Human Understanding and Other Writing (Cambridge University Press, 2007)

-----, Dialogues concerning Natural Religion (Penguin, 1990 ed)

Hunt, Alan, Reading Dworkin Critically (Berg Publishers, 1992)

Kant, Immanuel, Critique of Practical Reason (Mary J Gregor trans, Cambridge University Press, 1996)


-----, Groundwork of The Metaphysics of morals (Mary J Gregor trans, Cambridge University Press, 1998)


Leiboff, Marett and Mark Thomas, Legal Theories: Contexts and Practices (Lawbook Co, 2009)

Leiter, Brian (ed) Objectivity in Law and Morals (Cambridge University Press, 2001)


-----, The Future for Philosophy (Clarendon Press, 2004)


Limnatis, Nectarios G, German Idealism and the Problem of Knowledge: Kant, Fichte, Schelling, and Hegel (Springer, 2008)


McDowell, John, Mind and World, (Harvard University Press, 1996)


Meyerson, Denise, Understanding Jurisprudence, (Routledge, 2007)


Mill, John Stuart, Utilitarianism (Andrews, original 1861, 2011 ed)


Mounce, HO, Hume’s Naturalism (Routledge, 1999)


Quine, WVO, ‘Main Trends in Recent Philosophy: Two Dogmas of Empiricism’ (1951) 60(1) The Philosophical Review 20-43


-----, Political Liberalism, (Columbia, expanded ed, 2005)

Raz, Joseph, Between Authority and Interpretation, (Oxford, 2009)


Ripstein, Arthur (ed), Ronald Dworkin (Cambridge University Press, 2007)

Rorty, Richard, ‘Naturalism and Quietism’, in Mario de Caro and David Macarthur (eds), Naturalism and Normativity (Columbia University Press, 2010)


Ryle, Gilbert, The Concept of Mind, (Routledge, 2009 ed)


Smith, David Woodruff, Husserl, (Routledge, 2007)


