DWORKIN’S CHALLENGE

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0. Introduction

Legal positivism is the view that legal validity, or the binding force of legal rules, can be wholly explained by social facts. Orthodox natural law challenges this position: a rule is legally binding only if it conforms with certain moral requirements, on this view. Legal positivists have handily replied to this objection. First, the insistence on a moral test for legal validity rules out the possibility of wicked law, and we know that there is such a thing. Positivists have thus rejected natural law as incapable of accounting for this basic empirical fact. Secondly, however, it collapses the conceptual distinction between what the law is and what it ought to be. Regardless of the many ways in which law and morality may be related – I will note some of them below – positivists have long insisted that, as a conceptual matter, there is a difference between law and morality. And, they insist, any approach that collapses this fundamental conceptual distinction fails as a theory of law.

Ronald Dworkin’s attack on legal positivism takes a different tack.¹ Unlike orthodox natural law theorists, Dworkin does not posit an ultimate moral test for legal validity; he concedes with positivists that the fact that a given rule has been posited by a legally recognized source can make it a rule of the system. Instead, Dworkin argues for a necessary connection between law and morality by examining the nature of legal reasoning. Legal reasoning, for Dworkin, is inextricably moral. A complete theory of law

must explain the legal validity of moral considerations as well as posited ones, for Dworkin, and any attempt to rest the distinction between law and morality on an ultimate social rule must fail. Dworkin thus concludes that it is in principle impossible to advance a positivist theory of law. He thus proposes an alternative account of law.

I will argue that Dworkin is best interpreted as requiring that every determination of what the law is be made with a view to what it ought to be, and that the test for deciding whether, as a matter of law, the law ought to be decided on unposited moral grounds is itself a moral one. As I will argue, Dworkin’s argument against positivism requires this interpretation. But, I will argue, on this interpretation, Dworkin is vulnerable to a counter-example from legal doctrine. It is true that the law can sometimes require judges to draw a legal conclusion on the basis of moral considerations. But it need not, and whether or not it does is a matter of posited, not moral considerations. We can see this by examining some of the more complex conclusions that judges can draw at law, like for example, a verdict of guilty but excused. Here, the law directs judges to draw a moral judgment, but does so in a constrained way. I will argue that, on what I take to be the best interpretation of Dworkin’s position, he cannot explain this possibility, and that there is no other plausible interpretation of Dworkin’s position that is consistent with his rejection of positivism that is immune from this objection. I thus conclude that this example from legal doctrine serves as a counter-example to Dworkin’s theory of law.

I will begin by setting out the main tenets of legal positivism, including an account of the ways in which positivists think that law is fundamentally social, and by outlining some of the ways this is consistent with some connections between law and

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2 I also think that this interpretation is best supported by Dworkin’s own account of his position, however, for the purposes of brevity, I have omitted this argument here.
morality. I will then turn to Dworkin’s objection from hard cases, and his reasons for concluding that a complete theory of law must include all of morality, and that every application of a legal rule to a case requires that a judge invoke all moral considerations as well. I will then set out Dworkin’s alternative account of legal validity and the ways in which he takes it simultaneously to explain legal reasoning, as he understands it, yet keep the ultimate distinction between law and morality intact. Following this, I will set out my objection to Dworkin’s alternative theory, and argue that it follows from the failure of his approach that it must be possible to provide an positivist account of law. I will conclude by briefly setting out some ways of developing such an account that can avoid the difficulties that he poses for positivism, though I will not offer such a complete account here.

I. Legal Positivism

Legal positivists begin with the idea that there is a distinction between law and morality. Although there are many ways in which law and morality can relate to one another – and positivists can admit a number of these – there is, for positivists, a strict distinction between questions of what the law is and questions of what it ought to be, and the mere fact that one has answered questions of one type cannot, on its own, provide an answer to the other.

Positivists thus hold that law is exhausted by source-based rules. A social source is a law-creating act. A source-based (or posited) rule is a rule that can be traced to a law-creating act. So, for example, when the members of Parliament pass a bill, when a judge renders a judgment, etc., they engage in acts that produce law. Intuitively speaking,
source-based law is the law that is written in the books, where “the books” are broadly construed.

Positivists think that these conditions are necessary and sufficient for legal validity. They are necessary for legal validity in that a given consideration must be posited by a legally recognized source in order to be a valid rule of the system. This gives rise to the sources thesis, or the view that all law must come from a (social) source. Social facts are sufficient for legal validity, for positivists, since nothing more than being posited by a recognized source is needed for legal validity. In particular, no further appeal to morality is needed in order to determine what the law is. Hence, positivists also endorse the separation thesis, which says that there is no necessary connection between law and morality. It is the task of a legal positivist, then, to identify those social acts or practices that generate a legal system.

This characterization of law is consistent with a number of clear connections between law and morality. First, positivists of course recognize that the law can overlap with morality. It does so whenever a posited rule has the same content as a moral rule. So, for example, posited rules prohibiting murder, theft, assault, and so on are not instances of morality determining the law, nor are judges applying moral rules when they reason from these rules in deciding particular cases. Instead, there are two sets of rules in such cases: posited legal rules and moral rules. These sets of rules just happen to have the same content. The fact that many legal rules have the same content as moral rules is thus not a counter-example to legal positivism.

Note that inclusive positivists deny that they are committed to this claim. I argue that they are committed to it in the weak form that I defend in Chapters 4 of my dissertation.
Alternately, positivists also admit that the law can sometimes explicitly invoke moral considerations and direct judges to morality in order to determine a given legal outcome. So, e.g., positivists of course recognize that the law can, say, require employers to pay a *fair* wage; that it might enforce only *reasonable* terms of a contract; that it will refuse to enforce *grossly unfair* contracts, etc. They also acknowledge that the law can include constitutional provisions guaranteeing, say, equal protection and benefit of the law; that the law will operate in accordance with the principles of fundamental justice, and so on. Unlike posited rules that happen to overlap with morality, these rules are all posited rules that invoke further moral considerations, and that require judges to reason morally in order to render a legal decision. Positivists diverge as to whether these moral considerations are thereby incorporated into the law. But all agree that such appeals are consistent with positivism, since the test for whether or not the law does invoke further moral considerations, and which considerations it invokes, is itself a posited one. Questions of what the law is and what it ought to be thus remain distinct since, where a determination of what the law is requires an appeal to moral considerations, this itself is a function of further, posited considerations.

Finally, positivists also admit that morality can determine what the law *ought* to be, and whether or not judges ought to apply the law. It is of course true, for positivists, that legal systems ought to be just, and that judges ought only to apply the law when so doing is, on a balance, best. But, positivists insist, this connection between law and morality is no threat to positivism, because positivism is a theory of what the law *is*, not what it ought to be, and such appeals to morality can only determine what it ought to be.
Positivists can also readily admit that judges must sometimes engage in complex moral reasoning in order to decide whether or not to apply the law. This can require determining what the law on a matter is, and how this weighs against other considerations. This is not to say that judges ought never to apply bad law, or that they ought always to decide each case on its moral merits, decided independently of what the law on the matter is. There may be plenty of reasons for judges to uphold and apply the law even when it is not perfectly good.\(^4\) This relation between law and morality is no threat to positivism, however, because when judges do engage in such reasoning, they are deliberating about what they ought to do, not about what the law is. The distinction between these two questions thus remains intact.

Legal positivism thus allows for fairly robust connections between law and morality, despite its insistence on the separation between the two, and on the social nature of law. So long as what the law is ultimately remains a matter of social fact, and so long as the mere fact that a given law is positively enacted by a legally recognized source is sufficient to make it law, without appeal to a further moral test, connections between law and morality remain no threat to legal positivism.

Ronald Dworkin rejects the positivist approach wholesale. No combination of source-based rules, no matter how broadly construed or how carefully crafted can ground a theory of law, on his view. Instead, he argues, source-based rules must be underwritten by moral considerations in order to determine a given legal outcome, and it is just to the

\(^4\) So, e.g., concerns for, e.g., stability, democracy, or, as Dworkin puts it, “integrity”, and so on might swing the balance in favour of judges upholding the posited law, even when it does not dictate the morally best outcome. Alternately, judges (and other officials) can have moral reasons for upholding a system as a whole, or some portion of it, etc., which, while morally imperfect, is better than no system at all.
extent that they are underwritten by moral considerations that source-based rules can carry weight in legal deliberations. Dworkin thus proposes an alternative theory of law, one that can account for the role of moral considerations in legal reasoning as well. Let us consider Dworkin’s argument in more detail.

II. Dworkin’s Objection

Dworkin argues that in addition to source-based considerations, the law must also include rules that are binding because they ought to be, or merits-based considerations. This is because, for Dworkin, appeal to source-based considerations alone trivializes the nature of legal reasoning.

Dworkin provides two different formulations of this conclusion. In “Model of Rules I,”5 he distinguishes between rules and principles, where rules are those considerations that are binding in virtue of their sources, and principles are (legally) binding in virtue of their merits. Source-based rules determine their outcomes “automatically,”6 and apply in an “all-or-nothing” fashion.7 There can be no meaningful sense in which we can say that two (or more) posited rules conflict, and, although they might admit of exceptions, their exceptions must be capable of being enumerated.8

Principles, on the other hand, carry weight in judges’ deliberations about what the law requires in a given circumstance because they ought to. They are observed for their own sakes, and their validity arises from their appropriateness to the circumstances.

6 Dworkin, Taking Rights Seriously, 25.
7 Dworkin, Taking Rights Seriously, 24.
8 Dworkin, Taking Rights Seriously, 24f.
Unlike source-based considerations, which determine their outcomes automatically, principles incline a judge towards one outcome or another without necessarily providing a conclusive reason in either direction. Dworkin’s idea, then, is that a theory of law must explain the validity of rules and principles if it is to provide a complete account of law. Dworkin thus argues that “unless at least some principles are acknowledged to be binding upon judges, requiring them as a set to reach particular decisions, then no rules, or very few rules, can be said to be binding on them either.”9 That is, for Dworkin, it is only if a theory of law can explain the validity of moral principles, in addition to explaining the posited law, that it can explain how posited rules can be valid in the first instance.

Dworkin advances a similar conclusion in *Law’s Empire*, where he launches his later attack on legal positivism.10 There, he argues that positivism’s commitment to the existence of shared social rules for determining what counts as law renders it incapable of explaining the kinds of theoretical disagreements that judges have when they disagree about the grounds of law. The grounds of law are those facts that make it true that a given proposition is legally valid, or a proposition of law. Dworkin argues that positivists think that these consist in a set of “plain facts.” That is, for positivists, law “is only a matter of what legal institutions, like legislatures and city councils and courts, have decided in the past,”11 and it is exhausted by these considerations; there is nothing further to law than that which is written in “the books,” namely, those books “where the records of institutional decisions are kept.”12 Questions of law, then, on Dworkin’s understanding of

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positivism, can thus either be settled by inspection of the relevant facts, or else they are questions of what the law ought to be; on Dworkin’s understanding of positivism, there can be no further questions of what the law is than those that can be settled by inspection of the relevant social facts that make law.

The difficulty with this is that it forces positivists either to dismiss disagreements that judges have about the grounds of law as disputes about what the law ought to be, or to relegate them to mere disputes about the meanings of legal terms in borderline cases. This is because, where the grounds of law are a matter of plain fact, the only questions about what the law is that can arise are questions about the meanings of legal terms; all other questions must be questions of what the law ought to be. But, it is implausible to construe judges’ disagreements about the grounds of law as disputes about what the law ought to be. This explanation of disagreement about law is both unmotivated, and it fails to account for the ways in which judges and lawyers actually do describe their disagreements and argue for their conclusions. This leaves positivists with the option of holding that such disputes are disputes about how to settle borderline cases. And, Dworkin argues, this trivializes the significance of the theoretical disagreements that judges can engage in about the grounds of law.

III. The Argument from Hard Cases

Dworkin argues that positivism is incapable of explaining the nature of legal reasoning by examining the ways in which judges reason in hard cases. Hard cases are cases where judges agree on the facts of the case and on what the positive rules require, but they

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continue to debate what the law on the matter is. Consider Dworkin’s strongest example of a hard case, *Riggs v. Palmer.*\(^{14}\) *Riggs* is a case in which the plaintiff, Elmer Palmer, murdered his grandfather in order to expedite his inheritance. He was charged, and found guilty of murder. He then came before the Court and asked to receive his inheritance nonetheless. Even though Elmer was clearly set to inherit under the Statute of Wills that governed the case at the time, and even though there were no contravening posited laws overriding the Statute, the Court split in its judgment, with the majority siding against Elmer. It is true, the majority argued, that under the posited law, Elmer stood to receive his grandfather’s inheritance. The judges also conceded that this was the law governing the matter, and that there were no further posited considerations that bore on the issue. However, this alone did not settle the question. Instead, they argued, it was a “fundamental maxim of the common law”\(^{15}\) that is grounded in the “universal law administered in all civilized countries”\(^{16}\) that no one should be permitted to profit from his own wrong, and that this principle superseded Elmer’s entitlement to inherit under the governing statute. In other words, they argued, despite its lack of recognized pedigree, and despite the fact that the posited law points to the opposite conclusion, the principle governing the issue in this case is that no man should profit from his own wrong, and that it is legally binding because of its appropriateness to the circumstances.

The controversy that the Court encountered in rendering a judgment in *Riggs* did not arise from gaps in the law, or because the law on the matter was unclear. There were no omissions or mistakes in language in the governing statute. Nor was *Riggs* a

\(^{14}\) 115 N.Y. 506, 22 N.E. 188 (1889) [Hereinafter *Riggs.*] For Dworkin’s discussion of *Riggs*, see “Model of Rules I,” in *Taking Rights Seriously*, ch.2.

\(^{15}\) *Riggs* at 511; 190, as per Earl, J.

\(^{16}\) *id.* at 511f; 190.
borderline case where the court had to decide where to draw the line on an issue. The facts in *Riggs* clearly fell under the statute, and the wording of the statute was clear on the matter: the will was a valid one, and Elmer was clearly designated as the beneficiary. The judges also all agreed about what happened; the facts of the case were not in dispute. In all these respects, *Riggs* was an easy case. Rather, the difficulty that the Court encountered in *Riggs* was that the posited law did not, on its own, settle the question of what the law on the matter was. Even though they agreed on the facts of the case and what the posited law dictated, the presiding judges continued to dispute what the law required. And, in rendering its decision, the majority in *Riggs* relied on a further, unposited consideration, namely, the principle that no man should profit from his own wrong. Most importantly, the majority insisted that even though this principle was binding in virtue of its merits, not its sources, the decision remained a judgment about what the law was, and not what it ought to be. The intuitive plausibility of the majority’s judgment suggests that, in addition to explaining the validity of the posited law, a theory of law must also explain how the law can include considerations that are binding in virtue of their merits, not their sources.

Dworkin’s point in raising *Riggs* cannot merely be to show that there is one principle, namely, the principle that no man should profit from his own wrong, whose validity positivists cannot explain. This argument would fail to warrant his general anti-positivists conclusion. Nor, then, can *Riggs* be taken to show that judges must *sometimes* appeal to moral principles, but that which principles are legally valid, and when judges ought to make appeal to them, is a matter of posited law. If the test for legal validity of moral
considerations is itself a posited one, then positivists could, in principle, posit a further rule recognizing these moral considerations as legally binding, making their error one of omission rather than impossibility, again failing to ground Dworkin’s general anti-positivist conclusion.\(^\text{17}\)

Instead, Riggs shows that the test for whether or not the law is determined by unposited moral considerations is a moral, not a posited one. The initial dispute in the Court as to whether or not it was bound to uphold the posited law and award Elmer the inheritance, and the judgment in favour of setting aside the posited requirements in favour of the moral prohibition against allowing wrongdoers from profiting from their own wrongs were themselves decided on moral grounds. As the majority argued, “what could be more unreasonable than to suppose that it was the legislative intention in the general laws passed for the orderly, peaceable, and just devolution of property that they should have operation in favour of one who murdered his ancestor that he might speedily come into the possession of his estate?”\(^\text{18}\) In other words, the majority held that conferring the estate on Elmer would subvert the legislative aim of promoting the orderly, peaceable and just devolution of property. Moreover, as we have seen, this principle was binding in this case because it was merited, or appropriate to the circumstances, even though it had no source in the posited law. The majority’s decision to decide this case on

\(^{17}\) Positivists have adopted lines of response in their attempts to meet Dworkin’s challenge. On the one hand, inclusive positivists grant that the law can include unposited moral considerations, but hold that whether or not it does so is a matter of contingent fact of the system. On the other hand, exclusive positivists argue that although the law can require appeal to unposited moral considerations, it does not thereby incorporate them. Rather, for exclusive positivists, legal appeals to morality are like appeals to the rules of a foreign system: the rules of a foreign system can be required to determine a domestic outcome, but they are not thereby made part of this system. I argue against these responses to Dworkin’s challenge in chapters four and five of my dissertation.

\(^{18}\) Riggs, at 511, 190.
the basis of an unposited moral principle, and their selection of this principle, were thus made on moral, not posited grounds.

A moral test for the legal validity of moral considerations requires judges to appeal to morality in hard cases because they must do so in every case. Recall the majority’s reasoning in *Riggs*. As we have seen, even though it clearly dictated a (clear) outcome, none of the judges in *Riggs* took the posited law to settle the question of what the law required. Instead, both sides to the dispute took there to be a further question of whether or not the law required that they apply the law as written. This suggests that even cases in which the posited law dictates a clear result, and even cases in which there is no vagueness or defect in the language of the posited rules, judges must ask, as a matter of law, whether or not they ought to apply the law as written, and they must appeal to moral considerations in rendering their decision. This suggests that every case requires that, in addition to determining the dictates of the posited law, judges must also make this further moral judgment. Dworkin thus argues that

once we identify legal principles as separate sorts of standards, different from legal rules, we are suddenly aware of them all around us. Law teachers teach them, lawbooks cite them, legal historians celebrate them. But they seem most energetically at work, carrying most weight, in difficult lawsuits like *Riggs* […].^{19}

The existence of a moral test for determining the legal validity of moral principles does threaten the possibility of advancing a positivist theory of law, because if the test for the legal validity of moral principles is itself a moral one, then any combination of posited rules is vulnerable to the possibility that a new hard case will arise that is not anticipated by the posited rules, but that has a legally determinate outcome nonetheless. On the one hand, positivists cannot hope to list all possible moral principles in the rule of

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recognition. Moral principles are too variable and their possible combinations and relative weights are too sensitive to be fully enumerated in a system of posited rules. Nor can positivists include among the criteria for legal validity the criterion that all moral principles are also recognized as law, since such a test would collapse positivism’s social test for distinguishing between law and morality into a moral one, contrary to the basic tenets of legal positivism.

Riggs is thus best understood as showing that judges must ask of every case whether, as a matter of law, they ought to uphold the posited law, or whether morality requires that they change it, and that the test for what they ought to do, and which moral principles prevail, is a moral, not a posited one. It is only on this broad understanding of Riggs that Dworkin’s in-principle objection to positivism follows. Dworkin’s task, then, in advancing a theory of law that can resolve the problem raised by Riggs is to articulate a theory that can explain how every legal judgment can invoke a moral judgment about

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20 As Dworkin explains, moral principles are “controversial, their weight is all important, they are numberless, and they shift and change so fast that the start of our list would be obsolete before we reached the middle.” (Taking Rights Seriously, 44.) Elsewhere, Dworkin writes, “we could not devise any formula for testing how much and what kind of institutional support is necessary to make a principle a legal principle, still less to fix its weight at a particular order of magnitude. We argue for a particular principle by grappling with a whole set of shifting, developing and interacting standards (themselves principles rather than rules) about institutional responsibility, statutory interpretation, the persuasive force of various sorts of precedent, the relation of all these to contemporary moral practices, and hosts of other such standards. We could not bolt all of these together into a single ‘rule’, even a complex one, and if we could the result would bear little relation to Hart’s picture of a rule of recognition, which is the picture of a fairly stable master rule specifying ‘some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule…” (Taking Rights Seriously, 40f, citing Hart, The Concept of Law, 92.)

what, on a balance, the law ought to be, while avoiding the mistakes of orthodox natural law. Consider, then, Dworkin’s alternative account of law.

IV. Dworkin’s Alternative

Dworkin’s alternative account of law begins with the supposition that legal reasoning is a kind of political reasoning. This is not to say that Dworkin is advancing a theory of how judges ought to decide cases, or what people ought to do; Dworkin explicitly denies that he is answering these practical questions. Rather, he thinks that legal reasoning – that is, determinations of what the law requires and the application of legal rules to cases – is itself inherently political, and a correct theory of law must take this fact into account.

Dworkin thus proposes a two-step test of fit and justification for legal judgment. The test of fit requires judges first to identify those principles of justice, fairness, and

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22 Dworkin notes that “conceptions of law [including the one he is offering] which are theories about the grounds of law, commit us to no particular or concrete claims about how citizens should behave or judges should decide cases. It remains open to anyone to say that though the law is for Elmer or Mrs. McLoughlin or the snail darter, the circumstances of these cases are special in some way such that the judge should not enforce the law. When we are for some reason anxious to remind ourselves of this feature of our concept of law, we say that the law is one thing and what judges should do about it is quite another; this accounts, I think for the immediate appeal of the positivist’s slogan. But it wildly overstates this point to insist, as the positivists did, that theories about the grounds of law cannot be political at all, that they must leave entirely open the question how judges should decide actual cases. For a theory about grounds, which in itself takes up no controversial position about the force of law, must nevertheless be political in a more general and diffuse way. It does not declare what a judge should do in a particular case; but unless it is a deeply skeptical conception it must be understood as saying what judges should do in principle, unless circumstances are special in the way just noticed. Otherwise we could not treat the theory as an interpretation of law, as a conception of our concept. It would be an orphan of scholasticism, a theory whose only use is to furnish memory tests for students who match slogans like ‘law is the command of the sovereign’ to the philosopher whose motto that was.” Law’s Empire, 112.
procedural due process that best explain the posited law as if it were structured by a coherent set of such principles.\(^{23}\) That is, in the first stage of judicial analysis, law as integrity requires judges to that can provide the best explanation for the law that has come before, as if it could be explained by a unified set of such principles. Secondly, where more than one such interpretation fits or explains the posited law, law as integrity requires judges to decide which such interpretation makes the law the best it can be from the perspective of political morality. This stage of analysis explicitly requires judges to make a substantive moral judgment. Judges must decide which principles of justice and fairness are better, as a matter of abstract justice, as well as which are preferable as a matter of political fairness, given the moral convictions of the members of the community in question.\(^{24}\) Where these two sets of considerations diverge, judges must also decide which ought to prevail.\(^{25}\) This decision likewise requires a judgment of political morality.

Dworkin’s account of judicial reasoning as proceeding in two stages is best understood heuristically, rather than literally. Notwithstanding Dworkin’s two-stage analysis, these two processes are deeply intertwined. As he explains,

> in law, as in literature the interplay between fit and justification is complex. Just as interpretation within a chain novel is for each interpreter a delicate balance among different types of literary and artistic attitudes, so in law it is a delicate balance among political convictions of different sorts; in law as in literature these must be sufficiently related yet disjoint to allow an overall judgment that trades off an interpretation’s success on one type of standard against its failure on another.\(^{26}\)

\(^{23}\) Dworkin thus explains that in law as integrity, the first stage of judicial reasoning “asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process and it asks them to enforce these in the fresh cases that come before them, so that each person’s situation is fair and just according to the same standards.” Dworkin, *Law’s Empire*, 243.

\(^{24}\) Dworkin, *Law’s Empire*, 249.

\(^{25}\) Dworkin, *Law’s Empire*, 250.

\(^{26}\) Dworkin, *Law’s Empire*, 239.
On the one hand, determinations of fit enter into questions of justification since an interpretation is morally better if it better fits the existing law. Judges must therefore consider which interpretation best fits the law when engaged in deliberations about justification. Dworkin thus explains that “questions of fit arise at this [second] stage of interpretation as well, because even when an interpretation survives the threshold requirement, any infelicities of fit will count against it… in the general balance of political virtues.”

On the other hand, as Dworkin notes, determinations of fit are “political not mechanical.” Judges cannot simply count the number of decisions that fit an interpretation, and choose the one that fits the most decisions. Some decisions, or some lines of reasoning generally, might be mistaken, and some might be more fundamental to a given area of law than others. When deciding questions of fit, judges must “take into account not only the numbers of decisions counting for each interpretation, but whether the decisions expressing one principle seem more important or fundamental or wideranging than decisions expressing the other.” Dworkin thus concludes that questions of fit express [a judge’s] commitment to integrity: he believes that an interpretation that falls below his threshold of fit shows the record of the community in an irredeemably bad light, because proposing that interpretation suggests that the community has characteristically dishonoured its own principles. When an interpretation meets the threshold, remaining defects of fit may be compensated, in his overall judgment, if the principles of that interpretation are particularly attractive, because then he sets off the community’s infrequent lapses in respecting these principles against its virtue in generally observing them. The constraint fit imposes on substance, in any working theory

As Dworkin explains, “an interpretation is pro tanto more satisfactory if it shows less damage to integrity than its rival.” Law’s Empire, 246f.

Dworkin, Law’s Empire, 256.

Dworkin, Law’s Empire, 257. Dworkin also notes this at 247.

Dworkin, Law’s Empire, 247.

Dworkin, Law’s Empire, 247.
is therefore the constraint of one type of political conviction on another in the overall judgment which interpretation makes a political record the best it can be overall, everything taken into account... It is... the structural constraint of different kinds of principle within a system of principle, and it is none the less genuine for that.\footnote{Dworkin, Law's Empire, 257.}

Dworkin thus imagines legal decision-making on the model of what an ideal judge, Hercules, would decide. Hercules has perfect knowledge of all the facts of the legal system and a perfect justification for it. In order to decide a given case, he must determine what the best justification for the system would require of the instant case, and apply this justification to the case at hand. The decision that Hercules would make in a case is thus the one that best coheres with the best justification for all the rules and decisions of the system. A given consideration is legally valid, then, and a given conclusion is the legally required one on this approach, if it is the one that Hercules would provide in a given case.\footnote{See generally Dworkin, Taking Rights Seriously, 105.} Dworkin’s alternative approach to law thus avoids the difficulties that positivism encounters because he can explain how the law can include unposited moral considerations, and how every application of a legal rule to a case must invoke a moral judgment as well.

Dworkin’s account of legal judgment thus explains the robust relationship between law and morality that he takes law to have, and the manner in which morality figures in legal reasoning. My claim, however, is that the constraints that Dworkin imposes on moral and political judgment from the posited law are not sufficient to distinguish legal from moral judgment. Dworkin’s requirement that legal judgments fit the posited law does not sufficiently constrain questions of justification, and legal judgment for him collapses into general political justification. As a result, I will argue, despite his efforts to the contrary,
Dworkin collapses legal and moral reasoning, and, with it, the ultimate conceptual distinction between law and morality.

I will argue for this conclusion by attempting to show that Dworkin cannot explain some of the more complex judgments at which legal officials might arrive. I will argue that the reason he cannot explain these more complex judgments is because insists that the test for the legal validity of moral considerations is a moral, not a posited one. It is true, as Dworkin insists, that the law can sometimes require appeal to moral considerations. But it need not as a conceptual matter, and whether or not it does must be a posited, not a moral, question.

I will begin by setting out an example of the kind of complex legal judgment that Dworkin cannot explain. I will then argue that this problem generalizes: there are many such examples at law. Moreover, I will argue, Dworkin’s insistence on the moral nature of legal judgment infects his account of legal reasoning all the way down; Dworkin cannot even explain the ultimate distinction between law and morality because even this distinction is dependent on posited considerations. As a result, I will conclude, Dworkin cannot even get a theory of law off the ground. I will then conclude, pace Dworkin, it is not a conceptual feature of law that every determination of what the law on a matter is requires a judgment of what, on a balance, it ought to be, and that the test for whether the law does require such a moral judgment must be a posited, not a moral one. Let us now examine the difficulty with Dworkin’s alternative approach to law.

V. The Problem I: Justifications and Excuses
Suppose an accused has hit someone. When is he criminally responsible for assault? The law has a two-part test for criminal responsibility. First, it asks whether the accused is guilty of the offence charged: did he commit an assault, at law? Determining this requires inspecting the test for assault and deciding whether his actions fall under it.

The law then asks whether he has any defences. There are two kinds of defences at law: justifications and excuses. Suppose he hits someone in self-defence; suppose, say, that he hit someone, and he did it on purpose, but he hit his victim in order to stop the victim from hitting him first. Here the law says even though the accused has satisfied the requirements of the crime, he acted in self-defence, and so has a justification. It is true that he hit someone, and he did it on purpose. It is also true that it is unfortunate that this happened. But, where an accused has a justification, he has committed no wrong at law. The initial finding of guilt is thus extinguished, and the law returns a verdict of not guilty.

Suppose, on the other hand, that the accused was provoked. So suppose, for example, that his victim was taunting him, uttering racial slurs, insulting him or his family, and so on, and the accused hit his victim. Here, the law does say that the accused did something wrong. He committed a guilty act at law. But, the law holds, the accused has an excuse; he ought not to be held fully responsible. He acted as any reasonable person would have, he succumbed to ordinary human weakness, he couldn’t help himself, and so on. Where an accused has an excuse, the initial finding of guilt remains intact, but he is not held responsible. The law thus returns a verdict of guilty but excused here. Both defences thus absolve an accused of criminal responsibility; however, legally speaking, these are two different verdicts.
The problem with Dworkin’s account is that he cannot why the law would require a verdict of guilty but excused rather than a verdict of not guilty. Recall Dworkin’s account of legal reasoning: Dworkin thinks that every application of a source-based rule to a case must invoke a moral judgment of what, on a balance, the law ought to require of the case. Only so can an account of law avoid the problem of hard cases and the difficulties that he attributes to positivism. The fact that an accused has an excuse must therefore enter into the initial question of whether or not his actions satisfy the requirements for assault. This is because, when applying the test for assault to the case at hand, judges must also decide whether, on the best justification for the posited law, the accused ought to be held responsible for assault. By hypothesis, however, where an accused has an excuse, he has satisfied the requirements for assault, but he ought not to be held responsible for it. This is just what it means to have an excuse. But because Dworkin requires that judges make a moral judgment every time they make a legal one, the fact that the accused has an excuse must be brought to bear on the initial question of whether or not he has committed an assault, thereby extinguishing the initial finding of guilt. As a result, judges, on Dworkin’s approach, will never get to the second stage of judicial analysis, making all excuses function like justifications, and collapsing the distinction between the two kinds of defences. This basic legal distinction therefore serves as a counter-example to Dworkin’s theory of law.

There are a number of concerns that one might raise about the argument presented. First, one might object that the distinction between excuses and justifications is itself a moral one, and can thus indeed accommodate the legal distinction. So, for example, one might
argue that, morally speaking, there is a distinction between being excused and having a justification, and that judges may well take this distinction into account when engaging in their moral evaluation of the posited law. It is true that the distinction between excuses and justifications is a moral one; morality does indeed distinguish between prohibited acts that people are nonetheless not responsible for, and acts that are bad or unfortunate, but for which they are not to blame. This cannot save Dworkin’s approach to law, however. Irrespective of this moral distinction, the moral fact that an accused has an excuse must enter into the first stage of legal analysis, for Dworkin, and it still tells against an initial finding of guilt. This is because even the application of the initial test for assault requires the judge (or the trier of fact) to make an all-things-considered moral judgment about whether he has committed an assault for the purposes of an attribution of criminal responsibility. Where an accused has an excuse, however, he ought not to be held responsible. This just follows from the nature of excuses. As a result, even if, morally speaking, he is guilty of an assault, but excused, for Dworkin, the fact that he has an excuse must result in a verdict of not guilty, contrary to legal doctrine.

Alternately, one might object to my characterization of Dworkin as requiring that all moral considerations enter into each application of a legal rule to a case. Instead, one might hold, he can perhaps distinguish between those moral considerations that are relevant at the first stage of legal analysis, and those that are relevant at the second stage. This alternative presents Dworkin with a dilemma, however.

The distinction between those moral considerations that are relevant to the first stage of analysis and those that are relevant to the second stage of analysis is either a source-based one or a moral one. Suppose it is a moral one. Then there would be some
moral requirements holding that it is morally best if judges consider excusing conditions in the second stage of legal analysis. It is perhaps true that law ought to be so structured, but it need not be, and whether or not it is is a legal, not a moral question. On this understanding of Dworkin’s position, he can only explain one legal system, namely, the one that happens to accord with morality, and he does so by accident, by engaging in some moral analysis. This approach cannot serve as a general theory of law.

Suppose, on the other hand, that the distinction between moral considerations that bear on the first stage and those that bear on the second is a posited one. A moral test for the legal validity of moral considerations then might hold that, given the posited law, it is morally best if judges consider excusing conditions in the second rather than the first stage of legal analysis, then. There are two ways one might interpret such a test.

First, morality might dictate that, the best justification for past legislative history and past judicial decisions alone requires judges to continue as before. So, for example, one might judge that given the rules that the legislators enacted, and the judicial decisions that have come before, and so on, it is morally best if judges carry on as before, and consider excusing conditions only in the second stage of legal analysis. The difficulty with this line of reasoning is that it eliminates the possibility of hard cases that Dworkin relies on in his attack on legal positivism. The problem of hard cases rests on the possibility that, despite the relative justice of the written law and past decisions, a new case might arise in which morality requires judges to diverge from the posited law, and decide on previously unanticipated and unposited grounds. If the moral requirements of a given case rested solely on the merits of upholding the law that has come before, then it
could never be true that morality requires judges to decide on unposited moral grounds *despite* the law that has come before.

On the other hand, morality might dictate that given the past law *and* the application of the posited law to this case, this case is best decided in accordance with the posited law, and the posited law ought to be upheld as written. In other words, one might argue that, in addition to the merits of upholding the posited law as written, judges must also weigh the outcome that the posited law dictates for the case before them prior to deciding what morality requires of the case. Morality requires judges to uphold the posited law in a given instance, on this understanding of Dworkin’s test, when, given the outcome that the posited law returns in a given case, this case is best decided in accordance with the posited law alone, as distinct from what morality would require absent the posited considerations. So, in the example discussed above, morality might require judges to direct excusing conditions to the second stage of legal analysis when the posited law, as applied to the case, requires excuses to be considered in the second stage of legal analysis, and the best justification for this result requires that it be upheld as written rather than overruled or amended.

This is a tempting line of reasoning. If it succeeds, if would indeed provide Dworkin with a solution to the difficulty presented above. The problem, however, is that it is not available to Dworkin without abandoning his rejection of positivism. Consider the judgment described above more carefully. To say that morality requires judges to uphold the verdict returned by the posited law in a given case, considered independently from the merits of the case itself, requires, first, that judges apply the posited law to the case on its own, separately from deciding what, on a balance, the law ought to require in
the circumstances. In the example described above, then, a judge must first decide whether the initial attack constitutes an assault for the purposes of a determination of criminal responsibility, without considering the fact that the accused has an excuse, and she must turn to the question of defences only after applying this initial test. What counts as an assault, however, depends on the posited rules of the system. In order to determine whether the initial attack constitutes an assault for the purposes of determining criminal responsibility, a judge must apply the test for that system.

This judgment presupposes a prior judgment made in accordance with the posited secondary rules of the system, identifying the test for assault as the authoritative one for the system. This judgment must likewise be made separately from a judgment about what this test ought to be. This is because the best justification for the criteria for identifying the test for assault might deliver different criteria than the actual ones, thereby identifying a different test for assault than the actual posited test. If a judge is to apply the actual test for assault prior to drawing a moral judgment about what the law ought to require, then she must also apply the actual posited criteria for identifying this test, separately from a determination of what they ought to be.

This judgment, in turn, supposes an identification of those procedures that generate the authoritative tests for criminal responsibility, and a determination that these tests were developed in accordance with these procedures, whether or not these procedures are as they ought to be. And so on, until we reach a posited rule identifying those considerations that distinguish the posited legal requirements from all other moral and social considerations. Dworkin might take a moral test for the legal validity of moral

34 E.g., whether or not a threat of assault counts as an assault depends on the jurisdiction.
considerations might to require judges to ask of this ultimate rule whether it is as it ought to be, and decide in accordance with its best justification. Where the criteria listed in the rule of recognition are morally imperfect, however, this moral test will deliver different, and perhaps opposing ultimate criteria than the ones listed, making it impossible even to identify the actual posited rules as such, and virtually collapsing the distinction between law and morality. Or else, Dworkin might hold that morality requires that these criteria, and all the subordinate posited rules be applied as written to the case at hand, and that judges then ask, of these posited judgments taken together, whether the law is as it ought to be. But this is just the positivist account of legal reasoning.\textsuperscript{35}

This counter-example thus shows that although, as Dworkin insists, the law may well require judges to appeal to moral considerations in rendering their decisions, it need not; it is also possible that it require that judges exclude some moral considerations when deciding its requirements. This calls into question Dworkin’s insistence that every legal judgment invoke a moral judgment as well. More importantly, however, the discussion above suggests that the test for deciding whether or not the law requires appeal to morality in order to decide a case is itself a posited, not a moral rule. It thus undermines the main line of argument that Dworkin advances against legal positivism.

\textsuperscript{35} Strictly speaking, although positivists recommend that judges first determine what the posited law requires of a case, and then ask what they ought to decide, positivists and Dworkin differ on whether judges must ask this moral question as a matter of law. If this is the best way to interpret Dworkin’s insistence on the inclusion of morality in law, then Dworkin must take the requirement that judges ask what they ought to decide to be a legal, and not merely moral, requirement. But, on this reading of Dworkin, his position is no different from orthodox natural law theorists who insist on a moral test for legal validity. On the other hand, if Dworkin takes the question of what, given the dictates of the posited law, judges ought to decide to be a moral question, then his position collapses into legal positivism.
This difficulty poses a serious problem for Dworkin. This is because it is not a problem with excuses and justifications in particular. It generalizes to any instance in which the law directs judges to make all-things-considered judgments, but does so in a limited way. And the reason that Dworkin is vulnerable to this problem is precisely because he denies that source-based considerations can have independent legal weight; it is only if we think that source-based considerations can carry independent weight in judges deliberations, separately from moral considerations, that we can explain how judges can draw the basic distinctions that we think are available at law. Let us consider this claim in more detail.

**VI. The Problem II: Its Full Generality**

The problem outlined above is completely general. It has nothing to do with excuses and justifications in particular. In order to see this, consider another example. One of the distinctive features of the Canadian constitution is the existence of s.1, which asks the Court to decide whether an infringement of a Charter right is justified in a “free and democratic society.”

Canadian law thus distinguishes between a person’s not having a right, and having a right that is justifiably infringed. So, for example, when the police arrest someone without a warrant, but they have reasonable and probable grounds to believe that this person has committed or will commit an offence, they are not infringing

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36 Section 1 of the Canadian Charter reads “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982 (U.K.), 1982, c.11.
on anyone’s rights. Nor are any rights violated when the courts designate someone a “dangerous offender” and sentence him to a penitentiary for an indeterminate period of time where they constitute a threat to the life, safety, or physical or mental well-being of those around them. When police stop people at random to check their driver’s license, insurance certificate, the mechanical fitness of their car, and their sobriety, however, they are violating people’s s. 9 rights to be free from arbitrary detention and imprisonment. But, this right is justifiably infringed because of the great contribution that spot-check programs make to highway safety.

Like the distinction above, this distinction poses a difficulty for Dworkin. This is because, by hypothesis, where a right is justifiably infringed, people ought not to be able to claim it. This is just what it means to say that it is justifiably infringed. For Dworkin, however, this consideration must enter into the initial question of whether or not people have the right, and again, it tells against it. It thus extinguishes the initial claim to the right, making it impossible for Dworkin ever to proceed to the second stage of the analysis, and ever to return a verdict of someone’s having a right but it being justifiably infringed.

Dworkin will run into similar difficulties when attempting to distinguish between someone being responsible and not owing damages, and not being responsible; a contract that is void and one that is valid, but unenforceable, and so on. There is nothing special about these distinctions; they can be found all over the law. They arise because a legal

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37 R. v. Storrey, [1990] 1 S.C.R. 241, holding that s. 9 of the Charter, which guarantees the right to be free from arbitrary arrest or detention, does not include this right.
39 Section 9 of the Canadian Charter reads “everyone has the right not to be arbitrarily detained or imprisoned.”
system consists in some number of rules, and these rules can be combined in some
greater number of ways, and each combination grounds a different legal outcome. Some
of these rules raise questions of moral evaluation, especially in a just system. But not all
of them do, and what the law requires of a given case will depend on the precise
combination of rules that bear on it, and the precise ways in which the law introduces, or
excludes, moral considerations from its dictates. The ways in which the law does so
depends on the posited facts of the system, however. That is, whether or not the law
requires an appeal to moral considerations in order to determine its requirements, and
which moral considerations are relevant, depends on contingent facts about its rules. By
making the application of every rule in the system depend on its underlying moral
justification, Dworkin collapses these various rules into one another, making these
distinct outcomes impossible.

This problem for Dworkin is also much deeper than it first appears. Consider again
Dworkin’s test for legal validity. In order to determine what the law requires in a given
case, for Dworkin, we must first identify those moral principles that best fit the posited
law, and then select from these the one that provides the best justification for it. Recall,
however, that, as we saw above, whether a moral principle “fits” the existing posited law
itself requires moral judgment. In a complex system, there are likely to be inconsistencies
in a line of past decisions, and even in the statutory law. A determination of fit also
requires some way of distinguishing between those judgments that count as mistakes and
those that correctly represent the law. But, this distinction itself often rests on some kind
of evaluation of what the law ought to be. A determination of fit is therefore itself, in part, a moral question.

Secondly, what counts as the relevant law and the relevant facts of a case can itself require moral judgment. For example, there has been significant debate as to whether or not someone’s past sexual history is relevant to a determination of consent to sex. But, whether or not someone thinks this is relevant is likely going to depend, at least in part, on her moral views about sex.

Finally, one of H. L. A. Hart’s central insights into the nature of a legal system was to notice that what counts as a rule of the system, and where the boundary between legal rules, and all other social and moral rules lies, is itself a question for the system. It is true that Dworkin denies that such posited considerations are all there is to law; however, he never denies that this is the test for validity for the posited rules. As a result, the test for determining which rules count as the posited rules of the system is itself a social test. But, for Dworkin, even this rule is subject to moral evaluation in its application; that is, judges must even ask about the best justification for the rule of recognition when relying on the distinction between legal rules and all other rules and considerations. As a result, even the ultimate test for distinguishing between law and morality is, at least in part, a moral one, for Dworkin; he cannot even identify what counts as the posited law without asking which considerations ought to count, and deciding on the basis of this. But, as we have seen, where the posited considerations are

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42 Indeed, Dworkin concedes as much in his response to the objection that there is no real difference between his position and Harts. There he argues although he grants that there is some distinction between law and morality, this distinction rests on a moral test, not a social one. See his discussion in *Taking Rights Seriously*, pp. 58-64.
morally imperfect, the moral test will deliver different ultimate criteria for validity, thereby failing to identify the actual posited rules. Dworkin’s test for legal validity is thus moral all the way down, making it impossible for him even to get the initial distinction between law and morality off the ground. This obliterates the possibility of law, as distinct from morality. But we know that there is such a distinction. Dworkin’s in-principle objection to legal positivism must therefore fail.

VII. Ways Out

It thus seems that we are left with a puzzle. On the one hand, it seems that social facts cannot fully ground a theory of law since any combination of social facts alone is vulnerable to the problem of hard cases. On the other hand, however, it seems that a complete solution to the problem of hard cases – namely, the inclusion of a moral test for the legal validity of moral rules – collapses the distinction between law and morality. How, then, can we reconcile these two features? I will conclude with a suggestion for a few places to look.

First, we need not accept the source-merits distinction that Dworkin begins with, and that positivists inherit. Underlying this debate is a distinction between a very thin notion of source-based or posited law, and merits-based considerations, which include all of morality. This distinction is very intuitive if we begin with the problem of hard cases, which make it seem as though law consists in those considerations that are binding in virtue of their sources, or pedigree, and those to which are binding because they ought to be, whether or not they have been posited by a recognized source. This distinction, however, is both problematic on its own terms, and, as we saw above, it leads to
problematic consequences. One suggestion for resolving this puzzle, then, is to reconsider the initial distinction between source- and merits-based considerations with which we began.

Secondly, we might also look more carefully at what constitutes a hard case. As we have seen, hard cases appear to be decided on unposited moral grounds, but they remain determinations of what the law is, rather than what it ought to be. Any theory of law, however, must at the very least, explain the distinction between what the law is and what it ought to be. We can thus perhaps draw on this starting point for a theory of law to help to shed some light on why hard cases are decided on the basis of what the law is rather than what it ought to be. This might then point to a promising way of explaining how the law has the resources to resolve these cases without collapsing the distinction between law and morality. Although these proposals do not solve the problem with which we began, they might point us to a way out of our initial problem without running into the difficulties that Dworkin encountered.