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# Dworkin's 'Best Light' Requirement and the Proper Methodology of Legal Theory†

OFER RABAN\*

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**Abstract**—This is an examination of Ronald Dworkin's claim that the true theory of legal practice is the theory that puts legal practice in its 'best light'. By 'best light' Dworkin means a measure of *desirability* or *goodness*: the true theory of legal practice, says Dworkin, portrays the practice at its *most desirable*. Now why would that be the case? What's between the desirability of a theory and its truth? The article examines the reasons leading Dworkin to this strange claim. It then argues that the claim is ultimately unsustainable, but also that it contains much insight about legal practice: the true theory of legal practice need not put the practice at its most desirable, but there is much between maximizing desirability and the practice's standards. Dworkin's is another important effort to explain the *normative* aspect of legal validity—in a way that transcends both the crudeness of natural law, and legal positivism's attempt to wash its hands of this crucial aspect of law.

## 1. Introduction

It is rather safe to say that Ronald Dworkin, at least so far as the Anglo-American world is concerned, is today's most renowned living legal philosopher. Oddly enough, it is equally safe to say that Dworkin's most important theoretical claims (the 'right answer thesis' for example, or his conception of 'law as integrity') are by and large rejected by the legal community. This article examines another important claim Dworkin makes—the assertion that the search for a true legal theory (a theory specifying what makes legal propositions correct or valid) can only be a normative search: that a true theory of law is a theory putting legal practice in its 'best light'. A theory of law, says Dworkin, must seek to present legal practice at its most desirable—and the more desirable, the truer the theory is.<sup>1</sup> Dworkin does not deny that many scholars advancing theories of law have different purposes in mind (other than portraying legal practice as desirable); but he insists that the best way to make sense of their claims, and to test

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<sup>1</sup> This is a simplified version of Dworkin's claim: the correct theory must also 'fit' legal practice. I will elaborate on the fit requirement below.

their veracity, is to see these claims as hypotheses about what's most *desirable* in legal practice.<sup>2</sup> Now few people deny that many legal theories seek to present a desirable conception of legal practice; what is denied is that a legal theory is *true* by virtue of its desirability.

Allow me to divulge the conclusion of the coming inquiry: Dworkin's claim is unsustainable—his 'normative methodology' must be rejected. The success of a theory of law in putting legal practice in a good light has little to do with its truth. Now this conclusion may seem utterly trivial (after all, why on Earth would the desirability of a theory spell its truth?); but herein lies Dworkin's ingenuity, for, as it comes out, there is much insight in this surprising claim that he makes, and an analysis of this claim teaches much that is penetrating and perceptive about legal practice. So, to return to the seemingly paradoxical observation with which I began: Ronald Dworkin may be wrong, but his fame is deserved.

## 2. *Dworkin's Methodological Claims*

### A. *Dworkin and the Problem of Essential Contestedness*

Dworkin's *Law's Empire* is launched with the rejection of the claim made by legal positivism that legal rights and duties are determined by criteria shared among legal practitioners (i.e. by conventions). Legal practitioners, says Dworkin, habitually disagree about which rights and duties are legally valid and about why they are: there are no shared criteria to be found here.<sup>3</sup> Yet if the question of what counts as legal rights and duties is not a question about conventions, what kind of a question is it? Dworkin's answer is this: it is a question about the best theory we have of what legal practice is about. The determination of what is and what is not legally valid is settled by appealing to the best theory of law we can get our hands on. This, says Dworkin, is what interpretive practices (of which legal practice is one) are about: when we are called to decide whether a certain conduct is or is not *courteous*—courtesy being another interpretive practice—our decision turns on the best available theory of what 'courtesy' is, and similarly, when we decide whether a certain proposition is or is not *legal* we turn to the best theory of what 'law' is. People hold different—indeed incompatible—understandings of these practices, and the true conception is the best one among those.

So what makes a conception 'best'?

<sup>2</sup> Thus in one section of his *Law's Empire* Dworkin reinterprets legal positivism precisely in such normative terms, though many proponents of legal positivism consider this an appalling misrepresentation of their project. See R. Dworkin, *Law's Empire* (London: Fontana, 1986) at 114–50.

<sup>3</sup> See *ibid* at 1–44. Dworkin articulates this complaint by opposing what he regards as legal positivism's misconceived semantic assumption: he claims that the concept of law is an 'interpretive concept'—a concept whose correct use is not a function of shared criteria (as the positivists presumably believe). The move to this linguistic perspective is best understood by seeing the interpretation of legal practice as equivalent to the 'conception of the concept of law'. (And this equivalence may be most simply understood by seeing the use of the concept of law as the practice being interpreted.) I will stay away from this linguistic perspective: Dworkin's claims can be understood in full, and with better clarity, without it.

### B. *The Best Theory: 'Fit' and 'Best Light'*

How are we to evaluate the merit of a conception? Dworkin's test employs two dimensions: 'fit' and 'justification'. Our best conception of an interpretive practice is the conception that best *fits and justifies* that practice. The dimension of fit is self-evident: to say that a conception must fit the practice is to say that it must account for many aspects of the practice generally believed to belong to it. For example, in order to be a good conception of the practice of courtesy, a conception must account for many—though not all—of the actions people consider to belong to that practice (for instance, opening doors for people, pouring drinks to others before filling one's own glass, etc.).<sup>4</sup> A conception of courtesy claiming that courtesy is a matter of paying homage to old age would presumably fail, because it cannot account for all those numerous instances generally believed to belong to the practice which have nothing to do with old age. There cannot be too many instances which a theory of the practice leaves unaccounted for: a theory presenting itself as an interpretation of a certain phenomenon cannot leave much of that phenomenon outside its scope. Dworkin puts this point in the following way: an interpretation 'must fit enough [of the practice] for the interpreter to be able to see himself as interpreting that practice, not inventing a new one'.<sup>5</sup>

A conception does not need to fit *all* those instances generally believed to belong to the practice: the very possibility of formulating a coherent conception may require that not everything fit in. A good conception of courtesy may fail to fit the practice of taking people's shoes off, even if people consider this the highest of courtesies.<sup>6</sup> (Perhaps courtesy properly understood does not encompass acts that can be perceived as subservient.) A conception of a social practice is not shown to be wrong by failing to account for *all* those instances or features commonly believed to belong to that practice. If I claim that marriage consists of a commitment to a long-term relationship then showing that certain marriages lack such a commitment does not prove me wrong. Theories in the social sciences may categorize instances as abnormal deviations—or simply as wrong. (A theory of legal interpretation may conclude, for example, that certain judicial practices constitute a departure from legal interpretation properly understood; that they constitute an error so far as proper legal interpretation is concerned; that they are not really instances of legal interpretation, even though they are generally believed to be.) Conceptions of social practices seek to pinpoint the *essential* features of those practices. And they may make claims about what instances belong in the practice by virtue of these instances possessing the identified

<sup>4</sup> Dworkin says that an interpretation need fit 'the raw behavioural data of the practice'. Ibid at 52.

<sup>5</sup> *Law's Empire*, 66 (footnote omitted).

<sup>6</sup> In fact, there is some disagreement as to whether a conception may fail to account for instances that are considered *paradigmatic* by the relevant community. On this point See T. Endicott 'Herbert Hart and the Semantic Sting', 4 *Legal Theory* 283 (1998).

essential characteristics. Thus, they must fit some, but not all, those instances considered a part of the practice.

The second dimension of Dworkin's test—'justification'—consists of 'putting the practice in its best light'. A conception of an interpretive practice, says Dworkin, must make the practice 'the best it can be'.<sup>7</sup> What kind of excellence are we talking about here? The best conception, says Dworkin, must show the practice as *worthy of being pursued*, as *desirable* rather than deplorable, as being *good*—and the more worthy or desirable or good it is, the truer our conception.<sup>8</sup> (Indeed Dworkin sets his entire chapter on interpretation in *Law's Empire* as a response to the objection that 'interpretation tries to show the object of interpretation . . . as it really is, not as you suggest through rose-colored glasses or in its best light'<sup>9</sup>—the response consisting of the assertion that interpretation does seek to portray its object as the most desirable—as the *rosiest*—but this in fact shows it as it really is.) Of course, not all interpretations of interpretive practices are geared towards the same desirability: the interpretation of a literary work is geared towards a desirability that is rooted in the artistic literary domain, whereas the interpretation of legal practice is geared towards desirability that is rooted in the realm of political morality.<sup>10</sup> Nevertheless, to put a practice in its best light is to portray it as the most *desirable*; and the best interpretation of an interpretive practice must put that practice in its best light.

Equipped with the twin requirements of fit and justification, the interpreter sets about her job by theorizing the *purpose* served by the social practice whose conception she seeks. The interpreter need not look for a purpose that all practitioners have in mind when undertaking the practice (practitioners may disagree about what that purpose is), but the interpretation must hypothesize a purpose—as vague and abstract as may be—because certain inquiries, including the kind of inquiry undertaken by legal philosophy, must approach their subject matter through seeking to understand the *purposes* or *functions* those practices serve.<sup>11</sup> We can, of course, seek to understand social practices *without* recourse to their

<sup>7</sup> Ibid at 53.

<sup>8</sup> Ibid at 421–2. At times Dworkin refers to the best light as to a requirement of *intellectual* excellence: for example, he draws a parallel between his criterion of best light and the principle of charity. See *ibid* at 53. Nevertheless, there can be no doubt that Dworkin also has in mind a requirement of *goodness* or *desirability*. He says, for example, that a critic who offers an interpretation of a work of art portraying that work as *banal*—art being another interpretive practice—will be offering a successful interpretation only if it is assumed that a more *attractive* interpretation is not available. *Ibid* at 421–2 (n 12). (See also the discussion over the debate about author's intention in works of art. *Ibid* at 60–1.) He also says that an interpreter assessing whether the practice of courtesy is a matter of showing respect to people of higher rank must make 'judgments about whether social ranks are desirable or deplorable'. *Ibid* at 67. Or that a correct conception of legal practices would 'justify these practices by providing an attractive picture of law's point', *ibid* at 150. Dworkin believes, of course, that there is a link between the intellectual excellence of a conception of law and its desirability. But whether such a link actually exists—and where it may come from—is the subject matter of this paper.

<sup>9</sup> *Ibid* at 54.

<sup>10</sup> 'Constructive interpretation is a matter of imposing a purpose on an object or practice in order to make it the best possible example of the form or genre to which it is taken to belong'. *Ibid* at 52 (emphasis added).

<sup>11</sup> 'We must', says Dworkin, 'notice Gadamer's crucial point, that interpretation must *apply* an intention'. *Ibid* at 55 (emphasis in original) (footnote omitted). See also 'the interpretation of social practices . . . is *essentially* concerned with purposes rather than mere causes'. *Ibid* at 51.

purposes or functions: we may understand them in certain behaviourist terms, for example, restricting our efforts to the attempt to formulate generalized rules of behaviour along the model of the natural sciences (which speak the language of regularities rather than the language of purposes). But then our interpretation would move away from an entire realm of meaning—that realm of meaning to which legal philosophy belongs. The positing of a purpose, says Dworkin, whether done explicitly or implicitly is the 'formal structure' that any jurisprudential interpretation must have.<sup>12</sup> (This claim, I might add, seems to merit no controversy.) In short, the true conception of an interpretive practice is its best conception; and that best conception is the one which best fits the practice and puts it in its best light.

### C. *Why Best Light?*

Now why must the true conception of legal practice put it in its best light? Why can't the true conception of our practice put it in a *bad* light? According to some critical scholars, the determination of legal rights and duties revolves around whether those rights or duties serve the interests of certain economic élites (a conception which seems to put legal practice in a rather bad light). Now why is a conception showing legal practice in a more desirable light (assuming an equal level of fit) more *true*, by that fact alone, than the conception advanced by these critical scholars?

The answer to this question begins with the claim that legal practitioners seek to put legal practice in a desirable light when making legal determinations.<sup>13</sup> We expect the reasons for which a claim is recognized as legally valid to entail the worthiness of legal practice, not its wickedness. It sounds crazy for a judge or a lawyer to suggest that a legal claim is legally valid on the grounds that this serves the interests of the rich: practitioners employ a desirable conception of the practice when making their legal determinations, not a wicked one. So if legal practitioners understand legal validity to be a function of desirable conditions, and they are the ones who make determinations of legal validity, it follows that any true understanding of the practice's conditions of legal validity must be desirable.

Now this claim seems clear enough (even though it is false); but it does not address the following difficulty—even if we grant that practitioners' own understanding means that a true conception of legal practice need present the

<sup>12</sup> Ibid at 52 (emphasis in original). It is therefore a mistake to do as some scholars have done and attack Dworkin for *assuming* that the purpose of law is the justification of state coercion. That hypothesis is itself the structure that Dworkin's own conception assumes: rather than standing outside and conditioning Dworkin's conception, it is already the articulation of his own substantive interpretation.

<sup>13</sup> Indeed this is also the reason why, as Dworkin claims, interpretations of works of art putting them in a good light would ordinarily seem more correct than interpretations showing them as banal. An interpretation showing the work as banal or stupid would seem less correct than an interpretation showing the work as sophisticated or smart to the extent that the artist tried to be sophisticated and smart and not banal and stupid in making her artistic creation.

practice as desirable, still it remains unclear why—as Dworkin claims—the true conception need present legal practice as the *most* desirable.

#### D. The ‘Most’ Desirable Conception

Now by virtue of what can such a claim—that the true conception of legal practice is the most desirable—be true? What can be the explanation for it? The claim seems to rest on the following suggestion: practitioners do not merely employ a desirable conception of legal practice when making legal determinations, they employ *the most* desirable conception of it. For them legal practice just *is* the best thing it can be. This would be the case, for example, if practitioners would change their legal determinations when presented with different determinations flowing from a more desirable account of legal practice.<sup>14</sup> The claim derives from the way practitioners practise their practice—it claims that practitioners identify the rights and duties flowing from the most desirable conception of law in making the determination that ‘such and such is the law’. This is the ‘interpretive attitude’ which Dworkin attributes to practitioners of ‘interpretive practices’: practitioners adopt the interpretive attitude when they determine the correct moves within the practice by seeking the most desirable account of that practice.<sup>15</sup>

This is why a conception putting legal practice in a *bad* light is for Dworkin a declaration that *we can do nothing better* with it. Dworkin does not rule out the possibility that the true conception of legal practice is unhappy, but he insists that an unhappy conception must demonstrate why a better conception *cannot* constitute the practice. ‘The internal sceptic [i.e. the one offering an unhappy interpretation] must show that the flawed and contradictory account is the *only one available*’,<sup>16</sup> an unfavourable interpretation succeeds only if there is ‘no [other] more favourable interpretation [which] fits equally well’.<sup>17</sup> To repeat, this heavy burden with which Dworkin saddles critical interpretations of legal practice is supposed to arise from the fact that practitioners employ the most desirable interpretation available when making legal determinations. The demand that a critical interpretation demonstrate the unavailability of an equally fitting but more desirable conception is the other side of this coin.

It is this understanding which underlies Dworkin’s belief that ‘the contribution that a philosopher can make to political morality really is distinctive’: the

<sup>14</sup> The idea, of course, is not that practitioners choose the most desirable legal rights and duties: X is not legally valid to the exclusion of Y simply because X is more desirable than Y. The claim is that X is legally valid to the exclusion of Y if the *conception of legal practice* (i.e. the account of what makes a legal claim true or correct) from which it derives is a more desirable account of legal practice than the conception from which Y derives.

<sup>15</sup> Practitioners of interpretive practices, says Dworkin, do not determine what the practice requires ‘mechanically’; they do that, instead, by trying ‘to impose *meaning* on the institution—to see it in its best light—and then to restructure it in the light of that meaning’. *Ibid* at 47 (emphasis in original).

<sup>16</sup> *Ibid* at 274 (emphasis added).

<sup>17</sup> *Ibid* at 422 (n 12).

conceptions (interpretations) developed and made available by philosophers for practices like law or democracy may determine what these practices really are. And it is this picture which underwrites Dworkin's famous doctrine of the continuity of legal theory and practice—the idea that 'jurisprudence is the general part of adjudication, silent prologue to any discussion at law': legal theory (jurisprudence) develops conceptions of law which in turn determine legal rights and duties. Since there is no conventional understanding regarding what makes a claim legally correct, practitioners must resort (whether explicitly or implicitly) to theory construction in determining the content of law. Legal theory is a philosophical discipline which, in effect, shapes its own subject matter: 'Interpretation folds back into the practice, altering its shape, and the new shape encourages further reinterpretation, so the practice changes dramatically, though each step in the progress is interpretive of what the last achieved'.<sup>18</sup> In short, the best light requirement derives from a thesis about the way practitioners determine what is required by their practice, coupled with the truism that their determinations shape and determine the character of the practice.

### 3. Practitioners' Understanding

#### A. Do Practitioners Associate Legal Validity with the Desirability of Legal Conceptions?

The first objection that springs to mind is that the desirability or undesirability of the conception of law underlying a legal claim is of no importance to practitioners assessing that claim's legal validity. This objection, however, appears to be false: there is much that is true and insightful in Dworkin's claim. Consider, for instance, the argument underlying the spectacular rise of the Law and Economics movement. Here a group of scholars began claiming that private law is best read as a scheme aimed at maximizing economic efficiency, and the correct legal requirements are therefore derived from such economic considerations. The claim was not framed in terms of what the law *should be*, the claim was framed as a thesis about what the law *is*: about what the correct legal rights and duties are—not what they ought to be. Yet despite the novelty of the claim (the doctrines and precedents upon which the claim was based, apart from some isolated exceptions, seemed to have paid little heed to efficiency considerations<sup>19</sup>) it was nevertheless quickly accepted by quite a number of people. Lawyers, scholars, and judges soon began to claim that the content of the law was this or that because that content flowed from the conception of law as a scheme aimed at maximizing

<sup>18</sup> Ibid at 48.

<sup>19</sup> The most famous of these exceptions being Learned Hand's economic formulation of tortious negligence in *United States v Carroll Towing Co.* 159 F.2d 169 (2d Cir. 1947). This case is credited with giving rise to the Law and Economic movement.

economic efficiency: academic articles, court briefs, and judicial opinions all moved through the motions of economic efficiency in purporting to determine legal rights and duties. Now what can explain this success?

It is rather clear that the acceptance of this radical reinterpretation of private law was at least in part motivated by its promise to convert a notoriously problematic legal domain—with its persistent feel of moral subjectivity—into the (purportedly) technically dispassionate realm of economic calculations. What legal practitioners found so attractive in the economic analysis of tort law—above and beyond the obvious attractions of economic efficiency—was the idea that legal resolutions could turn ‘objective’, that judges no longer needed to waddle in the murky waters of ‘negligence’, ‘reasonableness’, or ‘due care’—that instead they could engage in the dispassionate calculations of information-costs and self-insurance in making their legal determinations.<sup>20</sup> In short, the Law and Economics movement rose to success because legal practitioners consider the desirability of a conception of law as important to questions of legal validity.

Note, however, that nothing has yet been said about what *in fact* determines legal validity. Practitioners may very well consider the desirability of a conception of law as important to questions of legal validity; but this need not mean that desirable conceptions of law are indeed the real determinants of their determinations. The Law and Economics movement may have been successful not only because it presents a desirable conception of law, but also because the economic analysis of law can somehow yield desired legal determinations—determinations which are desirable for reasons having little to do with Law and Economics’ desirability as a conception of law.

(i) *The gap between the desirable conception and the actual determination*

We can accept the claim that practitioners consider the desirability of a conception of law as important to questions of legal validity, but we may still reject the best light requirement by disputing—along with quite a number of legal scholars—the determinative power of practitioners’ own understanding. These legal scholars reject the claim that legal rights and duties are determined by practitioners’ desirable conceptions of legal practice; these desirable conceptions, they say, are mere superstructures—remove them and legal determinations will remain as they are. To return to the claim I voiced above, it may be true that no judge would suggest an undesirable conception of law as the standard for evaluating the validity of a legal claim, but so what? An undesirable conception is precisely what it comes down to when legal determinations are in fact made. The

<sup>20</sup> Unfortunately, the economic analysis of law appears to be as ‘subjective’ as the analysis it sought to replace (as the emergence of a conservative/liberal ideological divide within the movement seems to indicate). On this see D. Kennedy, *A Critique of Adjudication* (Cambridge: Harvard University Press, 1997) at 287–8.

claim that 'X is legally valid by virtue of it being good for the rich' sounds crazy only because judges tell themselves—or others—some vacuous story with no real determinative power in the matter. In fact a close analysis will show that this cover story changes all the time whereas the *real*—and stable—determinant is (say) hopelessly class-oriented. Besides, the suggestion that it is by virtue of serving the rich that a right or a duty is legally valid sounds much less crazy if we move it from the courtroom to a lawyer's office: 'this'—says the lawyer—'is what I believe to be the law governing this case, for the federal courts have consistently shown themselves in this matter on the side of the rich'.

What is being disputed here is the causal link between practitioners' desirable conceptions of legal practice and the determinations they make. Dworkin seems to assume that because a certain legal discourse—the 'adjudicative discourse', the sort of discourse heard in the courts—purports to derive legal resolutions from the most desirable legal conception, then legal determinations in fact flow from such a conception. It is precisely this assumption that many critical conceptions dispute: they do not deny that legal determinations are supposed to derive from desirable conceptions of law; they just deny that this is in fact the case.

The account of this disconnection between official discourse and the determinations actually made takes many forms. The crudest accounts suggest that legal practitioners purporting to derive their decisions from desirable legal conceptions simply operate in conscious bad faith: they know that their decisions are determined by some less desirable understanding of their job, but they present them as if they flow from a desirable legal conception. They 'play the game' while simply making the determinations they consider the most moral, or the most efficient, or what have you.<sup>21</sup> When these determinations accord with the 'black letter law', judges present them as dictated by a positivist conception of law, but when they don't then these judges mumble something about the 'spirit of the law' and forget all about positivism.<sup>22</sup> But others suggest that legal practitioners are engaged in self-deception—they deceive *themselves* into believing that their decisions derive from considerations, which are in fact grafted upon a decision after it has been taken. They simply deny to themselves the realities of their decision-making. Or they may simply be mistaken about their own decision-making processes: self-deception implies a measure of wrongdoing, but legal practitioners may be utterly unaware of the reasons that *really* propel them. Yet a careful analysis may grasp these realities better than those practitioners do.

These various claims are supported through equally diverse strategies. Some critiques seek to challenge the determinative power of the desirable discourse by

<sup>21</sup> Some prominent members of American Legal Realism were judges who spoke about the importance of 'intuition' to legal determinations, thereby describing a decision-making process whose determinants are by definition unknown. See, e.g. J.C. Hucheson 'The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision', 14 *Cornell Law Quarterly* 274, 278 (1929). But they sure didn't employ such frankness in their official discourse.

<sup>22</sup> So these 'bad faith' explanations do not challenge the importance of practitioners' self-understanding, only what that self-understanding is.

demonstrating its indeterminacy *as a discourse*. If the economic considerations identified by economic legal analysis (information costs, self-insurance costs, etc.) are in fact indeterminate, then the economic analysis of law may not be the determinative factor in making legal determinations. In other words, if it can be shown that the economic analysis of law can yield conflicting results, depending on the factors one's analysis privileges, and the choice among those factors cannot be itself the result of economic theory, then something other than economic considerations may (indeed *must*) be determinative as to the ultimate resolution. And then it is a further possibility that these real determinants constitute some systemic, analysable, and potentially undesirable pattern which a critical conception of law can expose. The Legal Realists attacked what they called 'legal formalism' (the idea that legal determinations are deduced, syllogism-like) by maintaining that the determinants purporting to guide legal decision-making according to this conception are too indeterminate to yield the resolutions they purport to determine. Legal interpreters, they said, make legal determinations they purport to deduce analytically from highly abstract legal concepts ('the freedom of contract', for example, or the concept of a 'corporation'), but such concepts cut in too many ways to decide, by themselves, the cases they are proclaimed to decide.<sup>23</sup> The real determinants, said some Legal Realists, were in fact ideological: right-wing pro-business judges masked determinations guided by an anti-labour ideology by purporting to use a determinate and desirable conception of law.

Others, like Law and Economics scholars, argue that the (desirable) official discourse is not the determinative one by purporting to uncover a pattern which, they say, better explains legal determinations. Many legal determinations in tort and in contract law are aimed at maximizing economic efficiency—despite the fact that practitioners habitually justify them on different grounds altogether. Tort doctrines such as necessity, contributory negligence, or multiple tortfeasors were reinterpreted in terms wholly different than those in which they were originally introduced and discussed—implying that the explicit discourse employed by those introducing them was not the determinative one, rather, it was economic efficiency which determined things all along. Other critical scholars seek to demonstrate contradictions among the considerations figuring in the desirable discourse, thereby implying that these considerations are not the *ultimate* determinants: if the desirable discourse encompasses contradictory considerations, then the desirable discourse cannot really determine the resolution; and the question becomes what determines the choice among these contradictory alternatives.<sup>24</sup>

<sup>23</sup> See, e.g. F. Cohen 'Transcendental Nonsense and the Functional Approach', 35 *Columbia Law Review* 809 (1935). For a modern example of this sort of criticism see W. Gordon 'Unfreezing Legal Reality: Critical Approach to Law', 15 *Florida University Law Review* 195 (1987).

<sup>24</sup> See, e.g. R.T. Ford 'The Boundaries of Race: Political Geography in Legal Analysis', 107 *Harvard Law Review* 1841 (1994); D. Kennedy 'Form and Substance in Private Law Adjudication', 89 *Harvard Law Review* 1685 (1976). Here, unlike with the 'indeterminacy strategy' examined above, the critic often traces the sources of indeterminacy to endemic and unsolvable contradictions.

In short, the fact that practitioners consider the desirability of a conception of law as important to questions of legal validity need not mean that legal determinations in fact flow from any desirable conception. And once it is acknowledged that there may be no causal link between practitioners' understanding of the practice and their legal determinations, there seems to be no basis upon which to claim that desirability is at all a criterion of evaluation for the true conception of law.

(ii) *Ronald Dworkin, Peter Winch, and practitioners' own understanding*

In an unpretentious little book, written in 1958 and still going strong, Peter Winch quarrels with the idea that the correct understanding of a social practice may differ from practitioners' own understanding of it.<sup>25</sup> Winch attributes the idea to certain positivist thinkers—Max Weber, Emil Durkheim, and Vilfredo Pareto, among others—who believed that the social sciences must 'get empirical', and must strive to explain human behaviour in scientific terms—which may be very different than those employed by the people whose behaviour they seek to explain.<sup>26</sup> Against this Winch asserts that in order to understand a practice one must employ the concepts, and the modes of understanding, of its practitioners. The opinion championed by Winch is fairly representative of ideas current in hermeneutic circles, and is also very similar to some of Dworkin's ideas. This small detour should serve to highlight some of Dworkin's affiliations with that intellectual movement.<sup>27</sup>

Winch's fourth chapter begins with an attack on the claim made by Vilfredo Pareto that the self-understanding of people engaged in a practice may be irrelevant to the true understanding of that practice. Pareto advances two principal claims in the excerpts quoted by Winch. The first states that the reasons people advance for their actions may fail to constitute adequate grounds for committing them: 'In the eyes of the Greek mariner', says Pareto, 'sacrifices to Poseidon and rowing with oars were equally logical means of navigation'.<sup>28</sup> But that need not mean that things are in fact so—Greek mariners may have carried their sacrifices for the purpose of guaranteeing a calm sea, but a better understanding of their actions may insist, for example, that their actions were aimed at reducing anxiety in the face of unruly nature (through appeals to a powerful father-like figure). Indeed given that these Greek mariners were totally wrong about the purposes that could be served by their actions, isn't it safe to assume that the correct understanding of their actions must differ from theirs?

<sup>25</sup> P. Winch, *The Idea of a Social Science* (London: Routledge, 2nd edn, 1990).

<sup>26</sup> It is debatable to what extent this claim is applicable to Weber, who saw the self-understanding of the practitioners of a social practice as an integral part of its social understanding, so that sociology, according to Weber, must at least account for the 'subjective intent' of practitioners. See A.T. Kronman, *Max Weber* (Palo Alto: Stanford University Press, 1983) at 22–8.

<sup>27</sup> That is the hermeneutic tradition of Dilthey and his more or less faithful followers (like Gadamer and Habermas, who Dworkin mentions), with their insistence on the indispensability of adopting the 'internal' perspective in the understanding of social phenomena.

<sup>28</sup> V. Pareto, *The Mind and Society* (A. Bongiorno and A. Livingston trans, London: Cape, 1935) at 23.

Pareto's second claim is that some human practices remain the same from one culture or historical epoch to another, while their practitioners explain them in starkly different terms. It is then conceivable that the correct explanation would capture some deeper, more fundamental truth about these practices while discounting the self-understanding of their practitioners. Pareto adduces the case of baptism, which Christianity explains as the purification of the original sin. But baptism is a practice common to many cultures that do not possess the idea of an original sin. It is then at least a possibility that baptism can be better explained in terms different than those used by its Christian practitioners. Here is another example: in *History of Sexuality* Michel Foucault surveys the various justifications offered through the ages to the practice of sexual monogamy.<sup>29</sup> That practice was seen by its practitioners as serving the purpose of individual self-possession (associated with the Classical Greek ideal of moderation), of religious piety (the Catholic doctrine tolerating sex only within the confines of the institution of marriage), and of faithfulness to a loved one (the modern understanding of romantic love and 'betrayal'). It is at least conceivable that the most accurate way to understand the practice and its requirements is to look beyond practitioners' own proclamations about it.<sup>30</sup>

Now Winch opposes Pareto's two claims on essentially the same grounds:

Two things may be called 'the same' or 'different' only with reference to a set of criteria which lay down what is to be regarded as a relevant difference. When the 'things' in question are purely physical the criteria appealed to will of course be that of the observer. But when one is dealing with intellectual (or indeed any kind of social) 'things', that is not so. For their *being* intellectual or social, as opposed to physical, in character depends entirely on their belonging in a certain way to a system of ideas or mode of living. It is only by reference to the criteria governing that system of ideas or mode of life that they have any existence as intellectual or social events. It follows that if the sociological investigator wants to regard them *as* social events (as, *ex hypothesi*, he must), he has to take seriously the criteria which are applied for distinguishing 'different' kinds of action and identifying the 'same' kinds of action within the way of life he is studying. It is not open to him arbitrarily to impose his own standards from without. In so far as he does so, the events he is studying lose altogether their character as *social* events. A Christian would strenuously deny that the baptism rites of his faith were really the same in character as the acts of a pagan.<sup>31</sup>

According to Winch it is a mistake to try to understand such practices by assimilating them into other supposedly 'similar' ones. The correct understanding of

<sup>29</sup> M. Foucault, *The History of Sexuality* (R. Hurley trans, London: Allen Land, 1979).

<sup>30</sup> Claude Lévi-Strauss, coming from a somewhat different perspective, puts things this way: 'We know that among the most primitive peoples it is very difficult to obtain a moral justification or a rational explanation for any custom or institution. When he is questioned, the native merely answers that things have always been this way, that such was the command of the gods or the teaching of the ancestors. Even when interpretations are offered, they always have the character of rationalizations or secondary elaborations. There is rarely any doubt that the unconscious reasons for practicing custom or sharing a belief are remote from the reasons given to justify them'. C. Lévi-Strauss, *Structural Anthropology* (C. Jacobson and B.G. Schoepf trans, London: Penguin Press, 1968), 18.

<sup>31</sup> *The Idea of a Social Science*, above n 25 at 108.

Greek mariners' sacrifices must involve itself in the 'way of life' of the mariners: it must look at things, as Winch puts it, 'from the inside'. Attempting to understand the practice in terms alien to the practitioners—as some failed attempt to exercise control over the environment, for example—is of necessity to misunderstand its true meaning. That practice consists in worshipping a god—with all that is entailed by that—and not in some failed engineering effort. Again, to properly understand the practice of monogamy one must employ the modes of understanding of its practitioners; to understand that practice in external terms is simply to misunderstand it *as a social practice*.

These claims have great similarity to many of the claims made by Dworkin.<sup>32</sup> Like Winch, Dworkin believes that a true understanding of a social practice requires the interpreter to look at the practice 'from within'; to stand, as it were, side by side with its practitioners. He says that 'A social scientist who offers to interpret the practice [of courtesy] must . . . use the methods his subjects use in forming their own opinions about what courtesy really requires. He must, that is, *join* the practice he proposes to understand'.<sup>33</sup> That means, among other things, employing the conceptual apparatus of the practitioners and sharing in their 'form of life'—in short, offering an understanding that employs the practice's own internal criteria.<sup>34</sup> And, like Winch, Dworkin is also waging a war against positivists who purport to interpret social practices by merely 'observing' them and then speaking the language of 'facts'.

Now there is a level at which Winch's claims are indisputable: can one really understand a magical rite when viewing it as failed science? Can we really understand the Christian practice of baptism while ignoring the idea of the original sin? Would we be understanding monogamy if we viewed it not as a requirement of romantic fidelity but as a practice aimed at preserving the nuclear family unit? There is no doubt a *sense* that is lost in an interpretation not employing practitioners' own understanding. Winch wants to conclude from this that the *only* true way to try to understand a practice is through the self-understanding of its practitioners.<sup>35</sup> This claim is patently wrong—there are different methods and concepts (other than practitioners' own) through which we may seek to understand social practices 'as social phenomena'. Still, we must examine whether the understanding that *Dworkin* is talking about—i.e. an articulation of *the conditions*

<sup>32</sup> And also to some famous claims made by Wittgenstein, to which both Dworkin and Winch appeal (and who is, in fact, the principal hero of Winch's book).

<sup>33</sup> *Law's Empire*, 64. See also 'A social scientist must participate in a social practice if he hopes to understand it' at 55.

<sup>34</sup> Practitioners, says Dworkin, 'must agree about a great deal in order to share a social practice. They must share a vocabulary . . . 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 [about the practice] . . . That means not just using the same dictionary but sharing what Wittgenstein called a form of life sufficiently concrete so that 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', *ibid* at 63–74. The *interpreter* must presumably share all these as well.

<sup>35</sup> 'Magic, in a society in which it occurs, plays a peculiar role of its own and is conducted according to considerations of its own . . . To try to understand magic by reference to the aims and nature of scientific activity [i.e. by reference to considerations different than those used by its practitioners], as Pareto does, will necessarily be to misunderstand it', *The Idea of a Social Science*, above n 25 at 100 (emphasis in original).

making a claim legally correct or incorrect—must be restricted to practitioners' own perspective. If it does, this may help support the desirability requirement. Perhaps Winch's claim—or the part of it that we feel obligated to accept—can lend some much-needed support to Dworkin's best light.<sup>36</sup>

But, alas, Winch's claim does not help.<sup>37</sup> Interpretations of social practices which fail to employ practitioners' own understanding (their own opinions and methods) also profess to describe what makes a move within the practice correct or incorrect (or, in the case of interpretations of legal practice, what makes a claim legally valid). Take Freud's interpretation of the often-recurring tribal taboo barring the mother of a married woman from the presence of her son-in-law. According to Freud, the taboo comes to thwart the sexual attraction the mother is bound to feel towards her son-in-law (and he goes on to explain the sources of this sexual appeal).<sup>38</sup> This interpretation is very different, of course, from the understandings offered by the practice's own practitioners (indeed one can only imagine these practitioners' horrified protestations), but it certainly purports to say—just like practitioners' own understanding does—why a certain conduct is a violation of the taboo while other conduct is not. Similarly, the economics analysis of law is very different from the understanding (the opinions and methods) of the judges whose determinations it seeks to explain (maximizing economic efficiency is certainly not what these judges thought they were doing), and yet it does purport to articulate the conditions making a claim legally valid. The insistence on practitioners' own perspective becomes even more doubtful given that legal practitioners *themselves* accept the Law and Economics interpretation as sound, despite its variation from the self-understanding of previous practitioners.

On the other hand, if the Law and Economics' interpretation of tort law, or Freud's interpretation of tribal taboos, *do* somehow count as 'internal' perspectives (the claim being that judicial determinations sought to maximize economic efficiency *whether the judges were aware of this or not*), then Winch's claims do not help either: if the 'internal' perspective may encompass unconscious and unarticulated conceptions, then there seems to be no basis for the claim that the 'internal' perspective must be desirable (for this is a claim which appears to be grounded in practitioners' *conscious* understanding alone).

### B. Practitioners' Mistake

There is another rather obvious point. Even if we could somehow defend the idea that the true conception of legal practice must agree with practitioners'

<sup>36</sup> In a similar vein, Jurgen Habermas says that legal realism is a critique which 'relies on an observer's point of view' and that consequently 'the realists cannot explain how the functionally necessary accomplishments of the legal system [which for Habermas include some notion of the certainty of legal determinations] are compatible with a radical skepticism on the part of legal experts', J. Habermas, *Between Facts and Norms* (W. Rehg trans, Cambridge: Polity Press, 1996) at 201. I find it a mystery in what way such accomplishments are 'necessary', and why the realists must 'reconcile' them with their radical skepticism.

<sup>37</sup> Even if we put aside the possibility of practitioners' bad faith, which this suggestion fails in any case to handle.

<sup>38</sup> S. Freud, *Totem and Taboo* (A.A. Brill trans, New York: Vintage, 1960).

self-understanding, still we would not end up with the desirability requirement because practitioners may simply be wrong about what is desirable. Dworkin asserts not only that a true understanding of legal practice must portray legal practice as the most desirable *in the eyes of practitioners*; he insists that a true understanding must portray legal practice as *desirable in fact*. But there surely remains the possibility that practitioners believe a conception of law to be highly desirable whereas in fact it is highly undesirable. Practitioners may think that following linguistic conventions in the application of legal rules is a desirable conception of law because they think it produces predictable and easily ascertainable legal requirements. But this may prove to be a misguided illusion: legal interpretation guided by such linguistic conventions may be shown to produce highly unpredictable and uncertain legal requirements. Practitioners may believe they are practicing according to a most desirable conception of law, but they may be wrong—history is littered with practices taken to be desirable and then discredited as downright pernicious. But again, if practitioners can be wrong about the desirability of a conception of law, then desirability cannot even be a criterion for practitioners' own understanding of the true conception (let alone a criterion for the true conception itself).

#### 4. *The Best Light: the Error and the Insight*

##### A. *The Error*

To cut a long story short, the problem with deriving the desirability requirement from practitioners' own understanding concerns the possible gap between practitioners' own understanding and the determinative conception of law, as well as the possibility of error in assessing desirability. Now in fact Dworkin agrees that the true conception of law need not accord with practitioners' own understanding, indeed he commits himself to this position by rejecting the idea that the true conception of law is the one shared among legal practitioners (there is, he says, no such shared understanding). This means that the 'truth' of a conception cannot be a function of its agreement with practitioners' own understanding but a function of its own theoretical merit—and it therefore also means that the true conception does not accord with many practitioners' understanding of it. Indeed Dworkin explicitly says that:

an interpretation need not be consistent . . . with how past judges saw what they were doing, in order to count as an eligible interpretation of what they in fact did . . . [W]e cannot reject . . . [an] interpretation on the sole ground that it would have amazed the judges whose decisions it proposes to interpret.<sup>39</sup>

<sup>39</sup> *Law's Empire* at 285. There is no necessary contradiction between the claim that the correct conception of legal practice must accord with practitioners' own understanding and the claim that the best conception of legal practice may surprise legal practitioners. What it means for a conception to 'accord' with an understanding may very well be a flexible thing, and practitioners may be surprised by a conception which, upon a deeper reflection, they may recognize (as Dworkin also notes) as a truer understanding of their practice than the one they themselves hold. A lexicographer may spend her life writing up dictionaries while believing—and indeed carrying her work trying to

But once we insert a wedge between practitioners' own understanding of the practice and its true conception, what can be the justification for the claim that desirability is a criterion for a true conception of law? What can justify an acknowledgement that the true conception may have 'amazed' the practitioners whose decisions it proposes to interpret, but an insistence that nevertheless that conception must be desirable? It is impossible to defend the best light requirement by relying on practitioners' own understanding of their practice, but where else can it come from? Dworkin has been recently occupying himself with this question—though so far (it seems to me) with little success.<sup>40</sup> And the more one considers the problem, the less likely it seems that Dworkin can pull this rabbit out of his hat.<sup>41</sup>

The conclusion of all this is that the best light requirement—unlike the requirement of fit—is not a criterion for the true conception of law. The latter requirement is necessary; we cannot be offering a good interpretation of legal practice if our interpretation leaves out much of that practice. If we fail along the dimension of fit, our conception is by this fact alone untrue. The fit requirement is, in fact, a methodological triviality: it merely means that a theory that fails to explain much of the data it is supposed to be a theory *of*, must be wrong. But the requirement of best light is a different matter altogether, it appears to derive from practitioners' own understanding of their practice, and it therefore can be proven wrong just like practitioners' own understanding can. The best light may be a necessary requirement for the judicial discourse; but that discourse need not be determinative, nor need it be *in fact* desirable.

In *Law's Empire* Dworkin dedicates long pages to demonstrating that the economic conception of law is less desirable than alternative conceptions of law,<sup>42</sup> or that legal positivism is undesirable because it does not sit well with democratic theory.<sup>43</sup> Such discussions play an important role in jurisprudential

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execute this belief as best she can—that her endeavour consists in the mere enunciation of the conventional understanding of terms. Yet philosophers of language may reject this belief as a misleading oversimplification: the work of lexicographers consists not in the mere enunciation of conventional understandings but in the articulation of the essential, i.e. the important, features of terms—at times in *opposition* to what most people take them to be. Now this articulation of the lexicographer's practice may appear to our lexicographer, on first sight, as mighty surprising; but she may come to recognize this latter view as superior to her own.

<sup>40</sup> See R.M. Dworkin 'Hart's Postscript' (paper presented at Oxford University H.L.A. Hart Lecture Series, 2000).

<sup>41</sup> Nicos Stavropoulos has offered a revisionary and compelling interpretation of Dworkin, describing Dworkin's methodological claims as a form of semantic realism. See N. Stavropoulos, *Objectivity in Law* (Oxford: Oxford University, 1996). According to Stavropoulos, Dworkin's claims amount to the proposition that the correct application of concepts is a function of the best theory we have of what these concepts are concepts *of* (and not a function of conventional agreement). In a recent unpublished paper, Stavropoulos moves to try and justify Dworkin's best light requirement by relying on semantic realism and avoiding relying on practitioners' own understanding of their practice. See N. Stavropoulos 'Interpretivism, Analysis, and Realism' (unpublished manuscript 2001) (copy with author). I will not get into a discussion of this work, other than saying that I believe this strategy also fails. To the extent to which the best light is understood as a criterion of desirability—as it certainly should, semantic realism, I believe, cannot defend that criterion. For an extended discussion of Stavropoulos' interpretation of Dworkin, as well as his explanation of the best light requirement, see O. Raban, *Modern Legal Theory and Judicial Impartiality* (forthcoming in GlassHouse Press, September 2003).

<sup>42</sup> See N. Stavropoulos, *Objectivity in Law* (Oxford: Oxford University, 1996) at 277–312.

<sup>43</sup> See *ibid* at 139–50.

debates: the fact that Law and Economics or legal positivism are undesirable conceptions of law may have an impact on what legal practitioners actually do, or on scholarly attempts to influence what they do. But these arguments do not prove what Dworkin believes that they prove: legal positivism may not sit well with democratic theory, but what of it? This tells us little on whether legal positivism is a true understanding of law. It is perfectly true that legal scholars often combine the quest for a true conception of law with the quest for a conception of law putting legal practice in its best light. To be sure, the wish to justify a social practice is oftentimes the very purpose of articulating an interpretation of it. Indeed it seems to me that Dworkin is right in claiming that legal positivism, despite its protestation to the contrary, is such a theory of law.<sup>44</sup> But Dworkin is wrong in claiming that there is no distinction to be had between these two efforts. An interpretation may claim to be the most desirable conception of law without also claiming to be a true conception. It may say this understanding of legal practice is not an understanding of how legal practice really works; it is an understanding of how legal practice should work, because that would be wonderful. But it is still an understanding of our legal practice because it is a claim about the logical possibilities of our practice—about what it is good for legal practice to be and about what it can be, though not necessarily about what it is. And, obviously, an interpretation may claim to be a true conception of law without being the most desirable.

This is easy to see in the case of *critical* legal theories, which Dworkin believes must compete with other conceptions of law along the dimension of desirability. Critical legal theories need do nothing of the kind if only because they may seek to re-describe a supposedly desirable conception. For instance, practitioners may think that Law and Economics presents a desirable conception of private law, but it is conceivable that legal determinations guided by the maximization of economic efficiency are consistently biased in favour of the wealthy and to the detriment of most. Maybe our existing economic arrangements are such that the maximization of efficiency—so it happens—tends to benefit the rich at the

<sup>44</sup> I believe that legal positivism seeks to establish the objectivity of proper legal interpretation. According to H.L.A. Hart, the conditions of legal validity are conventional. These conventions (conventions in identifying the authoritative legal rules—the famous 'rule of recognition'—and then linguistic and interpretive conventions in applying these rules) lead the legal interpreter to the legal answer. Where they do not lead to a *uniquely correct* legal answer, this is the result of having no convention governing the matter. But since the content of the law is a matter of conventional agreement, where there is no convention—there is no law (this is a case of a 'gap' in the law). In other words, where there is no one correct legal answer, there is no legal answer to be had. When such cases come before a judge, the judge ceases to act as a legal interpreter and begins to act as a judicial legislator—the judge moves from the task of establishing what the law is, to the task of establishing what the law should be. Now this is a rather peculiar doctrine. (Especially since today's legal positivists readily admit that legal practitioners employ extra-legal considerations in deciding cases, even in those cases which have a governing convention in the matter; that these considerations are presumably the same considerations which are employed in cases where there is no governing convention; and that legal practitioners themselves deny any distinction between the two activities, insisting that there is law even when there is no governing convention). Now I think that the best explanation for this doctrine—notwithstanding the various positivist attempts to justify it—is the wish to put *legal interpretation* in a good light: if legal interpretation, when carried properly, leads to one unique resolution, then proper legal interpretation leads to a resolution that is 'correct' to the exclusion of all incompatible claims; its conclusions are objectively true.

expense of everyone else. Now if such were the case with the economic analysis of law, then Law and Economics' proposed conditions of legal validity could be captured from highly undesirable perspectives. Legal validity would be a function of a legal right's tendency to perpetuate existing distribution of economic power. There is no reason why one description of this legal conception would be truer than the other, the maximization of economic efficiency and the perpetuation of existing distribution of economic power (or the privileging of a certain political ideology) may amount to the very same thing.

But Dworkin may have a different claim in mind: not that the redescription is *untrue*, but that it is untrue *as a conception of law*. In other words, it may be true that the Law and Economics conception of law is biased against the poor, but even if things are so (so the claim goes), this is not an *essential* part of Law and Economics: we can easily imagine the maximization of efficiency as *not* being biased against the poor. A theory of a social practice is aimed at capturing its *essence* (i.e. what the practice is *about*) not its contingencies. The institution of marriage may bring an increase in the sales of diamonds, but marriage is not about increasing diamonds' sales—that would be an untrue theory of marriage.

There are two responses to this claim. First, that an undesirable consequence is not what the practice is *about* is precisely what many critical conceptions dispute. The bias against the poor, the Marxists would say, *is* the essence of legal practice. If Law and Economics were not biased against the poor, then Law and Economics would not have been the criteria of legal validity. Broadly speaking, the *essential* features of legal practice need not be desirable. But there is an even simpler response to the above claim: if this is what Dworkin means by his best light requirement, then Dworkin's claim is not very significant. Suppose that the critic offering the undesirable redescription of Law and Economics concedes Dworkin's point: bias against the poor, she says, is indeed not an *essential* feature of legal practice (we can easily imagine legal practice which is not biased against the poor). Now what on Earth is the significance of that concession? It seems to have none. If this is what the best light requirement is about, then the best light requirement is an uninteresting thesis.

And yet, there is much insight in Dworkin's claims.

## B. *The Insight*

I commented before on the accuracy of Dworkin's claim that legal practitioners consider the desirability of the arguments underlying legal claims as important for their legal validity. I now wish to examine the relations between this important observation and some other aspects of Dworkin's legal theory.

As we saw, Dworkin begins his attack on legal positivism by noting that legal practitioners habitually disagree about the correct legal rights and duties, and about what makes them correct. Now the commonness of such disagreements is

undeniable (they exist in every case arriving before a court, for example); but legal positivism has downplayed the implications of this phenomenon for the understanding of law. H.L.A. Hart, for instance, claimed that such disagreements exist only on the 'margins of [legal] rules': it is only where the law 'runs out' that genuine legal disagreements arise.<sup>45</sup> Hart's point is an upshot of the positivist claim that the correct legal requirements are a matter of (non-controversial) conventional agreement—conventions about where to look for authoritative legal rules, and then linguistic and interpretive conventions in applying those rules. Only when these conventions fail to point to one resolution in a given case (when the language of the identified rule is ambiguous under the circumstances, for example), do genuine legal disagreements arise. (Legal practitioners may of course disagree all the time, but many of these disagreements are disingenuous—as when lawyers proclaim the legal requirements which suit their clients rather than those they ought to know the law actually requires.) It follows that genuine disagreements are not about what the law *is*, for what it *is* must be a matter of conventional agreement (indeed the law *is* what it is by virtue of this conventional agreement), instead, these are disputes about what the law *should be*: genuine disagreements arise precisely where the law is no longer around. In fact, looked at from this peculiar perspective, the more genuine disagreements we have regarding a particular legal issue, the less law we have regarding it. Such disagreements are, for the most part, disagreements not about law but about moral issues or economic issues or political issues or what have you—and the arguments they involve are similar to the arguments of legislators deliberating over a proposed legislation.<sup>46</sup> Such arguments, say the positivists, are often advanced as claims about what the law *is*, but they are best understood as claims about what the law *should be*. If you take a good look at these arguments you see that they are not the mere descriptions of the state of the law they purport to be, but that instead they appeal, whether implicitly or (often enough) explicitly, to what's *desirable* about the right or duty that they proclaim.

Dworkin turns all this around: he argues that these pervasive disagreements are legal disputes *par excellence*—that they are (as they claim to be) disagreements about what the law *is*, not about what it should be. Dworkin transforms what for the positivists is an unfortunate though perhaps inevitable *modus operandi*—the dirty little secret of legal practice which Austin has branded a 'childish fiction'<sup>47</sup>

<sup>45</sup> See H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 2nd edn, 1994) at 135.

<sup>46</sup> But according to Joseph Raz, certain legal disagreements may in fact be about the law: these are disagreements about what the ruling convention is. See J. Raz 'Two Views of the Nature of the Theory of Law', 4 *Legal Theory* 249 (1998) for advancing this argument. I will not get into this claim: once a convention can be a subject of dispute it is doubtful that it is still a convention in any respect that is significant here.

<sup>47</sup> '[T]he childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely declared from time to time by judges'. J. Austin, *Lectures on Jurisprudence* (London: John Murray, 4th edn, 1879) at 655. Austin speaks against the claim, which he sees implicit in judges' pronouncements, that establishing legal rights and duties is never a matter of 'personal' judgment differing from one judge to the other. Since things are obviously not so, and judges do often issue judgments whose content would have been different if decided by a different judge, Austin concludes that in

(i.e. practitioners purporting to determine what the law *is* while making normative claims about the desirability of their own positions) into a fundamental aspect of legal argumentation and legal decision-making. There is nothing childish about purporting to ascertain what the law is while making normative claims—this is precisely what ascertaining the law is about! If the positivists see this as institutional deception, it is only because their understanding of law is wrong.

Dworkin proceeds to elaborate this claim with his ‘interpretive attitude’—the idea that practitioners establish the correct legal rights and duties by seeking those which derive from the most desirable conception of law. This hypothesis explains the commonness of legal disagreements: practitioners habitually disagree about what the law is because they disagree about which conception is the most desirable (desirability being a controversial matter). And it also accounts for the normative element in legal claims—for the way with which a claim’s desirability supports its legal validity: it is the desirability of the *theoretical conception from which a claim derives* (rather than the desirability of the claim itself) which infuses legal discourse with normativity. Dworkin channels this normative element into a respectable outlet. The positivists explained this normative element away by insisting it is not really about the law; Dworkin insists that it is about the law, but that it is a perfectly respectable lady. (The lady’s respectability is then further cemented by the claim that there is *one* correct most desirable conception of law.<sup>48</sup>)

Now I think that there is much that is wrong in the hypothesis of the ‘interpretive attitude’ (I do not think, for example, that the normative element of legal arguments consists in the desirability of their underlying conception of law). But Dworkin has touched upon an important point in insisting that determining what the law *is* is a process involving claims for desirability—for goodness. His theory joins a number of efforts seeking to explain the role of desirability in determinations of legal validity (and thereby to substitute the seemingly irremediable account of natural law).<sup>49</sup> So Dworkin’s methodological claims are wrong; but his attempt to explain the normative nature of legal discourse as an *essential* aspect of establishing the content of the law (and not an unfortunate if unavoidable game that practitioners play) pulls legal philosophy in the right direction: legal discourse is infused with claims about what ought to be done because what the law *is* is, *in some way*, what ought to be done.

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such cases they do not really declare the law (as they claim they do) but in fact write it. Implicit in his claim is the assumption that legal rights and duties are not controversial.

<sup>48</sup> That claim is put forward, among other places, in R. Dworkin’s ‘Objectivity and Truth: You’d Better Believe It’, 25 *Philosophy & Public Affairs* 87 (1996).

<sup>49</sup> See, e.g. H.M. Hart and A.M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (New York: Foundation Press, 2001); F. Frankfurter ‘Some Reflections on the Reading of Statutes’, 47 *Columbia Law Review* 527 (1947). The most important legal theorist to propound such a view was Lon Fuller (despite Fuller’s own unfortunate identification of his theory with natural law). See L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 2nd edn, 1969).

## 5. Conclusion

Legal practice is essentially contested, says Dworkin, and there is no 'true' conception other than the one which tries—along with all other ones—to put legal practice in its most desirable light. The interpreter who wishes to avoid this normative inquiry and merely to 'describe' the practice will end up with a useless report, for practitioners employ pervasively different understandings of the practice which are incompatible with each other. A real interpretation seeks to establish what *the* practice (in the singular) is about; it seeks to tell us what makes a rule or a proposition legally valid for the practice as a whole. And proposing such an interpretation—says Dworkin—takes the articulation of a conception of law that best fits and justifies legal practice.<sup>50</sup>

This claim must be rejected. But Dworkin is raising an interesting methodological difficulty: given pervasive disagreements about which rights and duties are legally valid and about why they are, what can make a conception of law *true* or *correct*? As I said, one possibility that is rejected by Dworkin is an interpretation uncovering a hidden pattern underlying all of practitioners' legal determinations. Law and Economics, for example, is a legal conception with such an ambition in some areas of private law. Economic efficiency is supposedly what underlies numerous legal determinations, even where the self-understandings of the interpreters making these determinations may have been very different and indeed mutually incompatible. After all, as we saw, a conception of law must agree with practitioners' ultimate determinations, not with their opinions about how they arrived at them. Practitioners may disagree about the correct legal rights and duties, but their disagreements may be explained as disagreements over what determination best advances economic efficiency. The conception they employ, however, is essentially similar.

Dworkin denies that any such interesting conception exists. According to Dworkin, practitioners' understanding of legal practice is so profoundly controversial that a legal conception capturing what makes legal determinations valid for legal practitioners *as a whole* must be something extremely vague and indefinite—so vague and indefinite as to be unable to guide legal practitioners to the correct legal right or duty in the face of conflicting claims. But according to Dworkin, conceptions of law vie with each other for the honour of providing the true standard of legal validity, and legal practitioners choose one conception or another precisely in order to sift the correct legal requirements from all the incorrect ones (this is the gist of the 'interpretive attitude'). This must mean, in turn, that the sort of conceptions in which Dworkin is interested are less interesting the less they can decide between mutually incompatible legal claims. And what Dworkin appears to say is that a conception of law describing the conditions

<sup>50</sup> As Dworkin points out, any number of conceptions can equally fit the data; 'desirability' is the second arm—joined to the arm of 'fit'—such that *together* the two constitute the tweezers with which one picks the correct conception from among those available.

of legal validity for legal practitioners as a whole would be so indeterminate as to be completely uninteresting.

I believe this conclusion is wrong. A conceptions of law describing the conditions of legal validity for legal practitioners as a whole can be determinate enough to provide much insight into legal practice and much guidance in distinguishing spurious legal claims from valid ones. That conception will not be *fully* determinate: good legal theory must either give up its aspiration to apply to all legal questions, or else it must give up the aspiration to point to unique legal answers for all or even for most of these questions.<sup>51</sup> The conditions of legal validity may leave ample room for different and conflicting legal answers. To that extent, our conception of law would not be as desirable as a conception of law might be; but as we now know, this tells us nothing about its veracity.

<sup>51</sup> Legal theory is not alone here: those constructing conceptions of *justice*, for example, face a similar compromise: utilitarians (for instance) must either give up the claim that utilitarianism underlies *all* decisions of justice, or else they must expand the notion of 'utility' to such a degree that it loses every deterministic bone it ever had in it.