

# What Makes a Moral Duty Legal? Dworkin's Judicial Enforcement Theory Versus the Moral Impact Theory

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## 1. Introduction

I'd like to ask you, dear reader, to begin by answering a brief survey question. Please try to set aside your theoretical preconceptions in answering this question.

Consider the moral requirement not to be cruel to others. I assume you share my intuition that this requirement is *not* a legal requirement. (If not, then, as Jerry Fodor once said, you should have your intuitions checked.)

Now here's the question. (Remember to set aside your theoretical views as much as possible.) **Why is the moral requirement not to be cruel to others not a legal requirement?** An important clarification: the "why" here is not a causal/historical one, but a philosophical one. That is, the question is not why people have not taken appropriate action to create a legal requirement not to be cruel, but why, as things are, it is not a legal requirement. Please remember your answer – we will make use of it later.

The central question this paper explores is what makes certain moral rights and duties legal ones. In particular, is an obligation legal because it ought to be enforced, on demand, by the courts? Or is an obligation legal because it obtains in virtue of past actions of legal institutions? In *Justice for Hedgehogs* (*Hedgehogs*, for short), Dworkin offers the former answer, and I have argued elsewhere for the latter. (The initial rough glosses of the positions will need to be qualified.)

It is important to understand that the issue is *not* what properties legal obligations necessarily have, for example, whether legal obligations are necessarily such that courts ought to enforce them (and only them). It is very plausible that, at least in general, courts ought to enforce legal obligations and ought not to enforce non-legal obligations (though it will turn out to be difficult to specify the "at least in general" qualification in a way that is both precise and true). The issue is, rather, what it *is* to be a legal obligation, and, in particular, whether the fact that courts ought to enforce it is part of what it is to be a legal obligation.

Legal positivists will not think that there is any true story about what it is for a moral obligation to be a legal obligation. They may nevertheless be interested in the question of whether either entitlement to court enforcement or obtaining in virtue of past institutional action is part of the true constitutive account of legal norms.

In the next section, I explicate Dworkin's account of law in *Hedgehogs* – the *Judicial Enforcement Theory* (or *JET*, for short). In section 3, I examine the exceedingly weak argument Dworkin offers for JET. In section 4, I turn briefly to the relation between JET and Dworkin's position in *Law's Empire* with the goal of ascertaining whether the arguments of *Law's Empire* provide support for JET. Section 5 is the heart of the paper. I show that several different lines of

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<sup>1</sup> I am grateful to Larry Sager and Nicos Stavropoulos for valuable discussion.

argument strongly suggest that it is essential to legal norms that they obtain in part in virtue of past actions of legal institutions – and that it is not essential to legal norms that courts ought to enforce them on demand. In section 6, I briefly explicate my own alternative to JET. I conclude with a diagnosis – Dworkin has succumbed to the temptation to offer an anti-realist account of a real phenomenon.

## 2. Dworkin's view of law in *Hedgehogs*: The Judicial Enforcement Theory

In *Justice for Hedgehogs*, Dworkin offers a view of law according to which law is “a part of political morality.” Which part of political morality? Dworkin distinguishes “two classes of political rights and duties” – legislative and legal. “Legislative rights are rights that the community’s lawmaking powers be exercised in a certain way.” He gives as examples a right that the legislature create a system of public education and a right that the legislature not censor political speech.

By contrast, legal rights “are those that people are entitled to enforce on demand, without further legislative intervention, in the adjudicative institutions that direct the executive power of sheriff or police.” (406).<sup>2</sup> This is the position I have already labeled the Judicial Enforcement Theory (JET). In an alternative wording, Dworkin often writes that legal rights are those that are “enforceable on demand” in a court (e.g., 404-05, 407).<sup>3</sup> For simplicity of expression, I will typically formulate the position as follows: legal rights are those moral rights that courts *ought* to enforce (on demand). I intend this formulation to be equivalent to Dworkin’s.<sup>4</sup>

I begin with several points about how to understand the account. First, Dworkin is offering a *constitutive* account of legal rights and duties (and indeed of legal norms more generally) – an account of what it *is* to be a legal right or duty.<sup>5</sup> By a constitutive account, I mean the kind of account of the nature of a phenomenon that philosophers have sought for many important phenomena, including knowledge, justice, cause, convention, and person. As is familiar, a constitutive account does not purport merely to give necessary and sufficient conditions for the target phenomenon – not even modally necessary and sufficient conditions (i.e., conditions that

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<sup>2</sup> Given the way Dworkin formulates the distinction, a right could be both a legislative right and a legal right, e.g., the First Amendment right to freedom of speech. Dworkin's discussion might be read to suggest that he takes the distinction to be exclusive, however. Perhaps he means that legislative rights are rights that lawmaking powers be exercised in a certain way that are *not* enforceable on demand. The issue will not matter for my argument.

<sup>3</sup> In his posthumous article, “A New Philosophy for International Law,” Dworkin (2013, 12) offers very similar characterizations of the view.

<sup>4</sup> I address later in this section how to understand Dworkin's notion of an entitlement to judicial enforcement. As noted, I intend my formulation in terms of what courts ought to do to be equivalent to his. I also explain later in this section why I have formulated JET in terms of moral rights rather than political rights. I usually omit the qualification “on demand” in order to save words.

<sup>5</sup> Following Dworkin, I will often talk either of rights or duties for simplicity, but the discussion should be understood to apply to the full panoply of legal entities, including powers, immunities, and permissions. Indeed, as noted, the account should apply to legal norms generally. As the account is framed in terms of legal rights, it is not entirely clear how to generalize the account. Perhaps the idea is that to be a legal norm is to be a moral norm that individuals have the right to enforce on demand in the courts (cf. Dworkin 2013, 12). Many norms, such as those granting powers, do not admit of direct enforcement in the courts, but I will for the most part set such problems aside.

are necessarily necessary and sufficient). A constitutive account purports to give an account of the nature or essence of the phenomenon – of what it *is* for something to be, say, knowledge.

To be clear, a constitutive account must give necessary and sufficient conditions.<sup>6</sup> If the specified conditions do not pick out the target phenomenon in all possible worlds, they are a nonstarter as an account of the phenomenon's nature. But specifying necessary and sufficient conditions for a target phenomenon is not sufficient for providing a true constitutive account of the phenomenon. In Kit Fine's (1994) example, to be a member of the set whose only member is Socrates is necessary and sufficient for being Socrates. But being a member of that set is no part of the essence of Socrates or, in a different idiom, what it is to be Socrates. (I will use several locations interchangeably – *nature, essence, what it is to be* an instance of the target phenomenon). A constitutive account must specify the essence of the phenomenon.

(Here is a brief reminder of the distinction between a constitutive account and an account that specifies necessary and sufficient conditions.<sup>7</sup> A necessary and sufficient condition for being water is being the substance that actually is found in the oceans on earth and comes down in rain (setting aside qualifications about impurities that are irrelevant to the point of the example). Because of the “actually” operator, this account is necessary and sufficient – it picks out water in all possible worlds. But it is not a correct account of what it *is* to be water. To the best of our understanding, to be water is to be H<sub>2</sub>O.)

Second, although I have formulated JET in terms of moral rights, Dworkin writes that legal rights are *political* rights that are enforceable on demand. (2011, 405-06). Political rights, according to Dworkin, are rights that we “each as individuals have against our state – against ourselves collectively.” (328). For example, they include the right to free speech and the right not to be punished without a fair trial (329). Moreover, the relevant notion of “right” is that of a trump: “political rights are trumps over otherwise adequate justifications for political action” (329). Finally, Dworkin's discussion of political and legal rights makes clear that, in order to be a political right, a right need not derive from past political decisions (though political rights do require the existence of a political community). For example, he maintains that “Americans have a political right to adequate healthcare or insurance, but for many long decades ... they had no proper legal right to either.” (331; see also 327-31). Indeed, the fundamental political right, according to Dworkin, is the right to equal concern and respect, which does not depend on the content of past political decisions (330).

Dworkin's claim that legal rights are a subset of political rights understood in this way raises several difficulties that I will for the most part set aside. Many legal rights do not seem to be rights that we have against the *state*, but rights against individuals. Correspondingly, there are many individual legal duties. Think of tort and contract rights and duties, for example. Dworkin may hold that all such ostensibly individual legal rights and duties are properly understood as rights to court enforcement, for this would explain why he takes all legal rights to be political rights in the sense of rights against the state. For example, he may understand your duty to take reasonable care not to cause harm to me as my right that the court require you to pay me

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<sup>6</sup> To save words, I will generally omit the qualification that the necessary conditions hold necessarily, but it should be understood.

<sup>7</sup> See Kit Fine 1994; Greenberg 2005.

damages if your failure to take reasonable care harms me. As Hart famously argued, this view distorts the role of law in providing guidance to primary actors (Hart 1961/1994, 35-42).

For present purposes, what matters is that Dworkin has to consider any moral right that is enforceable on demand in the courts to be a legal right even if the moral right is not intuitively one that is against the state. Only in this way can he have any hope of accounting for the full range of legal rights (and, a fortiori, of legal norms). The apparent restriction of legal rights to political rights as opposed to moral rights more generally therefore seems to do no work (as it adds nothing to the requirement that the rights be enforceable on demand). JET therefore is the view that legal rights are moral rights that are enforceable in the courts on demand. For this reason, at the start of the paper, I used the example of the moral duty not to be cruel, despite the fact that it is not a political duty. (If you believe that the restriction to political rights and duties is essential to JET, you can substitute in my initial example some political right or duty that, in the United States, in no way traces back to past institutional action, such as the duty to provide adequate shelter.)

Third, there is a question concerning how to understand the idea that legal rights are enforceable on demand. Should we understand this account as specifying that the relevant rights are ones that courts must enforce all things considered? Or merely ones that courts have pro tanto reason to enforce? Or something else?

Begin with Dworkin's claim that legal rights are a subset of political rights, and that political rights are trumps. A trump defeats "otherwise adequate justifications for political action." So a "good all-things-considered justification" will not justify a violation of a political right. 2011, 329. Although the text is not entirely clear, one possible understanding is that enforceability on demand is *itself* to be understood in terms of the notion of a trump. That is, for a particular political right, itself a trump, to be enforceable on demand is for individuals to have a right to court enforcement of that political right in the sense that what would otherwise be good reasons for a court's not ordering enforcement are trumped. (E.g., 331-32).

This reading is in effect the all-things-considered understanding of enforceability on demand, except that Dworkin holds that trumps can themselves be trumped by an "emergency" (2011, 411, 473 n.1). I will often refer to the understanding of enforceability on demand as a trump as the "all things considered" understanding.<sup>8</sup>

Dworkin may assume that because rights are trumps, if a right is enforceable in the courts on demand, then the entitlement to judicial enforcement of the right must itself be a trump. This assumption would be mistaken. That a particular political right is a trump does not imply that the entitlement to judicial enforcement of that right is a trump. Indeed, as Dworkin recognizes, there are political rights that do not carry any entitlement to judicial enforcement. Once we see that point, it seems clear that there could be political rights that there are good reasons to enforce in the courts, but reasons that could be outweighed.

Nevertheless, Dworkin's response to Larry Sager's (2010) important arguments that there are legal rights that courts should not enforce suggests that he takes the entitlement to enforcement

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<sup>8</sup> Though he does not say so, it may be that Dworkin would allow that the entitlement to judicial enforcement may be defeated by other rights, for example by rights deriving from a statute of limitations, a waiver of liability, immunity of a government official, or a pardon. If not, these kinds of doctrines will yield counterexamples to JET. See section 5 below.

to be a trump. Sager describes a hypothetical case in which: “A constitution declares that people have a right to state-financed healthcare,” but the court declines to enforce that constitutional right directly because it “is not well-placed to adjudicate all the delicate questions of budget allocation and medical science.” 412. Dworkin responds by insisting that such rights are merely political, not legal. “It would make little sense to say what we said about the Fugitive Slave Act: that citizens have a prima facie constitutional right to medical care on demand that is however trumped by some emergency that prevents judges from actually enforcing it.” 413. He does not even consider the possibility that various ordinary reasons might simply outweigh the reasons for enforcing the right.

In the example, there are *some* reasons, indeed strong reasons, for a court to enforce the constitutionally specified right to medical care. In addition to the fact (assuming it is a fact) that citizens have a moral right to medical care, the right has been specifically declared in the Constitution, so there are reasons of democracy and fairness for enforcing that right (and some of the reasons that would otherwise militate against enforcement are eliminated or reduced in force). If Dworkin took a legal right to be a right that courts have pro tanto reasons to enforce, he would maintain that the constitutional right *is* a legal right; reasons of institutional competence simply override the reasons for enforcing the right. Rather than taking this line, which would allow him to defuse a set of powerful intuitive counterexamples to his position, Dworkin insists that there is no legal right here because there is no moral emergency preventing enforcement. The passage therefore suggests that Dworkin intends legal rights to be those that ought to be enforced all things considered – but with an exception for moral emergencies.

The language and tenor of the discussion also suggests the “all-things-considered” understanding. For example, Dworkin writes without qualification that legal rights are enforceable on demand, and that individuals are entitled to such enforcement.

In addition to the exegetical reasons that favor the all-things-considered reading, there is a dialectical reason for me to adopt that reading, as it makes my argumentative task more difficult. In section 4, I argue that the all-things-considered version of the position faces serious objections. Next, I argue that the pro tanto version of the position has fatal problems. Thus, if, contrary to what I have suggested, Dworkin is better understood as holding that legal rights are those that courts merely have merely pro tanto reason to enforce, then so much the better for my argument.

### **3. Dworkin’s argument for the one-system view**

The only explicit argument that Dworkin offers for the one-system view in *Justice for Hedgehogs* is both bizarre and extraordinarily weak. In order to save space, I will address it only cursorily here. (I have criticized it briefly elsewhere (Greenberg 2014; 2017).) Dworkin 2011, (402-03) argues: “Once we take law and morality to compose separate systems of norms, there is no neutral standpoint from which the connections between the supposedly separate systems can be adjudicated.” According to Dworkin, if we assume the one-system picture, there are two exhaustive possibilities. We must look either to the content of the law or to the content of morality to answer the question of how law and morality are related – in particular, “whether positivism or interpretivism is a more accurate . . . account of how the two systems relate” (2011, 403). But “either choice yields a circular argument with much too short a radius.” (2011, 403).

Given this “apparently insoluble problem” with the two-systems picture, Dworkin concludes that we must adopt “a one-system picture: we now treat law as a part of political morality.” (405)

The argument is utterly unsuccessful. To begin with, even if one assumes the two-system picture, not only are the two possibilities that Dworkin considers not exhaustive, neither is even a promising place to look for an answer to the question of how law and morality are related. Moral and legal norms don’t address such metaphysical questions. (Greenberg 2017, 283-84).

Perhaps even more bizarrely, the second step in the argument -- responding to the purported circularity problem by adopting the one-system picture that legal norms are a subset of moral norms – blatantly begs the question in Dworkin’s favor. It assumes Dworkin’s view of the relation between law and morality – a view that is inconsistent with positivism. Ironically, then, having offered the dubious argument that assuming the two-systems picture leads only to options that beg the question in favor of positivism or interpretivism, Dworkin responds by adopting a position that is evidently question-begging.

Moreover, this second step of the argument relies implicitly on the premise that the only alternative to assuming the two-systems picture is to assume the one-system picture. Obviously, however, a promising approach is not to assume either picture at the start. (This is the approach that I have taken in own my arguments for non-positivist views. Dworkin asserts that almost all philosophers assessing the debate have assumed the two-system view. It’s not clear to me that this is right, but I will not attempt to address this historical question here.)

It is worth noting that the argument I have been criticizing purports only to establish “the one-system view” that morality and law are not separate systems; it does not purport to say anything about the further question of the relation between law and morality, if the one system view is correct,. For example, if legal rights are a subset of moral rights, the argument has nothing to say about which subset of moral rights they are. So even if it were successful, the argument would do nothing to support JET specifically, as opposed to other views on which legal norms are a subset of morality.

#### **4. The relation between JET and law as integrity**

In this section, I turn to the question of the relation between JET and Dworkin’s well-known “law as integrity” theory as developed most fully in *Law’s Empire*. This question is of interest not just as a matter of Dworkinology. We have seen that Dworkin does not do much to support JET in *Hedgehogs*. If JET is the same view as law as integrity (or appropriately related to it), then Dworkin’s arguments for law as integrity will support JET.<sup>9</sup>

It is crucial at the start to distinguish two issues. First, is JET the same as Dworkin’s account of law in *Law’s Empire*. Second, does JET have the same consequences for the content of the law as his account in *Law’s Empire* – i.e., does it classify the same rights and duties as legal?

In order to understand the difference between these two issues, remember that Dworkin in both books purports to offer *constitutive* accounts of law – accounts of what it is to be a legal norm (or a legal right or duty). As noted, constitutive accounts are not merely accounts of necessary and

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<sup>9</sup> Dworkin suggests in a footnote that his discussion in *Hedgehogs* is meant to “supplement” rather than “substitute for” *Law’s Empire* and *Justice in Robes* (2011, 485 n.1).

sufficient conditions. They aspire to do more than correctly classify in all possible worlds, for they try to say what it *is* to be an instance of the phenomenon.

Once this point is recognized, merely stating the two theories reveals that that the theories are not only not the same, but they are inconsistent. Law as integrity holds that legal norms are those that “figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice.” 1986, 225. By contrast, JET holds that legal norms “are those that people are entitled to enforce on demand, without further legislative intervention, in the adjudicative institutions that direct the executive power of sheriff or police” (2011, 406).<sup>10</sup> At the risk of belaboring the obvious, these theories make inconsistent claims about what makes something a legal norm. For example, according to law as integrity, constructive interpretation is part of what makes something a legal norm, while constructive interpretation does not figure in *JET*’s account of what makes something a legal norm. Conversely, according to JET, an entitlement to enforcement in the courts is part of what makes something a legal norm, while such entitlement plays no role in law as integrity’s account.

Although law as integrity and JET are inconsistent constitutive accounts of legal norms, it is possible that they have the same consequences for the content of the law. I am doubtful, but I won’t pursue this issue here. Suffice it to note that it would require substantial argument to make the case.<sup>11</sup>

It might be pointed out that *Law’s Empire* offers a conjecture about the point of law that concerns when force is appropriately used. Dworkin suggests “that the most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way. Law insists that force not be used or withheld ... except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.” 1986, 93.

I will make several points about this conjecture. To begin with, the conjecture is not law as integrity, and Dworkin claims that his own arguments later in the book – his arguments for law as integrity – do not depend on the conjecture. 93. Rather, by contrast with law as integrity, the suggestion is supposed to be abstract enough that most legal theorists can accept it “so that their arguments take place on the plateau it furnishes.” 93. And in fact Dworkin does not argue for the conjecture but offers the hope that it is uncontroversial (though this hope is in vain) (92-94).

Dworkin also is explicit that his conjecture about the point of law does not entail that courts or other officials ought to enforce all legal norms. 109-10. Indeed, Dworkin’s conjecture about the point of law has to be relaxed about the need for judicial enforcement on demand because the conjecture is supposed to be acceptable to positivists who believe that whether it is morally required that legal norms be enforced is a contingent matter. Most importantly, nowhere in *Law’s Empire* does Dworkin argue that a norm that ought not to be enforced on balance, for example because of institutional limitations of the courts, is for that reason not a legal norm.

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<sup>10</sup> I have formulated both theories in terms of legal norms to aid comparison. For present purposes at least, nothing turns on whether they are formulated in terms of norms or in terms of rights, duties, and the like.

<sup>11</sup> In Greenberg (2017, 297-300), I briefly address the different question whether MIT and law as integrity have the same implications for the content of the law.

Dworkin considers an objection that “our lawyers and citizens recognize a difference between the question what the law is and the question whether judges or any other official or citizen should enforce or obey the law.” In response, Dworkin clarifies his suggestion:

Our concept of law is furnished, on my suggestion, by rough agreement... that law provides a justification *in principle* for official coercion. There is nothing absolute in that statement of the concept. It supposes only that in a flourishing legal system the fact of law provides a case for coercion that must stand unless some exceptional counterargument is available.... Any full theory of law, however, must be much more concrete. It must say much more about the kind of exceptional circumstance that might defeat law’s case for coercion even in a flourishing system. 1986, 110.

The qualification in this passage that the legal system be a flourishing one is important, for it leaves open the possibility that, in a legal system that is not flourishing, there may be no case for enforcement of legal norms. This qualification is one that JET has no room for. Because JET makes an entitlement to on-demand judicial enforcement essential to legal rights and duties, it entails that, even in a defective legal system, there is such an entitlement. This point reflects the critical distinction between a claim about the point of law and a claim about the essence of legal rights and duties.

Moreover, by contrast with JET, the conjecture does not limit the relevance of guiding and limiting the use of force to enforcement “in adjudicative institutions” (2011, 406). This difference is not a minor one. The importance of preventing force from being used when it is not justified reaches far beyond judicial orders. For example, it includes legislative oversight of executive action, such as congressional oversight of agency action, and executive branch decisions concerning use of force. Thus, the conjectured point of law in no way supports the claim that on-demand enforcement “in adjudicative institutions” is essential to law.

Finally, Dworkin’s conjecture about the point of law involves “past political decisions about when collective force is justified,” which do not figure in JET’s account of the essence of legal rights and duties.

It is almost as if Dworkin, in *Justice for Hedgehogs*, takes his earlier conjecture about the abstract point of law and hardens it into a constitutive account of law – with critical modifications: 1) making the requirement of enforcement on demand more absolute; 2) restricting the domain of law to *judicial* control of force; and 3) leaving out the role of past political decisions.

My own view is that Dworkin’s conjecture about the point of law, even before it is modified in these ways, is too narrow. What law is supposed to do is much broader than anything focused on force (see, e.g., Greenberg 2016, parts III and IV). Indeed, even in a community in which there was no need for the use of force, there would still be a role for law. But these suggestions are beyond the scope of this paper. The important conclusion for present purposes is that there is no straightforward way in which *Law’s Empire* supports JET; certainly, neither law as integrity nor Dworkin’s conjecture about the point of law provides any help.

## 5. Troubles for JET

The moral impact theory (*MIT*, for short) holds that what distinguishes legal duties from other moral duties is the way in which they derive from the actions of legal institutions (Greenberg 2014; 2017). (In section 6, I elaborate on MIT's account of the way in which legal duties must trace back to institutional action.) By contrast, *JET*'s account of legal duties (or legal norms more generally) makes no appeal to past actions of legal institutions or past political decisions. (For brevity, I will simply write of actions of legal institutions, rather than political decisions. The difference is smaller than might at first appear because I use the phrase broadly enough to include, for example, the passing of legislation by referendum. At any rate, for purposes of this paper, nothing will turn on the difference.) In this section, I argue that a constitutive account of the content of the law needs to make appeal to the past actions of legal institutions and that a requirement of judicial enforceability is highly problematic.

I emphasize that MIT does not deny that legal obligations are *prima facie* enforceable. My own view, which is consistent with MIT, is that courts, as a rule, should not enforce obligations that are not legal obligations, and, conversely, they ought, in general, to enforce legal obligations. The question at issue, rather, is whether an entitlement to enforcement on demand is part of what it *is* to be a legal obligation.

**i.** First, recall the survey question with which this paper began. I hope that your answer was that the moral requirement not to be cruel is not a legal requirement because it doesn't obtain in virtue of past decisions of legal institutions – or something in that vicinity. I suggest that our intuitions about why things count or do not count as members of particular types tend to reliably reflect our tacit understanding of what constitutes those kinds. For example, why is dry ice (frozen carbon dioxide) not water? Is it, for example, because it is a gas at room temperature or is it because it is not H<sub>2</sub>O? Why is the shape of the building that houses the U.S. Defense Department not a triangle? Is it because it does not have three sides or because it is not a type of polygon that can be inscribed in a circle regardless of the length of its sides (a necessary and sufficient condition for being a triangle)?

If I am right that our answers to such questions reflect our tacit understanding of what constitutes the relevant kinds, then our reactions to my initial survey question are evidence of our understanding of what makes something law. In particular, the fact that we think that the moral requirements not to be cruel, not to lie, to rescue others, and so on, are not legal requirements *because* they are not appropriately grounded in past decisions of legal institutions – *not* because courts are not morally obligated to enforce them – is evidence of our understanding of what makes something law. In particular, our reaction supports the view that part of what makes a norm legal is that it obtains in virtue of past actions of legal institutions – and *not* that courts ought to enforce it.

**ii.** Second, *JET* has the consequence that is not possible to explain why legal duties and legal norms ought to be enforced by the courts (and why merely moral duties and norms ought not to be). Let me explain. If an account makes a property constitutive of a phenomenon, then the account cannot explain why the phenomenon has that property – that's just what it *is* to be the phenomenon in question. For example, try to explain *why* water is H<sub>2</sub>O. There is nothing to say – that is simply what it is to be water.<sup>12</sup> (One can draw on the constitutive account to give a

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<sup>12</sup> What about the fact that something's being H<sub>2</sub>O explains its having water's superficial properties. That is a reason why we should *believe* that to be water is to be H<sub>2</sub>O, not a reason that water *is* H<sub>2</sub>O. Thanks to Nicos Stavropoulos for raising this question.

causal explanation of why some particular is water. For example, a chemical reaction might rearrange some hydrogen and oxygen atoms into water molecules. We can then explain that that chunk of matter is water because it is H<sub>2</sub>O. But that is not to explain why water is H<sub>2</sub>O.) Similarly, we can't explain why every point on a circle is equidistant from the center or why knowledge is true.

Because JET makes it constitutive of a legal right that the courts ought to enforce it, JET removes the possibility of explaining why the courts ought to enforce legal rights. That's simply what it is to be a legal right.<sup>13</sup> But this conclusion seems mistaken. There is in fact a great deal to say about why courts should generally enforce legal rights and why they should generally not enforce non-legal ones.

As I have developed elsewhere, morality frequently offers general and vague principles, leaving much unspecified; in other cases, morality simply has nothing to say. Even when morality is determinate, there is often a great deal of disagreement as to what it requires. The situation is even worse with respect to what remedies are required or permitted and who may impose them. (Greenberg 2016, 1973-1974). Legal institutions have a wide range of tools for solving these problems both by strengthening the reasons favoring coercive enforcement and removing reasons against it. By, among other things, harnessing reasons of fairness and democracy, legal institutions can channel vague moral principles into specific requirements; remove uncertainty; eliminate indeterminacy concerning which of many possible solutions to a problem is required; and so on. Greenberg 2014, 1310-17; 2016, 1965-68.

To take one example: "Given the great moral importance of advance notice of punishment, the indeterminacy — or at least uncertainty — with respect to which punishment is morally appropriate for a specific wrong, and morality's lack of clarity about who is authorized to administer punishment, punishment is in general morally problematic without law." Greenberg 2016, 1974. Legal systems can make punishment permissible by familiar means: giving clear advance notice of which conduct is prohibited and of the corresponding penalties; making prohibitions generally applicable and evenhandedly enforced; and giving those charged with wrongdoing a hearing and other procedural protections. (Greenberg 2014, 1311; cf. Greenberg 2016, 1976). We thus have the outlines of an explanation of why courts ought to enforce criminal law duties, even though they ought not to enforce comparable moral duties in the absence of appropriate legal norms.

If JET were true, however, explanations along these lines would do nothing to explain why legal duties were enforceable on demand. To see this, notice that, according to JET, even if a legal system did a poor job of deploying the mechanisms just described, all legal duties would nonetheless be enforceable on demand (absent an "emergency"). Any duty not so enforceable would not be a legal duty.

**iii.** Third, it seems plausible that there are moral rights that are so important that courts should enforce them even though they are in no way the result of past political decisions. Here are some potential examples: the right to self-defense, the right not to have punishment imposed retroactively, the right not to have capital punishment imposed on one, the right not to be

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<sup>13</sup> Of course, it's still possible to explain why a particular duty, which happens to be a legal one, ought to be enforced. But that is not to explain why legal duties as such should in general be enforced.

enslaved, the right not to be tortured by the government. Suppose that there is a legal system in which there have been no past political decisions or actions of legal institutions that would in any way, however indirect, support the existence of – or license the use of coercion to enforce – one of these rights, say, the right not to be enslaved.

To make it concrete, let's assume that there is a practice of enslaving people of a particular ethnic group. If you think it matters, we can further assume that governmental entities of some sort are enabling the practice in various ways. Now a person, claiming a right not to be enslaved, asks a court to enforce that right. It seems very plausible that, for powerful moral reasons, a court ought to enforce the right against being enslaved by directing the executive power to use coercion. Indeed, Dworkin (2011, 411) himself accepts that, for reasons of justice, courts in the United States ought to have enforced the right against being enslaved before that right was a legal right.

What matters is simply that it is possible that there be a case in which there is a moral right that a court ought, all things considered, to enforce, despite the fact that this right is in no way supported by past political decisions. If you don't agree with my particular example, please substitute one that you find plausible. If it is possible that there be a moral right that courts ought to enforce, despite there being no support for the right in past actions of legal institutions, then, according to *JET*, it is possible for there to be a legal right that in no way obtains in virtue of past institutional action.

I take it that any such case is an intuitive counterexample to *JET*. We do not think that a moral right is a legal right simply because courts ought to enforce it. The natural thought is that moral rights that courts ought to enforce are not legal rights *unless the reasons that courts ought to enforce them appropriately derive from past actions of legal institutions*. Indeed, at certain points in Dworkin's discussion he almost seems to assume some such qualification.<sup>14</sup> Regardless of what Dworkin's position is, however, this type of counterexample provides a reason for thinking that a necessary condition for a right to be legal is that it obtains in virtue of past actions of legal institutions.

**iv.** Next, a very different kind of point. Both positivist theories of law and Dworkin's law as integrity give a central constitutive role to past political decisions. According to standard positivist accounts, legal norms are those that trace back to practices of legal institutions such as courts and legislatures. According to law as integrity, the content of the law is the set of principles that form the best constructive interpretation of the past practices (as well as the more specific consequences of those principles). Indeed, the only thing law as integrity shares with positivist accounts is the idea that legal norms must obtain in some way in virtue of past political

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<sup>14</sup> In his discussion of the family example, what yields the "distinct family morality" are what Dworkin calls "structuring principles" – "principles of fairness that condition coercion – principles about fair play, fair notice, and a fair distribution of authority... that make your family's distinct history morally pertinent." (408-09). Similarly, in his discussion of the fugitive slave act, he refers to the "structuring fairness principles that make law a distinct part of political morality – principles about political authority, precedent, and reliance" (411).

decisions.<sup>15</sup> This observation highlights how intuitive it is that this role of past practices is essential to legal norms.

v. My next point involves the opposite type of apparent counterexample from those already discussed – cases in which there are duties or norms that, on balance, courts ought not to enforce, yet are intuitively legal duties or norms. As noted above, although there is a tricky exegetical issue, I am interpreting JET to hold that legal rights are those that courts ought to enforce all things considered (perhaps with an exception for moral emergencies), rather than merely pro tanto. (As noted above, I make this assumption in part because it makes my argumentative task more difficult. If in fact Dworkin holds that legal rights are those that courts ought to enforce pro tanto, then so much the better; we can simply skip the first stage of my argument.)

There are several categories of examples. First, there are the kinds of cases in which Larry Sager has argued that there are material constitutional rights that legislatures have a duty to enforce, but because of institutional limitations of courts, the courts ought not to enforce. Dworkin discusses Sager's (2010) example in which a constitution declares that people have a right to state-financed health care, but the courts are not well placed to make a range of delicate decisions necessary to implement the right. Dworkin argues that, because the court ought not to enforce the right, the case is one in which there is no legal right to healthcare – merely a political right.

Second, there are cases in which there are plausibly constitutional norms governing a government entity or branch of government that that ought to be enforced, on balance, only by the branch itself or by some non-judicial governmental entity. In the United States, for example, there are plausibly presidential duties and limits on presidential power that are not appropriate for judicial enforcement. Some of them can be enforced by impeachment, and it is arguable that the Senate, when it tries an impeachment proceeding, is an adjudicative institution. But there are limits on presidential power that probably cannot be enforced at all or at least not by any kind of adjudicative institution. The Constitution declares that the president “shall take care that the laws be faithfully executed.” This duty probably cannot be enforced in cases where the violation does not amount to “high crimes and misdemeanors.” For example, suppose the President violates the duty to take care simply by being lazy.

There are legislative and judicial branch duties that are not enforceable on demand in any adjudicative institution. Consider, for example the constitutional specifications that Congress assemble at least once a year, keep and publish journals of their proceedings and not adjourn during the session of Congress for more than three days. More interestingly, there is the duty of the House not to impeach, and of the Senate not to convict, unless the constitutional standard of high crimes and misdemeanors is satisfied.<sup>16</sup> With respect to judicial branch duties, consider the duty, announced in *Marbury v. Madison* “to say what the law is.” If the Supreme Court violates this duty, no one has an entitlement to enforcement on demand.

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<sup>15</sup> I speculate that one of the ways in which many people are led to positivism begins with the idea that legal norms must derive from past decisions or practices of legal institutions. That idea is then combined with an overly simple metaphysical picture of how norms can derive from past decisions – one on which the only options are for the norms to be explicitly adopted or implicitly accepted by a convergent practice. (I don't mean to accuse all positivists of holding an overly simple metaphysical picture; the suggestion is just that this is a straightforward route to positivism from a very natural starting point.)

<sup>16</sup> Thanks to Larry Sager on this point.

It is particularly implausible to treat this last category of constitutional duties of governmental entities as merely duties of political morality because, unlike material constitutional rights, they do not correspond to any purely moral rights or duties.<sup>17</sup> No duties with the relevant content would exist were it not for the ratification of the Constitution.

Third, there are familiar and varied reasons why a judicial remedy for violation of a duty (or right) might be unavailable that do not impugn the existence of the duty: laches, a statute of limitations, an immunity doctrine, a waiver of liability, a pardon, and so on. There are powerful reasons to believe that such barriers to a judicial remedy do not eliminate the duty (see, e.g., Cornell 2017). Conduct that contravenes what the duty specifies continues to be impermissible, and the continued existence of the duty may manifest itself in indefinitely many ways. Violation of the duty may, for example, result in loss of eligibility for a license or in exclusion of evidence or may have legal implications in a collateral proceeding. At bottom, the reason that barriers to judicial enforcement need not undermine the existence of a duty is that reasons that make judicial enforcement inappropriate may be of the wrong kind to bear on the existence of the duty; they leave the reasons underlying the duty unaffected.

JET can grant that a duty may exist without an entitlement to judicial enforcement on demand, but JET seems to imply that the duty will for that reason not qualify as a *legal* duty. It might be objected that the kinds of barriers to judicial remedies I have just mentioned are limited to particular parties and times. In fact, however, such barriers can apply permanently and across entire classes of plaintiffs or defendants. Conversely, the impediments that Dworkin holds to be fatal to a right's being legal need not be permanent and fully general. It can be a contingent and transient fact that, in the circumstances, a court ought not to enforce a right because it is not in a good position to make all of the necessary decisions about how to implement the right. More fundamentally, it is not clear why the specificity or scope of the barrier to judicial enforcement matters on Dworkin's view. If there can be a legal duty, a tort duty of care, say, despite the absence of an entitlement to judicial enforcement (because of, e.g., a waiver of liability or an immunity doctrine), then an entitlement to judicial enforcement is not essential to a duty's being legal. Thus, JET implies that duties for which judicial enforcement is unavailable because of legal doctrines not bearing on the permissibility of the primary conduct are merely moral or political duties.

Dworkin might respond that JET does not, after all, require an all-things-considered entitlement to judicial enforcement; rather, the entitlement may be trumped by other rights, such as those created by statutes of limitations, waivers of liability, and so on. These examples bring out the lack of clarity in Dworkin's notion of an entitlement to judicial enforcement on demand. Because of this lack of clarity, I will not make much of this category of examples here.

There might also be a fourth category of cases – ones in which the courts ought not to enforce a legal right, on balance, because of countervailing reasons (that do not amount to a moral emergency), say, reasons of expense. Imagine a situation in which there have been many rather trivial violations of a legal requirement of minor importance that, in the circumstances, would be prohibitively expensive to enforce. Or, to take a concrete example of a somewhat different kind, suppose that traffic violations based on automatic cameras become expensive and time-

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<sup>17</sup> I am grateful to Larry Sager for pointing this out to me.

consuming to prosecute because of evidentiary problems associated with the use of automatic cameras.

Dworkin addresses the first category of cases – in particular, he discusses Sager’s example of the constitutional right to state-financed medical care – but his response is inadequate. He points out that, in the example, there is not an emergency that trumps the right (2011, 413). This is true, but the point has no force unless one already assumes that a legal right is one that ought to be enforced unless there is an emergency.

Dworkin adds that “the structuring principles of fairness that distinguish legal from other political rights” do not argue for enforcement (2011, 413). To begin with, JET does *not* claim that structuring principles of fairness are what distinguish legal from other political rights. Setting this point aside, it begs the question for Dworkin to assume a particular view of what distinguishes legal from other political rights in answering objections to his view. Moreover, there *are* reasons of democracy and fairness that favor enforcement. After all, the Constitution specifically provides for the right. The reason the court should not enforce the right is that those reasons are outweighed by other reasons having to do with institutional limitations of the courts, for example, their not being well-equipped to decide “all the delicate questions of budget allocation and medical science” needed to implement the right (2011, 412).

A related point is that Dworkin’s classificatory scheme fails to mark a significant distinction with respect to such cases. Recall that legislative rights include rights that the legislature act that are in no way traceable to past political decisions. In the United States, for example, it is arguable that there has long been a legislative right to state-financed medical care, as Dworkin (2011, 331) maintains. In Sager’s example, by contrast, the constitution recognizes the right to state-financed medical care. Calling that right merely a legislative right does not mark the important distinction between legislative rights that are solely moral and those that obtain because of past actions of legal institutions. A natural way to mark that distinction is by classifying the latter as legal rights, not merely legislative ones.

We have seen that Dworkin does not offer much of an argument for the claim that rights like the constitutionally declared right to medical care in the hypothetical example are not legal rights. Sager powerfully argues that it promotes understanding to understand such rights as legal rights. Although the right to state-financed healthcare in the example is not judicially enforceable on demand, it has consequences for judicial enforcement because of the “secondary role of [the judiciary] in insisting on adequate procedures and substantive justifications for exclusions from benefits.” Sager 2010, xxx. Furthermore, it has various other implications – for example, for what justifications legislative and executive officials can offer for their actions, for when such officials have authority to act, and for the interpretation of other aspects of the Constitution. Sager 2010, 585, 588-89. Sager argues that, once we accept the wide-ranging implications of the constitutional right, “it seems both awkward and misleading” to insist that the underlying constitutional right is not a legal right – that only its manifestations in entitlements to judicial enforcement count as legal. 2010, 589.

**vi.** It might seem that an attractive response to the apparent counterexamples suggesting that JET is underinclusive is to modify the theory to specify that a legal right is one that courts have *pro tanto* reason to enforce. This response would allow Dworkin to accept that rights and duties may be legal even if courts for diverse reasons – including institutional competence, respect for other branches of government, preventing great harm, immunity of governmental officials,

waivers of liability, “emergencies” – ought not to enforce them. This response would also avoid the need for the ad hoc-seeming (and dubiously applied) emergency clause.

The problem is that the modification would have the consequence that all moral rights are legal rights. There is *some* moral reason for courts to enforce any moral right: to prevent the right from being violated or, more fundamentally, the reasons in virtue of which the moral right exists.

The natural response to this point is that not just any moral reason for enforcement is sufficient to make a right legal. The relevant moral reasons are ones that obtain in virtue of past actions of legal institutions. The constitutional right to medical care in the hypothetical case is intuitively a legal right because the reason for enforcing it derives from the ratification of the constitutional provision declaring the right. By contrast, the reason for enforcing the duty not to lie does not derive from any past action of legal institutions. (As I discuss in the next section, however, it is not enough to specify that legal norms obtain in virtue of institutional action; legal norms must trace back to institutional action in the right sort of way.)

**vii.** Here is a brief summary of this long argument. Several lines of argument strongly suggest that it is essential to legal norms that they obtain in virtue of past institutional action. JET also faces an intuitive underinclusiveness problem because it requires that courts ought to enforce the relevant norms *all things considered*. Once we specify that legal norms obtain in virtue of past institutional acts, we have a natural way to avoid the underinclusiveness problem -- eliminate the requirement of an all-things-considered entitlement to judicial enforceability. But, at this point, retaining a requirement that the norms be ones that the courts ought to enforce *pro tanto* does no work.

**viii.** [Here, in the interest of saving space, I omit a brief discussion of an account that is a kind of hybrid between MIT and JET: legal rights are those that courts ought to enforce *because of the way in which the obligations or rights trace back to legal institutional action*.<sup>18</sup> I argue that there is no reason to prefer this kind of proposal, which retains the idea of an entitlement to court enforcement, over an account like MIT that makes no reference to such an entitlement.]

**ix.** I want to close this section by suggesting that the difficulties JET encounters are a symptom of a more fundamental problem. One can stipulatively reserve the term *legal* for rights and duties that are judicially enforceable on demand. But, like classifying diseases by their symptoms, doing so will make legal norms a disunified and explanatorily shallow phenomenon.

One indication is that blocking the entitlement to on-demand judicial enforcement of what would otherwise be a legal right does not remove its other legal consequences. As we have seen, the reasons that affect whether a court ought to enforce a right or duty are often superficial in the sense that they do not affect the underlying reasons why the primary right or duty exists.

Examples include institutional limitations of the courts, respect for other branches of government, and possibly resource limitations. (And depending on how JET is understood, there are also the examples of barriers to judicial remedies such as waivers of liability, immunity doctrines, and statutes of limitations.) Rights and duties that courts ought not to enforce for such superficial reasons continue to have systematic and extensive legal implications (including

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<sup>18</sup> In an earlier mention of this hybrid proposal, I also made other modifications to JET, such as substituting the idea that it is *permissible* for court to enforce the relevant rights for the idea that courts *ought* to enforce them. Greenberg 2017, 286.

implications for judicial enforcement that will qualify as legal even according to JET). By contrast, we have seen no evidence that the property of being judicially enforceable on demand explains a range of other properties.

Another symptom is that JET implies that whether a duty qualifies as legal will switch on and off depending on peripheral factors. For example, if some impediment to court enforceability is lessened or the harms being caused by violations of the duty increase, a political duty may become legal.

It is worth noting that this point about making legal norms an explanatorily shallow phenomenon applies as well to a possible proposal that what is required is that there be not merely pro tanto reasons for judicial enforcement, but pretty strong pro tanto reasons (or something intermediate between mere pro tanto reasons and all things considered entitlement).<sup>19</sup> The category of norms for which there are medium-strong pro tanto reasons for judicial enforcement is unlikely to cut normative reality at its joints. For example, the proposal would have the consequence that a norm could slip from being merely moral to being legal or vice versa when there were small changes in the reasons bearing on whether a court ought to provide a remedy, even though the underlying reasons bearing on the primary conduct were unchanged. At any rate, the proposal seems unlikely to be able to capture the domain of legal norms accurately. There are legal norms of minor importance for which the reasons for judicial enforcement are weak, and, conversely, as we have already seen, there can be powerful moral reasons for enforcing purely moral norms.

## 6. The Moral Impact Theory and the role of past institutional action

In the last section, I offered several converging lines of argument for the proposition that a constitutive account of legal norms needs to include a requirement that those norms obtain in virtue of past decisions of legal institutions. In other work, I have argued that, though this appeal to the source is on the right track, it is not sufficient to capture what is distinctive about law. There can be moral duties that are the moral consequence of legal institutional action, yet intuitively are not legal duties. For instance, in one kind of case, legal institutional action that makes the moral situation worse may thereby generate obligations to remedy, oppose or otherwise mitigate the consequences of the relevant action. In another kind of case, legal institutions' actions lead through an extended chain of events to moral obligations that are intuitively too far downstream to qualify as legal obligations. For example, the actions of legal institutions in setting up a tax system might lead me to promise to help you fill out your tax returns. As a result of my promise, I may have a moral obligation to help you (Greenberg 2014; 2017).

Intuitively, the problem with these kinds of obligations is that they do not derive from the actions of legal institutions *in the right sort of way* to constitute a legal obligation. A challenge for the theorist is to specify the right sort of way – what I have called *the legally proper way*.<sup>20</sup> We have several familiar paradigms (Greenberg 2014; 2016; 2017). To take one example, by deciding

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<sup>19</sup> There are a range of alternatives for such an intermediate proposal, including, for example, one framed in terms of exclusionary reasons. I don't think that the differences would affect my main line of argument.

<sup>20</sup> Greenberg 2014. It is important that *legally proper* does not mean *following legally required procedures* or something along those lines. Legal institutional action that is taken in accordance with proper procedure may nonetheless generate obligations that are not legal obligations.

past cases in a particular way, reasons of fairness are generated for treating future decisions in relevantly similar ways. Differently, by ensuring that others will not shirk, the legal system can make it unfair for people not to do their part. And appropriately constituted legal systems can harness democratic reasons. It's tempting to gesture at such exemplary cases and say that *these* are the right sort of way.<sup>21</sup>

One problem is that describing some paradigm cases does not amount to providing a unified theoretical account of the right sort of way. And the mechanisms that the law appropriately uses are varied; any attempt to delimit them by enumeration risks failing to capture the full extent of the phenomenon. Conversely, in some of the apparent counterexamples, duties that are intuitively not legal duties obtain in part in virtue of reasons of fairness or democracy; specifying that the duties must be generated by institutional action via reasons of fairness or democracy is therefore not sufficient.

The problem here bears comparison with the problem of deviant causal chains in philosophy of action, mind, and epistemology. As will be familiar, causal accounts of intentional action, perception, and knowledge encounter apparent counterexamples in which cases satisfy the proposed causal conditions via peculiar or coincidental causal paths yet are not intuitively instances of the target phenomenon. A famous example is Davidson's (1980) case of the man whose intention to trip over the rug to amuse his friends causes him not to pay attention, with the result that he trips over the rug, thereby amusing his friends.

I mention the parallel to the problem of deviant causal chains in part because it is interesting – I'm not aware of another example of a *noncausal* deviant explanatory chain. In addition, for what it's worth, a common view is that counterexamples based on deviant causal chains do not fatally undermine causal theories of the relevant phenomena. Many theorists have instead taken the problem to show that we need a more refined causal theory, and several have sketched schematic solutions. (I don't mean to suggest that this reaction in other areas of philosophy is an argument that it is the right reaction in the legal case.)

In the legal case, I have made progress toward a schematic solution to the problem. The solution appeals to law's essential properties, including what law, by its nature, is supposed to do. For example, suppose that law, by its nature, is supposed to improve the moral situation by solving certain kinds of moral problems. If that is right, then a method of changing the moral profile that works by making the situation worse, thereby creating reasons to undo (or mitigate) what a legal institution has wrought, is a defective way of generating obligations (Greenberg 2014; 2017, 282-83). But this is not the place to say more.<sup>22</sup>

## 7. Dworkin's anti-realist turn

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<sup>21</sup> Dworkin in fact seems to share this temptation. As noted, despite his official formulation of JET in terms of judicial enforcement on demand, his most developed example of how law differs from morality appeals to "principles of fairness that condition coercion – principles about fair play, fair notice, and a fair distribution of authority, for instance." 408-09. And he even refers to these principles as "[t]he structuring fairness principles that make law a distinct part of political morality." 411.

<sup>22</sup> It is also possible that the legally proper way might be primitive in the sense that we might not be able to fully specify *in other terms* what the right sort of way is. The moral impact theory may nonetheless be on the right track; the consequence would just be that the theory cannot be fully reductive in a certain respect.

I conclude with a diagnosis. Dworkin has proffered an anti-realist account of a real phenomenon, identifying the phenomenon with one salient manifestation of it. A common philosophical tendency is to try to give an account of a phenomenon felt to be elusive in terms of a salient or characteristic nonmysterious consequence of the phenomenon. This tendency yields anti-realist accounts.<sup>23</sup> Behaviorism and verificationism are well-known examples.

When a phenomenon is real, there are indefinitely many ways in which it may manifest itself. Any attempt to identify the phenomenon with a particular consequence of it, or way of measuring it, will fail. On the one hand, any such manifestation may be blocked by an interfering factor or failure of necessary background conditions. On the other hand, in the presence of other relevant factors, the phenomenon may have consequences that are hard to predict, uncharacteristic, and subtle.

Consider philosophical behaviorism's attempt to identify mental phenomena such as beliefs, desires, and fears with behavior. A desire for milk, say, was thought to be reducible to a cluster of behavioral manifestations, such as asking for milk or opening the refrigerator. But whether one who desires milk will open the fridge depends on whether the person believes that there is milk in the fridge, whether she desires to hide her desire for milk, whether she believes that drinking milk would in fact damage her health, whether she is too weak to move, and indefinitely many other such factors. Conversely, a desire for milk might manifest itself, under the right conditions, in any number of apparently unrelated behaviors. And even if it has no immediate behavioral consequences, it may have mental consequences, say, a feeling of frustration or the forming of a plan. And these mental consequences may themselves have hard-to-foresee consequences.

Of course, if a phenomenon or domain is not real, an anti-realist account will be appropriate. Thus, pointing out that the philosophical account of a phenomenon has anti-realist overtones does not show that the account is on the wrong track. Those who advocate the Copenhagen interpretation of quantum mechanics believe that quantum mechanics is just a useful way of predicting measurements, not a description of a real phenomenon.

One might think that the debates between realists and anti-realists are merely verbal. The anti-realist merely wants to reserve the relevant term, say, "desire" for a particular observable phenomenon. But anti-realist accounts of real phenomena miss the deep connections between apparently unrelated observations. The richness of human verbal behavior, to take a famous example, cannot be accounted for without appeal to causally active cognitive states that are not reducible to behavioral manifestations. (Chomsky 1958).

We have seen that JET encounters a range of problems, such as its apparent under- and over-inclusiveness and its lumping together of rights and duties with systematic and extensive legal implications with rights and duties of political morality that lack such implications. My diagnosis, in conclusion, is that Dworkin has offered an antirealist account of a real phenomenon. JET is an attempt to specify what it is to be a legal right in terms of one salient and characteristic consequence of those rights – enforceability in the courts. American legal realism – a deeply anti-realist movement – tried to reduce law and legal rights to the behavior of judges.

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<sup>23</sup> I am, of course, using the terms *realism* and *anti-realism* in the philosophical sense. American legal realism is, confusingly, a strongly anti-realist position.

JET in effect transposes American legal realism into a normative key: it purports to reduce law and legal rights to what judges *ought* to do.<sup>24</sup>

Legal rights and duties, or norms more generally, resist an anti-realist account because legal norms are a robust phenomenon unified by the way in which the reasons behind those norms are generated. The presence of interfering factors that make judicial enforcement inappropriate does not remove the phenomenon, but merely blocks a characteristic manifestation of it.

By contrast with JET, law as integrity is a strongly realist theory: it takes the law to be the principles that lie behind and justify the decisions of legislatures, courts, and agencies. Law as integrity in effect regards the legal practices as manifestations of an underlying reality that may reach far beyond all actual decisions at any given point in time. It is thus powerfully ironic that Dworkin's views about law took this final turn.<sup>25</sup>

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<sup>24</sup> JET is not fully anti-realist; for example, what judges ought to do outstrips our beliefs about what they ought to do. But the position has a distinctly anti-realist flavor.

<sup>25</sup> On the other hand, Dworkin's views about metaphysics and metaethics long betrayed a quietest or instrumentalist streak.