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Author

Greenberg, Mark

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THE NATURE OF LAW: JUDICIAL ENFORCEABILITY OR PAST INSTITUTIONAL ACTION

BY

MARK GREENBERG

*MICHAEL H. SCHILL ENDOWED CHAIR IN LAW AND
PROFESSOR OF PHILOSOPHY*

The Nature of Law: Judicial Enforceability or Past Institutional Action?

Mark Greenberg, UCLA¹

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 (in the U.S. and U.K. legal systems). (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 duty not to be cruel to others not a legal duty? 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 duty not to be cruel, but why, as things are, the duty not to be cruel is not a legal one. Please remember your answer—we will make use of it later.

The central question this paper explores is what makes certain rights and duties legal ones. In particular, is a duty legal because people are entitled to have it enforced, on demand, in the courts? Or is a duty legal because it obtains in virtue of past actions of legal institutions? In

¹ I would like to thank Mitch Berman, Brian Bix, Sam Chilovi, Larry Sager, and Nicos Stavropoulos for valuable comments on drafts. I'm also grateful for questions and comments to many participants in workshops and conferences where I presented drafts of this paper. I'm especially grateful to Felipe Jimenez and Jed Lewinsohn who offered valuable comments at workshops in the role of commentator. Many thanks to Nick McClean for excellent research assistance.

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* which properties legal duties necessarily have, for example, whether legal duties are necessarily such that courts ought to enforce them (and only them). It is very plausible that, as a rough rule of thumb, courts ought to enforce legal duties and ought not to enforce non-legal duties, though we will encounter many counterexamples to this rule of thumb. The issue is, rather, what it *is* to be a legal duty, and, in particular, whether the fact that courts ought to enforce it is part of what it is to be a legal duty.

Because Dworkin (in *Hedgehogs*) and I share the view that legal duties are a proper subset of moral duties, I will focus specifically on the question of what makes a moral duty a legal duty. Legal positivists will not think that there is any true story about what it is for a moral duty to be a legal duty. 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). Other prominent theorists have defended the idea that judicial enforceability is essential to law. The 19th century British constitutional theorist A.V. Dicey (1915, 24) famously argued that judicial enforceability is what distinguishes constitutional law from constitutional convention, and Scott Hershovitz (2023, 39-40) has recently espoused a version of JET.² In this paper, I focus on Dworkin's version both because of his enormous

² The American Legal Realists claimed that law is whatever judges will enforce—in effect, a non-normative version of JET. See section 7.

influence and because of this volume's focus on his legacy. 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. Sections 5 and 6 are the heart of the argument. In section 5, I show that several lines of argument strongly support the thesis that it is essential to legal norms that they obtain in part in virtue of past actions of legal institutions. Section 6 uses several categories of counterexamples to establish the conclusion, fatal to any version of JET, that it is not essential to legal norms that people are entitled to enforce them in the courts on demand. In section 7, I briefly explicate my own alternative to JET. I conclude (section 8) 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” (2011, 405-07). 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” (406).³ 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

³ Pages numbers standing alone refer to Dworkin 2011.

or police” (406).⁴ This is the position I have already labeled the Judicial Enforcement Theory (JET). In an alternative, more economical, wording, Dworkin often writes that legal rights are those that are “enforceable on demand” in a court (e.g., 404-05, 407).⁵ Like Dworkin, I will often use this formulation as a shorthand for the longer one. (I’ll also often omit the phrase “on demand,” but it should be understood.) As noted above, others have defended versions of JET.

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.⁶ 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

⁴ The quoted passage is Dworkin's fullest and most careful formulation of his new account of legal rights. One note: 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.

⁵ In Dworkin's posthumous article, “A New Philosophy for International Law,” the only other place he discusses JET, he offers similar characterizations, e.g., that the law is the “rules its citizens or officials have a right they can demand be enforced by its coercive institutions without any further collective political decision” and those “political rights and obligations of people and officials [that] are properly enforceable on demand through institutions like courts that have the power to direct coercive force” (2013, 12).

⁶ In Dworkin (2013, 12), he characterizes the account more generally in terms of all legal rules. 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 aside such problems for Dworkin's account.

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.⁷

To be clear, a complete constitutive account must give necessary and sufficient conditions.⁸ If the specified conditions do not pick out the target phenomenon in all possible worlds, they are a nonstarter as a full 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 locutions interchangeably—*nature*, *essence*, *what it is to be* an instance of the target phenomenon). A constitutive account must specify the essence or nature of the phenomenon.

(Here is a brief reminder of the distinction between a constitutive account and an account that specifies necessary and sufficient conditions.⁹ 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 H₂O.)

⁷ Other sorts of account could plausibly be called constitutive, such as an account of how a phenomenon is grounded in more basic facts or an account of how it is in the nature of the phenomenon to be grounded. See Rosen (2015). Dworkin's accounts of law are not best understood in terms of grounding, and the issue of how precisely to understand constitutive accounts won't matter to my argument. Thanks to Sam Chilovi for pushing me on this topic.

⁸ To save words, I will generally omit the qualification that the necessary and sufficient conditions hold necessarily, but it should be understood. It's possible to give an account of what is *partially* constitutive of a target phenomenon without giving sufficient conditions, but this issue won't be relevant here.

⁹ See Kit Fine 1994; Greenberg 2005.

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 moral 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). (I’ll say more about Dworkin’s understanding of rights as trumps shortly.) 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) (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 for his account that I will for the most part set aside. Most importantly, many legal rights do not seem to be rights that we have against the *state*, but rights against individuals. Think of tort and contract rights, for example.¹⁰

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

¹⁰ Dworkin may hold that all such ostensibly individual legal rights are properly understood as rights to state intervention, 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 damages if your failure to take reasonable care harms me. As Hart famously argued, this type of view distorts the role of law in providing guidance to primary actors (Hart 1961/1994, 35-42). But I set aside such problems for JET.

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.)

Finally, there is a question concerning how to understand the idea of an entitlement or right to court enforcement.¹¹ First, the entitlement is moral, not legal. The entitlement is supposed to be the central element in Dworkin's attempt to explain what legal rights and duties are—indeed of what all legal norms are—in terms of morality. It would be viciously circular to invoke a legal entitlement at this crucial point.¹²

Second, for people to have an entitlement or a right to enforcement, on demand, of a (different) right, it must at least be the case that the courts have reason to enforce the latter right when requested to do so. But what *more* is involved in there being an *entitlement*? The crucial point for

¹¹ As noted above, in "A New Philosophy for International Law," Dworkin (2013, 12) uses the term *right* rather than *entitlement*. I assume that he is using these terms interchangeably, and I will do so as well. He may prefer the term *entitlement* to avoid confusing the entitlement to enforcement with the underlying substantive right that is being enforced. If he were to write of "a right to enforcement of a right," subsequent references to the right would be ambiguous. In support of this exegetical hypothesis is the fact that when he generalizes his position to a right to enforcement of *rules*, he uses the term *right*, rather than *entitlement* (Dworkin 2013, 12).

¹² Dworkin makes clear that the issue is a moral one. He says that it "is a moral question" "which political rights and obligations... are properly enforceable on demand through institutions like courts" (2013, 12). See also 2011, 406-07, 411. He also makes clear that the issue is not the descriptive or practical one of whether there's any prospect of enforcement (2011, 406; 2013, 14-15)

our purposes is that an entitlement must to some extent defeat other reasons or rights or obligations.¹³

Dworkin's well-known view of rights as *trumps*, mentioned above, is a strong version of this position. This view is an important recurring theme in Dworkin's work (Dworkin, 1977, chap. 4; 1977, 269; 1985, chap.17). In *Hedgehogs* in particular, he claims that legal rights are a subset of political rights, and that political rights are trumps (329-332). A trump defeats "otherwise adequate justifications for political action." So even a "good all-things-considered justification" will not justify a violation of a political right (329). For instance, if the right to freedom of expression protects one's right to publish pornography, one is entitled to publish it *even if all things considered it makes the community worse off*. (1985, 336, 353). Indeed, Dworkin apparently takes the position that rights can themselves be trumped only by an "emergency" (2011, 411-13, 473 n.1).

Dworkin's discussion in *Hedgehogs* strongly suggests that the right to enforceability on demand is 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 sufficient reasons for a court's not ordering enforcement are trumped (2011, e.g., 331-32). Indeed, in accordance with the strong

¹³ There are other various other things that might be necessary for there to be an entitlement or right. For example, an entitlement must be *directed to a holder*. That is, it must be not just that a court should enforce the right, but that this obligation to enforce the right is owed to the person who holds the entitlement. For there to be an entitlement, it might also have to be the case that others have a duty not interfere (i.e., with court enforcement). And there are other possibilities. I'm grateful to Mark Schroeder for discussion of these issues. As noted in the text, Dworkin doesn't say anything to explicate what he takes an entitlement or right to be beyond the idea of a trump discussed in the text. Fortunately, for the most part, what will matter to my argument are the issues discussed in the text concerning what an entitlement defeats.

view mentioned above, the discussion suggests that the entitlement to court enforcement can be trumped only by an emergency.

Consider Dworkin's response to Larry Sager's (2010) important arguments that there are legal rights that courts should not enforce. 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" (2010, 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" (2011, 413). Notice that the only candidate he considers for something that could potentially override a right to enforcement on demand is an "emergency." Because there is no relevant emergency, he concludes that it would not make sense to say that there is an entitlement to enforcement of the underlying right to medical care. He does not even consider the possibility there is such an entitlement but that various important reasons or other rights or duties might outweigh or override it.¹⁴

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

¹⁴ I mention this example here for the light it sheds on how to understand Dworkin's notion of an entitlement or right to enforcement. I discuss the merits of Dworkin's argument that the right is not a legal one in section 6 below.

force). If Dworkin did not take the entitlement to enforcement to be a *trump*, he would maintain that the constitutional right *is* a legal right; various factors, including reasons of institutional competence, simply override the entitlement to enforcement. Rather than taking this line of argument, 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 emergency preventing enforcement. The passage therefore suggests that Dworkin intends the required entitlement to enforcement to be a *trump*.¹⁵

Another strong exegetical reason for taking the right to enforcement to be a *trump* is the great prominence throughout Dworkin's work of his view that rights are trumps. From his earliest work on rights through *Hedgehogs*, he has always argued that rights should be understood as trumps, and has never to my knowledge suggested a different understanding of rights. In addition, he says nothing else to explicate his notion of an entitlement to judicial enforcement.

A related issue concerns whether the entitlement to enforcement should be understood as absolute or merely *pro tanto*. I'll use the term *pro tanto* entitlement for a right that can be outweighed by weighty enough rights or duties that do not rise to the level of emergencies.¹⁶ By contrast, an absolute entitlement would not just trump ordinary justifications such as maximizing welfare, but all other rights and duties (again, with Dworkin's emergency exception).

¹⁵ See also Dworkin's discussion of the Fugitive Slave Act, where he argues that slaveowners' entitlement to enforcement of their right to reclaim their slaves was trumped by a moral emergency (2011, 411).

¹⁶ Or on one understanding, even an urgent policy goal could outweigh a *pro tanto* right or entitlement that it comes in conflict with in a particular situation. See Dworkin 1977, 92. An even weaker possibility would be to understand the entitlement merely as the existence of (*pro tanto*) reasons for enforcement on demand; in other words, for one to be entitled to enforce a right on this account would be simply for it to be the case that when one so requests, a court has reason, *pro tanto*, to enforce the right. (I use the term *pro tanto* reason in the standard way—for reasons that count in favor of an action, but need not be decisive.) I will address this possibility in section 6, and as I'll show, it's a nonstarter for Dworkin's position because it would have the consequence that every moral right is a legal right.

Dworkin's discussion suggests the absolute understanding. As already noted, he never considers the possibility of the entitlement losing out to anything but an emergency. And the language and tenor of the discussion also supports the "absolute" understanding. For example, Dworkin consistently writes without qualification that legal rights are enforceable on demand, and that individuals are entitled to such enforcement. If the entitlement were merely *pro tanto*, we would expect some qualification. In the discussion below, I'll begin with the absolute understanding of the entitlement before turning to the *pro tanto* version.¹⁷

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.¹⁸) 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 law and morality are distinct systems of norms, 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).

¹⁷ 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.

¹⁸ See Greenberg (2017, 283-85).

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.¹⁹

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 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.

¹⁹ 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).

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).²⁰ At the risk of belaboring the obvious, because these theories purport to give a complete account of what makes something a legal norm, their claims about what makes something a legal norm are inconsistent. For example, according to law as integrity, constructive interpretation is part of what makes something a legal norm, while, according to JET, constructive interpretation has no such role. 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.²¹

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

²⁰ 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.

²¹ 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.

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” (Dworkin 1986, 93).

I will make several points about this conjecture. To begin with, the conjecture is not Dworkin’s “law as integrity” theory, and Dworkin is explicit that his arguments for law as integrity—do not depend on the conjecture (1986, 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.” (1986, 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) (1986, 92-94).

Dworkin also is explicit that his conjecture about the point of law does not entail that there is an entitlement to judicial enforcement of all legal norms or even that courts or other officials ought to enforce all legal norms. (1986, 109-10). Indeed, Dworkin’s conjecture about the point of law could not have this entailment: it must 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 for which there is no entitlement to enforcement is for that reason not a legal norm. As I have pointed out elsewhere, Dworkin’s conjecture is consistent with the possibility of a legal system that does not use coercion to enforce its norms at all (2016, 1952-52).

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” (1986, 109). 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, 109-110).

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 an entitlement to on-demand enforcement “in adjudicative institutions” is essential to law.

Finally, Dworkin's conjecture about the point of law gives a constitutive role to “past political decisions about when collective force is justified.” Recall the conjecture: “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.”*²²

By contrast, past political decisions about when collective force is justified 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) transforming the claim about law’s point of ensuring that coercion is used in a justified way into the claim that a right to coercive enforcement on demand is essential to legal norms; 2) restricting the domain of law to control of force *by adjudicative institutions*; 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 were no need for the use of force and no entitlement to it, there would still be a role for law. If that’s right, then a right to enforcement on demand “in the adjudicative institutions that direct the executive power of sheriff or police” cannot be essential to law (406). 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 crucial role of past institutional action

²² Dworkin 1986, 93 (my italics).

In this section and the next, I argue against the claim that a right or duty is legal in virtue of an entitlement to judicial enforceability and offer support for the view that a constitutive account of the content of the law needs to make appeal to the past actions of legal institutions.

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 7, 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.²³

I emphasize that MIT does not deny that legal obligations are *prima facie* enforceable or typically 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.

Over the next few subsections, I proceed by explicating several kinds of considerations that cut against the proposition that a right or duty is legal in virtue of an entitlement to court enforcement and support instead a constitutive role for past actions of legal institutions. In section 6, I argue that an entitlement to court enforcement cannot be a necessary condition for a legal right or duty.

5.a. Intuitive support for MIT over JET

²³ 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 former 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.

To begin, our intuitions about what makes something law support MIT over JET. Recall the survey question with which this paper began. I hope that your answer was that the moral duty not to be cruel is not a legal duty 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 H₂O? 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 and three angles 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 we lack a moral right to court enforcement of 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 there is a right to court enforcement.

5.b. An explanatory problem for JET

A very different point: By taking the counterintuitive position that an entitlement to judicial enforcement is constitutive of law, JET saddles itself with two related explanatory problems.

First, the natural way to explain why a right or duty is properly enforceable in the courts is to appeal to the fact that it is legal (Greenberg 2017, 285). Why are tort duties enforceable in the courts, but the moral duty not to be mean is not? It is difficult to resist the thought that an important part of the explanation is that tort duties are legal duties, while the duty not to be mean is not. But JET would make this explanation viciously circular. Because it holds that what it is to be a legal duty is to be enforceable in the courts, the claim that a right is enforceable in the courts because it is legal would be tantamount to a claim the right is enforceable in the courts because it is enforceable in the courts. As we'll see below, Dworkin gestures at a different explanation of why certain rights are enforceable in the courts.

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 H₂O. There is nothing to say—that is simply what it is to be water.²⁴ (One can draw on the constitutive account to give a 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 H₂O. But that is not to explain why water is H₂O.)

²⁴ What about the fact that something's being H₂O explains its having water's superficial properties? That is a reason why we should *believe* that to be water is to be H₂O, not a reason that water *is* H₂O. Thanks to Nicos Stavropoulos for raising this question.

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 there is an entitlement to court enforcement, JET implies that there is no way to explain *why* there is an entitlement to court enforcement of legal rights. That's simply what it is to be a legal right.²⁵ 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

²⁵ As discussed below, 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 be enforced.

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.

As noted above, Dworkin can explain why certain rights are enforceable in the courts, though he cannot do so in the most natural way, by appealing to the fact that they are *legal* rights. He gestures at a different explanation. (407; 2013, 12). He suggests that past political decisions may play a role in explaining why some rights are enforceable. For example, he asks: “Under what conditions do people acquire genuine rights and duties that are enforceable on demand”? (406). He answers that “ordinary political facts are very likely to figure in the answer. It must be part of any responsible answer... that historical facts about legislation... do play a role. How great or exclusive a role these play is a matter of contest” (407). The crucial point for present purposes is that the putative explanation is not an explanation of why legal rights are enforceable on demand. (Indeed, it couldn’t be because, on Dworkin’s account, nothing without such an entitlement would count as a legal right.) Rather, it’s an explanation, as Dworkin puts it, of the conditions

under which “people acquire genuine rights and duties that are enforceable on demand” (406).

Compare: we can explain why some men remain unmarried, but that’s not to explain why bachelors are unmarried men.

Similarly, in “A New Philosophy for International Law,” Dworkin maintains that law is that part of political morality that is “properly enforceable on demand through institutions like courts that have the power to direct coercive force” (2013, 12). As to figuring out which rights are in fact enforceable on demand, he notes that there’s a great deal of consensus that only “the political constitution, legislation pursuant to that constitution, and past judicial decisions” can create such rights. Again, the crucial point is that Dworkin takes legal rights to be those rights that are properly enforceable on demand. That is, JET assigns a constitutive role to enforceability on demand. By contrast, the role Dworkin assigns to “history, convention, and expectation” is of helping to identify which political rights we are morally entitled to enforce on demand (2013, 12).²⁶

Now it might be suggested that Dworkin’s gesture to past political decisions to explain why certain rights are enforceable is an appeal to what makes the relevant rights legal. But this suggestion would concede, contrary to JET, that what makes a right legal is *not* its being enforceable in the courts, but its source in past political decisions.

5.c. Counterexamples: overinclusivity of JET

²⁶ Similarly, in his discussion of the family example, Dworkin takes the analogue of law to be “a special morality governing the use of coercive authority within [the] family” (408). That is, what makes the relevant rules analogous to law is that they are properly enforced with coercion. And for reasons of fairness, the family’s history is relevant to which rights are properly enforced with coercion: What yields the “distinct family morality” are “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).

Next, JET faces apparent counterexamples that strongly suggest that it is overinclusive. It seems plausible that there are moral rights that are so important that the right-holders are morally entitled to court enforcement even when the rights are not legal ones. 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 enslaved, the right not to be tortured by the government. Suppose that there is a legal system in which one of these rights—the right not to be enslaved, say—is not a legal right. If it helps, suppose that there have been no past political decisions or actions of legal institutions that would in any way, however indirect, support the existence of the right. (I conjecture that in such a case, you will not regard the right as a legal one. Remember the survey question with which this paper began.)

To make the example concrete, let's assume that in the relevant society, 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.

As noted, Dworkin does not explicate his notion of an entitlement or right beyond its being a trump, but other features that are plausibly necessary for a claim to count as an entitlement seem

to be present in the example.²⁷ For example, the obligation to enforce is directed to the holder of the underlying substantive right. Similarly, it's plausible that others have a duty not to interfere with the court's enforcement of the underlying right. Most importantly, the claim is a powerful trump. Dworkin himself points out that the right not to be enslaved is so important that it counts as a moral emergency that trumps legal rights. It's hard to imagine any interest, right, or duty that it doesn't trump. (As noted, we'll later consider a version of JET on which the entitlement to enforcement is only a *pro tanto* entitlement.²⁸ If the entitlement to enforcement need be only *pro tanto*, putative counterexamples of the sort under discussion would be even more compelling and there would likely be a greater number of counterexamples of this sort.)

What matters is simply that it is possible for there to be a case in which there is a moral right with respect to which the holder is morally entitled to judicial enforcement, despite the fact that the underlying right is not a legal right in the particular legal system. If you don't agree that the right not to be enslaved is such a case, please substitute an example that you find plausible, perhaps the right not to be tortured or not to be subjected to retroactive punishment.

I take it that any such case is a powerful intuitive counterexample to JET. We do not think that a moral right is a legal right simply because it's properly enforceable on demand in the courts. The natural thought is that such a moral right is not a legal right *unless the reasons for judicial enforcement appropriately derive from past actions of legal institutions*.

²⁷ See note 13 above. Perhaps some additional X-factor is needed in order for the claim to enforcement to count as an entitlement on Dworkin's view. But if that is the case, it greatly strengthens my argument in the next section that an entitlement to court enforcement is not essential to legal rights and duties.

²⁸ See section 6 below.

5.d. A broad consensus on the constitutive role of past actions of legal institutions among otherwise warring/opposed positions

Convergence of otherwise clashing theories provides a very different kind of support for the constitutive role of past actions of legal institutions. Both positivist theories of law and Dworkin's law as integrity, not to mention my own Moral Impact Theory, give a central constitutive role to past actions of legal institutions. 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 substantive that law as integrity's account of law shares with positivist accounts is the idea that legal norms must obtain in some way in virtue of past political decisions.²⁹ This observation highlights the breadth of the appeal of such an essential role for past practices.

I turn now to several categories of counterexamples that provide compelling reason to believe that an entitlement to judicial enforcement cannot be part of what makes a right or duty a legal one. This argument is important and extensive enough to deserve a section of its own.

6. Against the requirement of an entitlement to judicial enforcement

²⁹ 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.)

In this section, I show that the requirement of an entitlement to judicial enforcement is untenable. The argument involves several types of apparent counterexamples in which there are duties or norms that carry no entitlement to enforcement, yet are—it's difficult to deny— legal duties or norms. As noted above, at this stage of the argument, I am taking JET to hold that legal rights are those for which there is an absolute, rather than merely *pro tanto*, entitlement to court enforcement (though with an exception for moral emergencies). I will consider below a version of JET on which the entitlement is merely *pro tanto* (and briefly a version on which there are merely moral reasons for enforcement).

I will consider several categories of examples. First, there are cases in which there are plausibly constitutional norms governing a government entity or branch of government for which there is no entitlement to enforcement except 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 and for which there is no entitlement to judicial enforcement. Some of these presidential duties and limits 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 presidential duties, and limits on presidential power, that probably cannot be enforced at all and certainly not by any adjudicative institution. The Constitution declares that the president “shall take care that the laws be faithfully executed.” There is no enforcement mechanism in cases where the violation does not amount to “high Crimes and Misdemeanors.” For example, suppose the President violated the duty to take care simply by being lazy. No person or body would be entitled to judicial enforcement. The same applies to the presidential duties to “from time to time give to the Congress information of the

State of the Union” and to “receive Ambassadors and other public Ministers,” again so long as the violation doesn’t rise to the level of an impeachable offense.

Similarly, there are legislative and judicial branch duties that are not enforceable on demand in any adjudicative institution. Consider, for example the constitutional requirements that the Houses of Congress assemble at least once a year and that each House keep and publish journals of its proceedings and not adjourn during a session of Congress for more than three days without consent of the other House. More interestingly, there is the duty of the House not to impeach, and of the Senate, in trying an impeachment, not to convict, unless the constitutional standard of high crimes and misdemeanors is satisfied.³⁰ Presumably, no one is entitled to enforce *these* duties in any adjudicative institution, not even in the Senate sitting to try an impeachment case.

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, again, no one has an entitlement to court enforcement of the duty on demand.

It is particularly implausible to treat this category of constitutional duties of governmental entities as merely duties of political morality because, unlike some of the underenforced constitutional rights to be discussed immediately below, they do not correspond to any purely moral rights or duties.³¹ No duties with the relevant content would exist were it not for the details of the constitutional text.

Next, consider public law duties that are enforceable only by government bodies.³² These include a wide range of requirements from health and safety, zoning, and licensing to taxes to parking

³⁰ Thanks to Larry Sager on this point.

³¹ I am grateful to Larry Sager for pointing this out to me.

³² For purposes of the present discussion, I set aside duties that are enforceable through court actions brought by private parties.

and criminal law. Such requirements are routinely enforced in the courts through actions brought by government agencies of various kinds including, in the case of criminal law, by prosecutors. But it is far from clear that such governmental entities have a *right* to judicial enforcement, as opposed to merely the power to bring such actions. Suppose, for example, that a court decides not to enforce a legal requirement because of countervailing reasons (that do not amount to a moral emergency), such as reasons of expense. Imagine a situation in which there have been many rather trivial violations of a licensing requirement of minor importance that, in the circumstances, would be prohibitively burdensome and expensive for the courts 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-consuming to adjudicate because of evidentiary problems associated with the use of such cameras. If a court decides to dismiss or to refuse to entertain all such cases because they would take too much time and expense, it's hard to see what entitlement is violated. The decision against enforcement might be wise or foolish, correct or incorrect. But have the prosecutor's *rights* been violated?³³ Even if, on balance, the courts should adjudicate the cases, despite the reasons against doing so, the issue seems to be one of correctly balancing the applicable reasons, not of vindicating an entitlement,³⁴

I think it is unclear in US jurisdictions whether prosecutors or other government agencies have an *entitlement* to judicial enforcement of the legal requirements within their bailiwick, as opposed to merely a power to initiate court proceedings. (And the answer may be different for different agencies or with respect to different regulations.) What is clear, however, is that

³³ In addition, there is no private entitlement to enforcement on demand. In the cases under discussion, private parties lack even the power to bring an enforcement action, and private parties have no entitlement to have prosecutors or agencies bring cases.

³⁴ And the more that is necessary for a claim to enforcement to count as an entitlement, the more plausible it is that government agencies lack an entitlement to judicial enforcement. See note 27 above.

whether the relevant requirements are legal ones does not depend on this somewhat arcane issue about the existence of an entitlement. (Notice that whenever it's unclear whether an agency has an entitlement to judicial enforcement of a requirement, JET would have the peculiar consequence that it's unclear whether the requirement is legal as opposed to merely moral.) There's no reason to think that the legal status of the requirements depends on whether an entitlement of the government agency would be violated if a court refused enforcement.

Here's another way to see the point. Consider a hypothetical jurisdiction in which it is well established that a particular agency lacks an *entitlement* to judicial enforcement, despite the fact that the agency is the only body that has the power to bring enforcement actions in the courts with respect to certain requirements. (And let us assume that no other body or person has such an entitlement.) The agency routinely brings enforcement actions, and the courts routinely adjudicate them and enforce the resulting judgments. But according to the law of the jurisdiction, the judiciary would be violating no *right* of the agency if it decided against adjudication of a particular class of cases on the ground that the burdens of adjudicating the cases—or other reasons against judicial enforcement not bearing on the validity of the underlying claims -- outweighed the reasons in favor of enforcement. It's extremely plausible that the relevant requirements, which are routinely enforced, are legal requirements, despite the background legal rule concerning agency entitlement.

Next, there is a category of cases in which Larry Sager and other scholars have argued that because of institutional limitations of the judiciary, courts do not and should not enforce constitutional law to its full extent. Sager is the seminal figure in this area. In a series of highly influential articles and his book *Justice in Plainclothes*, he has defended the *underenforcement thesis*: There are reasons for not enforcing constitutional norms “that speak to the institutional

limitations of the judiciary, not to the best understanding of the Constitution itself” (2004, 91).

Implementing some constitutional rights requires “choices of strategy and responsibility that are properly the responsibility of popular political institutions” (2004, 87-88). Therefore, we should distinguish between what a constitutional norm requires and what the courts should enforce. For example, in the case of the political question doctrine, the executive branch may be in violation of constitutional law, but it may not be appropriate for the judiciary to intervene (2004, 90-91).

Sager has shown that the underenforcement thesis helps to explain many otherwise puzzling aspects of constitutional law. To take just one example, in *Plyler v. Doe*, the Supreme Court held that excluding illegal immigrants from public school is unconstitutional. As Sager points out, the decision is hard to understand if viewed through the prism of equal protection jurisprudence. But it makes good sense if there is a constitutional right to education, but the judiciary “cannot appropriately decide what an adequate education is or how it ought to be provided” (2004, 95-97). He argues: “The Texas children had a constitutional right to an adequate education, but the responsibility for recognizing that right in the first instance fell on local, state, and federal legislators. However, once a system of free public education was in place, it was within the competence of the constitutional judiciary to insist that every child have access” (2004, 96). As discussed below, Sager powerfully argues that there are important ways in which underenforced constitutional norms continue to be consequential, not only because of their implications for other branches of government, but also because of their implications for interpretation of other constitutional provisions and for proper judicial action once other branches have acted (2004, 95-102).

The underenforcement thesis has been extremely influential, and it has been defended, elaborated, and criticized by other scholars in a large body of literature. Mitch Berman aptly

summarizes: “in the US legal system, courts will hold some disputes ‘non-justiciable’—not meet for judicial resolution—on the ground that the legal provision invoked does not present a ‘judicially manageable standard’. On the orthodox American understanding, however, state actors are still *legally* bound to comply with these non-justiciable constitutional norms” (Berman, 2020, 278).

It’s important to understand JET’s implications for the underenforcement thesis: if there are constitutional rights or duties that are not properly enforceable in the courts because of institutional limitations of the judiciary, those rights or duties are not part of constitutional law. Dworkin discusses Sager’s (2010) example in which a constitution declares that people have a right to state-financed health care, but the courts lack the institutional competence to make a range of delicate decisions necessary to implement the right. Dworkin claims that, because an entitlement to enforcement is absent, there is no legal right to healthcare—merely a political right.³⁵

Dworkin’s response to Sager is inadequate. He points out that, in the example, there is no emergency that trumps the right (2011, 413). This is true, but the point has no force unless one already assumes Dworkin’s view that a legal right carries an entitlement to enforcement that can be defeated only by an emergency.

Dworkin adds that “the structuring principles of fairness that distinguish legal from other political rights” do not argue for enforcement (2011, 413). On Dworkin’s view, as noted above,

³⁵ It’s worth emphasizing that it’s not just that some constitutional provisions ought not be enforced by the courts. Rather, some provisions ought to be enforced by the courts *in some respects but not in others*. If provisions and the rights they create are not legal to the extent that they are not properly enforceable in the courts, then we have the peculiar result that some constitutional provisions and rights are legal in part and not legal in part. Potential examples can be found in the Thirteenth and Fourteenth Amendments (Sager 2004, chapter 7) and in the Fourth Amendment’s right to be free of unreasonable searches and seizures (Berman 2005).

the role of such principles of fairness is to explain which rights are properly enforceable in the court and consequently count as legal.³⁶ As with the previous point, it begs the question for Dworkin to assume his view that legal rights are those that are enforceable in the courts in answering objections to his view. Moreover, there *are* reasons of fairness, as well as democracy, that favor enforcement. After all, the hypothetical constitution specifically provides for the right. The reason the court should not enforce the right is not the absence of reasons of fairness favoring enforcement, but that those reasons are outweighed by other reasons having to do with institutional limitations of the courts, for example, the courts' not being well-equipped to decide "all the delicate questions of budget allocation and medical science" needed to implement the right (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 (though no such right was supported by past political decisions). 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. The natural way to mark that distinction is by classifying the latter as legal rights, not merely legislative ones.

³⁶ See note 26 above. As described there, Dworkin uses the term "structuring principles of fairness" for "principles of fairness that condition coercion—principles about fair play, fair notice, and the fair distribution of authority, for instance" (408-09).

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, 584). 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 concludes 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).

This discussion raises the question whether citizens have an *entitlement* to judicial enforcement even with respect to constitutional rights that *are* routinely enforced. Consider, for example, the right to interstate travel, the right to rear and educate one’s children as one chooses, the right to marry, or the right to vote on equal terms. It’s possible that changed circumstances -- perhaps new technological developments, new social science research, or a new societal trend that raises delicate issues unsuitable for judicial resolution -- could make it the case that the courts should not enforce one of these constitutional rights because of institutional limitations. The hypothesized change in circumstances is one that changes only the ordinary reasons bearing on whether courts, on balance, have sufficient institutional competence to resolve the issues needed to enforce the right.

But if changed circumstances increasing the difficulty of judicial resolution could have the consequence that courts should not enforce a constitutional right, then arguably private citizens do not, *even now*, have an entitlement to enforcement of the right on demand. Though people routinely are able to request and receive judicial enforcement, they lack a trump that defeats anything but a moral emergency. Indeed, as will see below, they lack even a *pro tanto* entitlement.

It might be objected that a right to judicial enforcement could be abolished, for example by legislative action or constitutional amendment. The mere possibility of such a change obviously doesn't show that there is no right as things stand. But, by hypothesis, the hypothesized change in circumstances is not the sort of change that could abolish a right. If the putative right to enforcement can be eliminated by enforcement's becoming more burdensome or complicated or less well suited to judicial capabilities, then it isn't a right in the first place. And if there is a right to judicial enforcement—a trump—it cannot be outweighed or defeated by an accumulation of ordinary reasons. Therefore, if a change in the difficulty of judicial resolution of the necessary issues could have the consequence that courts shouldn't enforce the underlying right, then it seems to follow that there was no entitlement to enforcement in the first place. If this argument is right, then JET has the startling implication that even routinely enforced constitutional rights are not legal rights. (Dworkin's discussion might be read to support this conclusion, given that, as noted, he makes no suggestion that cases in which courts properly underenforce a constitutional right involve an entitlement that is outweighed.)

Finally, 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.

The problem for JET is much more serious than might at first appear. It's not just that a duty enforcement of which is blocked by, say, a statute of limitation continues to be a legal duty. If the enforcement of the duty is merely *susceptible* to being blocked, then the entitlement to enforcement is not absolute. It follows that any duty the enforcement of which can be blocked by statutes of limitation, waivers, and the like is not a legal duty *even when its enforcement is not blocked*. But the duties whose enforcement can be blocked by the kinds of barriers just mentioned, e.g., statutes of limitation, waivers of liability, and so on, include indisputably legal ones such as ordinary tort, contract, and criminal duties. Indeed, almost any legal duty is susceptible to statutes of limitations, waivers, immunities, and the like. I take it that the absolutist version of JET we are considering is therefore unacceptable. It cannot seriously be maintained that none of the extremely broad range of apparently ordinary legal duties in question are in fact legal duties.

In response to this category of examples, JET's requirement of an absolute entitlement to judicial enforcement must be weakened to merely a *pro tanto* entitlement. The idea would be that the entitlement to enforcement may be trumped only by other *legal* rights or duties, such as those

created by statutes of limitations, waivers of liability, and so on (or perhaps by an exceptionally weighty and urgent policy). But it is still an entitlement because it trumps both moral rights that are *not* legal rights and ordinary reasons. (On another version of this view, the entitlement may be trumped by merely moral rights or duties, but not by ordinary reasons. This version would take us even further from Dworkin's apparently strong understanding of the relevant entitlement.)

The *pro tanto* approach can accommodate the last category of cases, where a legal norm, such as one created by a statute of limitations blocks the entitlement to enforcement. Arguably, barriers to enforcement such as a statute of limitation, laches, or a waiver of liability create or constitute legal rights or duties that outweigh or otherwise defeat the right to judicial enforcement. Would the *pro tanto* approach help to address the other categories of apparent counterexamples discussed in this subsection?

Begin with the cases of constitutional norms governing a government entity that ought to be enforced, on balance, only by the branch itself or by some non-judicial governmental entity. Take, for example, the duty of the Houses of Congress to keep and publish journals of their proceedings or the duty of the House of Representatives not to impeach unless it finds that the standard of high crimes and misdemeanors has been met. The *pro tanto* approach would claim that there *is* an entitlement to judicial enforcement of these duties after all, but it is trumped by a different right or duty.

Aside from the ad hoc desire to save JET, there is nothing to be said for this claim. To begin with, there's no good candidate for the holder of the relevant entitlement. The other house of Congress? The President? Setting aside this problem, the right that trumps the entitlement could only be the right of the relevant House (the one whose duty is at issue) not to have its duty

enforced by the courts, a right that presumably is a necessary concomitant of the duty. But the proposition that there's an entitlement to judicial enforcement of a duty is emptied of content if the very existence of the duty necessarily brings with it a right against judicial enforcement that trumps the supposed entitlement.

What about the cases involving public duties in which the relevant agency lacks an entitlement to judicial enforcement? It's built into the nature of such cases, that there's no entitlement of even a *pro tanto* sort and no competing right or duty. Recall that in the cases in question, if a court decided that ordinary reasons, such as ones of expense, outweighed the reasons favoring enforcement, no entitlement would be violated.

Finally, what about the cases of constitutional rights that on balance should not be enforced. Again, it's part of the nature of the cases that there's no other right or duty at stake and no especially urgent policy. As Dworkin's discussion of Sager's argument concedes, there's no entitlement to enforcement that is itself trumped; rather, facts about the judiciary's competences and weaknesses provide reasons why courts should not, on balance, enforce the underlying rights or duties.

In sum, weakening the relevant entitlement to a *pro tanto* one is necessary to deal with cases involving barriers to enforcement such as statutes of limitations and waivers of liability. But it provides no help with the other categories of counterexamples that suggest that JET misclassifies many legal rights and duties as non-legal.

To make matters worse, as noted above, moving to the *pro tanto* version of JET makes it more vulnerable to the converse type of counterexamples, those involving non-legal rights or duties with respect to which there is a moral entitlement to court enforcement (section 5.c. above). If

the entitlement need be only *pro tanto*, it's that much harder to dispute that there is an entitlement to judicial enforcement of the right, say, not to be tortured or not to be subjected to retroactive punishment. And, correspondingly, there will likely be many more examples of moral rights for which there is such an entitlement than there would be if the entitlement were absolute.

A brief summary: I've argued that there are three categories of legal rights that do not carry entitlements to enforcement on demand. (As we've moved to the *pro tanto* version of JET, we can set aside the examples involving statutes of limitation and the like.) First, in the case of constitutional rights and duties that the courts ought not to enforce for reasons of institutional competence, we've seen that Dworkin's argument that the rights are merely moral ones is weak. And, worse, I've argued that even constitutional rights that are routinely enforced may not carry an *entitlement* to enforcement.

Second, in the case of constitutional duties that are simply not enforceable except by the branch subject to the duty itself (e.g., the duty of each House of Congress to keep and publish journals of its proceedings), it is even more implausible to claim that the duties are merely duties of political morality because there are no purely moral duties with the relevant content; the duties would not exist were it not for the Constitution. In both types of constitutional cases, the denial that the duties are legal seems unmotivated except to preserve JET. (It's telling that Dworkin's response to Sager makes a question-begging appeal to JET).

Finally, the claim that the relevant requirements are merely moral is unacceptable in the case of regulatory requirements enforceable through actions brought by government agencies that lack an entitlement to judicial enforcement. In sum, JET should give up the claim that an entitlement to judicial enforcement is essential to law.

What's left of JET without this claim? It wouldn't help to hold that a legal right is one that the courts simply have reason, all things considered, to enforce; we've just seen several types of counterexamples involving legal rights that, all things considered, the courts ought not enforce. Most damningly, such an approach would entail that legal rights and duties cease to be legal when and as long as their enforcement is blocked by statutes of limitation, waivers, and the like, despite the compelling reasons for believing that the rights and duties still exist. Similarly, the approach would entail that when courts ought, on balance, not to enforce duties (for which there are no private rights of action) because it would be too burdensome or expensive to do so, the duties cease to be legal. And, of course, the approach would share the consequence of the entitlement version of JET that constitutional duties that the courts ought not to enforce (whether for reasons of institutional competence, of respect to other branches, or of other sorts) are not legal duties.

Could Dworkin hold that that a legal right is one the courts simply have (*pro tanto*) reason to enforce?³⁷ This move would allow JET to accept that rights and duties may be legal even if there is no entitlement to judicial enforcement and 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, and “moral emergencies”—ought not to enforce them. This approach would also avoid the need for the ad hoc-seeming emergency clause.

But this version of JET is fatally flawed. The modification would have the consequence that all moral rights are legal rights. There are *some* moral reasons for courts to enforce any moral right:

³⁷ On the term *pro tanto reason*, see note 16 above.

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 problem, in light of the arguments of previous sections, 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. For instance, the constitutional right to medical care in Sager's hypothetical case is intuitively a legal right because the reasons for enforcing it—and, more importantly, the reasons for its existence—derive from the ratification of the constitutional provision declaring the right.³⁸ By contrast, the reasons for enforcing the duty not to be mean do not derive from any past action of legal institutions.

Here is a brief summary of the argument of the last two sections. A compelling argument establishes that an *entitlement* to judicial enforcement, even a *pro tanto* entitlement, cannot be essential to legal norms. Requiring such an entitlement rules out far too much. (For the same reason, it cannot be essential to legal norms that courts have reason, all things considered to enforce them.)

Independently, several lines of argument strongly suggest the thesis that it is essential to legal rights and duties that they obtain in virtue of past institutional action. Once we adopt this thesis, we have a natural solution to the first problem: simply eliminate the requirement of an entitlement to judicial enforceability. But, at this point, retaining a requirement that the rights or

³⁸ My own view is that the relevant reasons are reasons why the duty exists, rather than specifically reasons for enforcement. But in general, reasons for the existence of the duty will be reasons for enforcing it.

duties be ones that the courts have *pro tanto* reason to enforce does no work. The courts have *pro tanto* reason to enforce all moral rights and duties.

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 removing an entitlement to on-demand judicial enforcement of what would otherwise be a legal right does not remove its other legal consequences. Appropriate illustrations will depend on which version of JET we are considering (and which of my arguments you accept). Begin with the entitlement version of JET. Consider requirements imposed by regulations and routinely enforced by agency actions. If the agency lacks or loses an *entitlement* to judicial enforcement, the requirements nonetheless may be routinely enforced; their violation may have the same consequences as they would if the agency had not just a power to bring enforcement actions, but an entitlement to adjudication of those actions.

Now consider the version of JET that holds that a legal right is a right that the courts have reason, all things considered, to enforce. As we've 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 barriers to judicial remedies such as waivers of liability, laches, and statutes of limitations; institutional limitations of the courts; respect for other branches of government; and resource limitations. Rights and duties that courts ought not to enforce for such superficial reasons continue to have systematic and extensive legal implications (including implications for judicial enforcement of rights and

duties that 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 right or duty qualifies as legal will vary depending on peripheral factors. For example, in the case of underenforced constitutional rights, if some impediment to court enforceability is lessened or the harms being caused by violations of the duty increase, a merely political duty may become legal.³⁹ Or in the case of violations of Presidential duties, such as the duty “to take Care that the Laws be faithfully executed” whether the duty qualifies as legal may vary depending on whether the particular violation satisfies the impeachment standard of high crimes and misdemeanors.

My diagnosis is that Dworkin’s concern with coercion has led him to confuse a salient but inessential feature of law with its essence. As I suggested in section 4 with respect to Dworkin’s conjecture about the point of law, his exclusive focus on law’s role in governing the use of state coercion is a mistake. Indeed, law would have an important role to play even in a society that did not employ state coercion (Greenberg, 2016).

7. 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.

³⁹ This example assumes that the reader has not accepted my argument that if changed circumstances could make underenforcement of a constitutional right appropriate, then there is no entitlement to enforcement of that right to begin with.

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 will provide reasons of fairness and democracy for you to file a tax return; as a consequence, I may have a moral obligation to help you. (Perhaps you have gone to great trouble to help me with something else, so fairness requires that I reciprocate in my area of expertise, or perhaps I simply promise to help you.) (Greenberg 2014; 2017). Notice that fairness and democracy figure in the explanation of why I have this moral obligation, as it comes about in part because of the reasons for you to file a tax return.

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*.⁴⁰ We have several familiar paradigms (Greenberg 2014; 2016; 2017). To take one example, by deciding 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.

⁴⁰ 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.

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.)

It's worth noting that JET's thesis—that legal rights and duties are those moral rights and duties that are enforceable, on demand, in the courts—raises the question of *which* moral rights and duties are so enforceable. Recall that Dworkin gestures at an answer: he uses the example of a family to suggest that because of “principles of fairness that condition coercion—principles about fair play, fair notice, and a fair distribution of authority, for instance”—past family history creates “a special morality governing the use of coercive authority within your family” (408-09). Presumably, the analogy is supposed to suggest that because of such principles of fairness, decisions by legal institutions create a distinct body of moral standards concerning which rights and duties are properly enforceable in the courts. So Dworkin's explanation of which moral rights and duties are properly enforceable in the courts is quite similar to my explanation of which moral rights and duties derive in the right sort of way from decisions by legal institutions. One important difference is that while Dworkin appeals only to “principles of fairness,” my account also appeals to other moral reasons, such as reasons of democracy, reasons to help others, and reasons deriving from the importance of solving coordination problems (2014, 310-17; 2016, 1965-66).

But the point I want to emphasize here is that Dworkin's explanation of which moral rights and duties are properly enforceable by the courts is subject to a problem parallel to the one I've been discussing in this section. For example, as noted above, the reasons of fairness that help to explain how the setting up of the tax system gives rise to the obligation to file tax returns will also be part of the explanation of the ensuing obligation to help another person with their tax return. But presumably Dworkin does not want to claim that this obligation to help is properly enforceable by the courts. Thus, it's not sufficient for him to say that the obligations that are properly enforceable in the courts are those that derive from past actions of legal institutions as a

consequence of principles of fairness. (Dworkin faces the problem at a different stage of his account from where I encounter it—in his explanation of which moral rights and duties are properly enforceable by the courts. But the structure of the problem is the same.)

In the case of the moral impact theory, 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. But this is not the place to say more.⁴¹

Before leaving this section, I should mention one related issue. The moral impact theory appeals to legal institutions in its account of legal norms. Consequently, I'm often asked what my account of legal institutions is. The potential worry is that my account of legal institutions cannot appeal to legal norms without vicious circularity. Now it is widely agreed – and, I've argued in this essay, overwhelmingly plausible -- that what makes something a legal norm is in part the actions of legal institutions; but legal norms plainly play a role in constituting legal institutions. Thus, there is a general puzzle here that any plausible theory of law must address. (HLA Hart's theory, for one, obviously faces this challenge, given its appeal to judges and other

⁴¹ See Greenberg 2014, 1321-23; 2017, 281-83. 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.

legal officials.) Given the generality of the puzzle, the moral impact theory doesn't bear any special burden here.⁴²

But my view is that there are relatively simple solutions to the puzzle. For example, a constitutional convention or a national electorate – the people acting collectively as a body politic -- is a legal institution that is not constituted by a legal norm, but by various of its features, including its role and what it is supposed to do. For example, on my view, part of what makes such a body a legal institution is that it is, by its nature, supposed to improve the moral situation.⁴³ (Other candidates for properties that contribute to making such a body a legal institution are its claiming to be supreme and its being self-certifying.⁴⁴) The constitutional convention or national electorate can create foundational legal norms, such as constitutional norms. And those legal norms can create further legal institutions, such as a legislature. There is no hint of vicious circularity here.

8. Dworkin's anti-realist turn

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. Behaviorism and verificationism are well-known examples.

⁴² I've commented on the issue briefly elsewhere (Greenberg 2014, 1323-1325).

⁴³ For refinement of this point, see Greenberg 2014, 1324.

⁴⁴ On the former, see Raz 1975, 150-54; on the latter, see Shapiro 2011, 222.

In a central philosophical usage of the term, *realism* about a particular domain is the thesis that truths of the domain may outstrip our ability to discover them.⁴⁵ *Anti-realism* about the domain is the denial of this thesis. It is in this sense that I use the terms here.

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 or depressed 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.

⁴⁵ See Miller 2024, section 6; Khlentzos 2025. As mentioned in the text below, the legal movement called "American legal realism" is, confusingly, a strongly *anti*-realist position in the philosophical sense.

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 consequence of those rights—an entitlement to enforcement in adjudicative institutions. American legal realism—a deeply anti-realist movement—tried to reduce law and legal rights to the behavior of judges.⁴⁶ JET transposes American legal realism into a normative key: it purports to reduce law and legal rights, roughly speaking, to what judges *ought* to do.⁴⁷

⁴⁶ As Oliver Wendell Holmes (1997) famously put it: “[T]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law”

⁴⁷ 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.

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. Think, in particular, of Dworkin's famous thesis that there is a right answer in hard cases, despite great uncertainty and disagreement about what that answer is and no guarantee that the uncertainty can be resolved.⁴⁸ The Dworkin of *Law's Empire* was able to defend this thesis because he took the law to be the principles that lie behind and justify the decisions of legislatures, courts, and agencies—and the norms that flow from those principles. 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 a final anti-realist turn.⁴⁹

References

- Berman, Mitchell N., 2004, "Constitutional Decision Rules," *Virginia Law Review*, 90:1-168.
- , 2005, "Managing Gerrymandering," 83 *Texas Law Review*, 83:781-854.
- 2020, "Constitutional Law," in Tasioulas J, ed., *The Cambridge Companion to the Philosophy of Law* (Cambridge, UK: Cambridge University Press).

⁴⁸ Dworkin 1977, chap. 4; 1985, chap. 5; 1986, chap. 2 & 266-71.

⁴⁹ I don't mean to suggest that the earlier Dworkin was a realist in all of aspects of his work. For example, Dworkin's views about metaphysics and metaethics long betrayed a quietest or instrumentalist streak (1986, 78-86; 2011, 9-11, 23-26, 30-33, 40-68).

Cornell, Nicolas, 2017, “The Possibility of Preemptive Forgiving,” *Philosophical Review*, 126: 241–272.

A.V. Dicey, 1915, *Introduction to the Study of the Law of the Constitution* (8th ed., Macmillan).

Dworkin, Ronald, 1986, *Law's Empire*, Cambridge: Belknap Press.

—, 1996, “Objectivity and Truth: You'd Better Believe It,” *Philosophy and Public Affairs*, 25: 87-139.

—, 2011, *Justice for Hedgehogs*, Cambridge: Belknap Press.

—, 2013, “A New Philosophy for International Law,” *Philosophy & Public Affairs*, 41: 2–30.

Fine, Kit, 1994, “Essence and Modality: The Second Philosophical Perspectives Lecture,”
Philosophical Perspectives, 8: 1–16.

Greenberg, Mark, 2005, “A New Map of Theories of Mental Content: Constitutive Accounts and Normative Theories,” *Philosophical Issues*, 15: 299–320.

—, 2014, “The Moral Impact Theory of Law,” *Yale Law Journal*, 123 (5): 1288–1343.

—, 2016, “How to Explain Things with Force,” *Harvard Law Review*, 129 (7): 1932–1980.

—, 2017, “The Moral Impact Theory, the Dependence View and Natural Law,” in G. Duke, and R. P. George (eds.), *The Cambridge Companion to Natural Law Jurisprudence*, Cambridge: Cambridge University Press, pp. 275–313.

Hershovitz, Scott, 2023. *Law Is a Moral Practice* (Cambridge: Harvard University Press).

Holmes, Oliver Wendell, 1997, “The Path of the Law,” *Harvard Law Review*, 110: 991-1009.

Khlerntzos, Drew, 2025, "Challenges to Metaphysical Realism", *The Stanford Encyclopedia of Philosophy* (Fall 2025 Edition), Edward N. Zalta & Uri Nodelman (eds.), forthcoming
URL = <<https://plato.stanford.edu/archives/fall2025/entries/realism-sem-challenge/>>.

Miller, Alexander, 2024, "Realism", *The Stanford Encyclopedia of Philosophy* (Summer 2024 Edition), Edward N. Zalta & Uri Nodelman (eds.), URL =
<<https://plato.stanford.edu/archives/sum2024/entries/realism/>>.

Raz, Joseph, 1975, *Practical Reason and Norms*, Oxford: Oxford University Press.

Rosen, Gideon, 2015, "Real Definition," *Analytic Philosophy*, 56: 189–209.

Sager, Lawrence, 2010, "Material Rights, Underenforcement, and the Adjudication Thesis,"
Boston University Law Review, 90 (2): 579–594.

—, 1978, "Fair Measure: The Legal Status of Underenforced Constitutional Norms," *Harvard Law Review*, 91: 1212.

—, 2004, *Justice in Plainclothes*, New Haven and London: Yale University Press.

Shapiro, Scott, 2011, *Legality*, Cambridge: Harvard University Press.