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Dworkin in the Desert of the Real

DAVID GRAY CARLSON*

According to recent critics,¹ the great Dworkin² is guilty of fallacy in supposing that the philosophy of language has something to do with the philosophy of law.³ Because these two fields are supposedly alien and indifferent to each other, any given philosophy of language is said to be inconsistent with any given philosophy of law.⁴ More specifically, Dworkin stands accused of falsely grounding his famous proposition that there are right answers in law on the linguistic claim that there are objective referents beyond mere convention. Yet whether or not there are right answers is supposedly unrelated to the issue of whether words refer to objective entities.

Close scrutiny of the argument, however, demonstrates that the *real* point of the criticism is that *theory* has nothing to do with *practice*. Theory is reflective, discursive, and descriptive of practice. "Practice" is something you just *do* unreflectively, without regard to theory. *These* are the incommensurates in Dworkin's philosophy—not the *philosophies* of language and law, which are both discursive narrations of *practices*.

If this distinction between theory and practice is properly understood, Dworkin is not only vindicated of fallacy but is revealed to be a deeper theorist of language and subjectivity than his critics have realized. Dworkin's thesis of right answers anchors itself in this precise gap between theory and practice (or what psychoanalysis calls between "nar-

* Visiting Professor of Law, University of Miami School of Law; Professor of Law, Benjamin N. Cardozo School of Law. Thanks to Dan Crane, Arthur Jacobson, Bill MacNeil, Jeanne Schroeder, and Bill Widen for their comments on early drafts of this paper. This paper was presented at the Law and Trauma conference sponsored by Griffith University in Brisbane.

1. See Michael Steven Green, *Dworkin's Fallacy, or What the Philosophy of Language Can't Teach Us About the Law*, 89 VA. L. REV. 1897 (2003); Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 1, 30 (Jules Coleman ed., 2001).

2. See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986) [hereinafter *LAW'S EMPIRE*].

3. Ronald Dworkin, *Introduction* to *THE PHILOSOPHY OF LAW* 1 (Ronald Dworkin ed., 1977) ("Even the debate about the nature of law, which has dominated legal philosophy for some decades, is, at bottom, a debate within the philosophy of language and metaphysics."); *id.* at 8 ("[M]any positivists rely, more or less consciously, on an anti-realist theory of meaning."); *cf.* H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 274 (noting that "much of what [Wittgenstein and Austin] had to say about the forms of language . . . and of rules determining the structure of language, has important implications for jurisprudence and the philosophy of law").

4. Green, *supra* note 1, at 1898 ("The philosophy of language generally has no jurisprudential consequences.").

native" and "act"). Far from being guilty of fallacy, Dworkin's philosophy reveals the chasm or split that must exist as the condition of possibility for both subjectivity and symbolic law. The centrality of this split is what makes Dworkin's jurisprudence "post-postmodern"—a movement whose time has come and in which psychoanalysis must play the leading role. If postmodernism stands for free play of texts and moral relativism, post-postmodernism, following Jacques Lacan,⁵ demands a return to the truth. The American philosopher who anticipates this return is none other than Dworkin.

In this paper, I acquit Dworkin of fallacy. For Dworkin, there is no proper split between law and language. The split inhabits *both* law and language—there is a fundamental incommensurability between *being* and *doing*. This split is no embarrassment to Dworkin but is rather the vortex around which his philosophy turns.

To defend Dworkin against the charge of fallacy, I proceed as follows. First, I summarize a distinction in language philosophy between conventionalism and materialism. Second, I show that the incommensurability in Dworkin's thought is not between two subsets of philosophy—linguistic and legal—but rather between being and doing—theory and practice. Third, I discuss this dichotomy, with the idea of emphasizing how the *act* (i.e., practice) is inherently disruptive of the imaginary order of theory. Fourth, I discuss what the nature of the legal object must be if there is indeed an incommensurability between being and doing. Finally, I discuss Dworkin's thesis of right answers. I agree that there is a right answer, but only one: *you are wrong*. I want to show that, if Dworkin is properly understood, law is the Freudian superego *tout court*. The superego both *requires* practice and condemns it. Only when this perhaps surprising linkage is made can Dworkin's philosophy be understood in its full descriptive power.⁶

5. Several works now exist on Lacanian jurisprudence. See DAVID S. CAUDILL, *LACAN AND THE SUBJECT OF LAW* 66-81 (1997); JEANNE LORRAINE SCHROEDER, *THE TRIUMPH OF VENUS: THE EROTICS OF THE MARKET* (2004); JEANNE LORRAINE SCHROEDER, *THE VESTAL AND THE FASCES: HEGEL, LACAN, PROPERTY, AND THE FEMININE* (1998); see also *LAW AND THE POSTMODERN MIND: ESSAYS ON PSYCHOANALYSIS AND JURISPRUDENCE* (Peter Goodrich & David Gray Carlson ed., 2001).

6. Brian Leiter errs in claiming that Dworkin's theory is not universally descriptive of practice but is descriptive only of legal systems in which convention makes moral criteria relevant in deciding cases. See Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JUR. 17, 27-28 (2003). In fact, Dworkin's system is deeply descriptive of the *logic* (i.e., the supra-conventional truth) of the nature of legal determination. Nor is Leiter correct in claiming that Dworkin cannot account for law's claim to authority. For Dworkin as well as for the positivists, law's authority is just a brute fact. See *LAW'S EMPIRE*, *supra* note 2, at 401. It is part of the very definition of law that it is followed unthinkingly by the public. Dworkin departs from the positivists, *inter alia*, in denying the validity of Hart's core-penumbra distinction. For Dworkin, it is core *and* penumbra all the way down.

I. PHILOSOPHY OF LANGUAGE

Philosophers of language address the question, to what do words *refer*? What connects the word "apple" with the red tasty object found in nature? Of course, most people would say the connection of signifier and signified just *is*—no sense in questioning it. But this cannot count as philosophy—only as dogma. Philosophy by definition reflects and asks *how* a signifier and a signified are linked together. Reflection problematizes the link. Philosophy has learned to wonder whether we have *any* access to a signified, or whether we are enmeshed in an inconclusive, infinite chain of signifiers.

Philosophy of language can be classified as conventionalist or materialist. Conventionalism refuses to admit that there is a material object beyond thought.⁷ Words never refer to anything "real." They only refer to the criteria of their own application, which are made up of more words, so that there is an endless signifying chain; a bad infinity that never connects with a material signified.⁸

Conventionalism is, however, contradictory to its core. When conventionalism says, "there is no object," it unintentionally confesses there *is* an object. Conventionalist theory *itself* is the object. The one objective fact in conventional theory is that there is no object. This hard, brutal kernel of material reality endures, even after every other subjective thought in the world fades away. Conventionalism is a non-critical theory—it cannot account for its own position. The implication of this simple point is profound. There is no escaping the object-beyond-thought. It only remains for us to say what this object is.⁹

7. IMMANUEL KANT, *CRITIQUE OF PURE REASON* 104-05 (Norman Kemp Smith trans., St. Martin's Press 1964) (1929) ("[T]he object is viewed as that which prevents our mode of knowledge from being haphazard or arbitrary.").

8. Kenneth Einar Himma, *Ambiguously Stung: Dworkin's Semantic Sting Reconfigured*, 8 *LEGAL THEORY* 145, 171 (2002) ("[I]t is a conceptual truth that the grounds of law are exhausted by conventional criteria of validity in the sense that all legal norms are valid in virtue of satisfying purely conventional criteria of validity.").

9. See Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 *PHIL. & PUB. AFF.* 87 (1996) [hereinafter *Objectivity and Truth*]. As Dworkin puts it in *Law's Empire*, the "preliminary dance of skepticism is silly and wasteful . . . [t]he only skepticism worth anything is the skepticism of the internal [e.g., materialist] kind, and this must be earned by arguments of the same contested character as the arguments it opposes." *LAW'S EMPIRE*, *supra* note 2, at 86.

Lately, positivists have claimed that Dworkin wrongly attributes conventionalism to H.L.A. Hart. Timothy A.O. Endicott, *Herbert Hart and the Semantic Sting*, in *HART'S POSTSCRIPT*, *supra* note 1, at 39, 41 ("[A] sound theory will reject criterial semantics, but I doubt that anyone has ever had a criterial semantics."). But see Nicos Stavropoulos, *Hart's Semantics*, in *HART'S POSTSCRIPT*, *supra* note 1, at 59, 85-88 (claiming that many of Hart's most famous positions do not make sense unless Dworkin's attribution is correct). Other positivist critics claim conventionalism is correct, but that it embraces definition by example and therefore reference to transcendental essences that exceed public agreement as to meaning. See Andrei Marmor, *Legal Conventionalism*, 4 *LEGAL THEORY* 509 (1998); Raz, *supra* note 1. This last line of attack

Theory that concedes the inevitability of encountering an object can be called materialist.¹⁰ It could be called *realist*, but this invites confusion with the American “legal realists” of the early twentieth century, who thought legal reasoning was indeterminate and mere rhetorical show for what was “really” going on—to wit, subjective politics. Materialism holds that there *is* something true out there beyond words and thoughts. Thoughtful materialists, however, are not so unwise as to claim a naive, pre-critical *immediate* relation between the thing and our descriptive thought of the thing. That is the position of naive empiricism (and, oddly, conventionalism, which naively supposes it can unproblematically describe law as a convention).¹¹ Rather, truth is obtained indirectly by reflection.

For materialists, the results of reflection are never guaranteed to be grounded in the truth. That there *is* a truth is a certainty, but there can be no direct access to it. Psychoanalysis calls this dilemma the “ethics of the real.”¹² Reflection is necessarily connected to the truth, and indeed cannot escape it. But any given proposition of the truth is doomed to capture it partially, at best.

Based on this definition, Kant, who is said to be the founder of German *idealism*, was in fact a materialist. Kant said that talk of appearance and phenomena presupposes a deeper thing-in-itself (or noumenon) that causes our thought of the thing. That is to say, if there is appearance, there must be something that appears. Kant insisted that we can know nothing of the noumenal thing-in-itself. All we can know is our thought of the thing. This was Kant’s “Copernican revolution”—that phenomenal things conform themselves to our thoughts, not our thought to the thing.¹³ Kant was followed and perfected by Hegel, who argued *against* a transcendental, noumenal ground. The so-called noumenon is *not* beyond us, but is fully present and located internally in our thought of the object. For Hegel, the transcendental noumenon is reduced to *limit* which is constitutive of the signifier.¹⁴

constitutes pouring materialist wine into conventional bottles, as Dworkin has shown. RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 62 (1977) [hereinafter *TAKING RIGHTS SERIOUSLY*].

10. John R. Silber, *The Copernican Revolution in Ethics: The Good Reexamined*, in KANT: A COLLECTION OF CRITICAL ESSAYS 266, 268 (Robert Paul Wolff ed. 1967) (“Knowledge, or a concept, is material when it refers to some object; it is formal when it refers merely to the form of understanding and reason.”).

11. Dworkin calls naive empiricism “external skepticism.” *LAW’S EMPIRE*, *supra* note 2, at 79.

12. ALENKA ZUPANČIČ, *ETHICS OF THE REAL: KANT, LACAN* (2000).

13. KANT, *supra* note 7, at xvi.

14. Hegel’s logic “extends Kant’s transcendental logic by exorcising the phantom of a thing-in-itself, which would always haunt our reflection and would limit knowledge in favor of faith and non-knowledge.” JEAN HYPPOLITE, *LOGIC AND EXISTENCE* 3 (1997) (Leonard Lawlor & Amit Sen trans., 1997).

For materialism, thought is a collaboration between subject and object. Dworkin suggests that there is a “reflective equilibrium” between subject and thing.¹⁵ That is to say, we develop a thought or a theory of the thing, but the thing obtrudes upon us, forcing us to revise our theory. In this process of reflective equilibrium, some material “thing” beyond language, convention, and positivism plays a role.

The Kantian and Hegelian versions of reflective equilibria differ in their nature. For Kant, it is the subject that does the revising. The thing holds itself aloof from the effects of thought. Whatever we think about, the thing-in-itself is a distortion by virtue of the radical divide between thought and materiality. This means that Kant suffers from the same contradiction that conventionalism does. If reflection distorts the object, does this not mean that Kantian philosophy *itself* is a distortion? As Hegel puts it in the *Science of Logic*, with Kant, “[k]nowing is supposed to have reached this conclusion, that it knows *nothing*.”¹⁶

The Hegelian version is anti-transcendental. It holds that the so-called object is entirely negative and incomplete. It depends on thought for its positivity. Unlike Kant, for whom the thing-in-itself endures beyond thought, Hegel would hold that *nothing is left behind* when the thing obtrudes on thought. What exceeds thought is negativity—that is to say, *nothing at all*.¹⁷ For this reason, there is no transcendence in Hegel. What is material in Hegel is *negative*. What is finite and ephemeral is the *positive* (as in “positive law”).

Materialism organizes Dworkin’s jurisprudence. In a famous passage from *Law’s Empire*, Dworkin accuses conventionalism of reducing all disagreements to triviality, or disagreement as to the dictionary definition of words.¹⁸ This consequence of conventionalism is what Dwor-

15. *Objectivity and Truth*, *supra* note 9, at 119; see also Ronald Dworkin, *Hart’s Postscript and the Character of Political Philosophy*, 24 OXFORD J. LEGAL STUD. 1, 18 (2004); LAW’S EMPIRE, *supra* note 2, at 65-66.

16. G.W.F. HEGEL, SCIENCE OF LOGIC 482 (A.V. Miller trans., 1993) [hereinafter SCIENCE OF LOGIC].

17. Dworkin reveals his Hegelian sympathy when he warns, “[t]he interpretive situation is not an Archimedean point.” LAW’S EMPIRE, *supra* note 2, at 62.

18. Hegel agrees:

When enquiry is made as to the kind of predicate belonging to [a] subject, the act of judgment necessarily implies an underlying Notion [i.e., an authentic objectivity]. But this Notion is first enunciated by the predicate itself. Properly speaking, therefore, it is the mere *general idea* that constitutes the presupposed meaning of the subject and that leads to the naming of it; and in doing this it is contingent and a historical fact, what is, or is not, to be understood by a name. So many disputes about whether a predicate does or does not belong to a certain subject are nothing more than verbal disputes because they start from the form above mentioned; what lies at the base . . . is so far nothing more than the name.

SCIENCE OF LOGIC, *supra* note 16, at 624-25.

kin calls the “semantic sting.”¹⁹ While the point of the “semantic sting” has proven confusing to Dworkin’s readers and infuriating to the positivists, my own reading of the point is this: If words refer to nothing but other words, then all disputes are reduced to mere word chopping, including our disagreements about morality, ethics, right, or wrong.²⁰ Since this consequence is unflattering to our sense of self-importance, it therefore follows that materialism is the better philosophy of language. Accordingly, there must be a real “world” out there so that people can nontrivially disagree about it.²¹ In Dworkinian terms, only if we share the same objective *concept* can we having conflicting *conceptions* of

19. LAW’S EMPIRE, *supra* note 2, at 45.

20. *Id.* (“[E]ither . . . lawyers actually . . . do accept roughly the same criteria for deciding when a claim about . . . law is true or there can be no genuine agreement or disagreement about law at all, but only the idiocy of people thinking they disagree because they attach different meanings to the same sound.”).

21. More precisely, Dworkin thinks the consequence of the sting is that there must be “hidden ground rules . . . embedded, though unrecognized, in legal practice.” LAW’S EMPIRE, *supra* note 2, at 45-46. This amounts to the claim that there is a legal object to which the word “law” refers. Dworkin returned to the semantic sting in Ronald Dworkin, *Thirty Years On*, 115 HARV. L. REV. 1655, 1683-84 (2002) [hereinafter *Thirty Years On*] (reviewing JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY* (2001)), in which Dworkin claimed that a critic:

announces that one of my arguments, which he refers to as the “semantic sting” argument, is “riddled with philosophical confusions.” But he identifies only one alleged confusion: “The problem with the semantic sting argument is that it mischaracterizes what individuals must share in order to have the same concept.” According to Coleman, I suggest that people can share a concept only when they agree on criteria for its application, whereas he insists that “individuals can share the same concept if they agree, not on criteria of application, but on a set of paradigm cases or instances of the concept.” . . . People who share a concept in this “paradigm” way, he continues, may disagree fundamentally about the best understanding of why the paradigms are indeed paradigms, and may therefore disagree about whether the concept applies to fresh or controversial cases. The purpose of my “semantic sting” argument was to make exactly that point: sharing a concept does not necessarily mean sharing criteria for its application, but might instead mean sharing paradigms as the basis for interpretive claims. Coleman’s account of concept sharing through paradigms is, in fact, almost identical to my own, using many of the same terms, including “paradigm.” He adds that this account of concept sharing is “a standard pragmatist view,” but again offers no citation to any writing in which this “standard” view of concept sharing is actually described. I do not claim originality for my account, of course, and the idea of a paradigm is in wide use among philosophers. But I am unaware of any other exposition of concept sharing through paradigms that is as close to my own as Coleman’s, and I would have been grateful for even one citation.

Id. (citations and footnotes omitted). This passage indirectly points to materialism as the point of the semantic sting. Examples are objects. To use Dworkin’s example, I can point to *Moby Dick* and say, “This is a book!” I can point to a short paper-cover tract and say, “This is no book, it’s only a pamphlet.” Use of examples to uncover meaning is an appeal to essence which the examples embody. You may disagree that *Moby Dick* is a book, but you do so by interpreting the essential concept “book.”

In his essay, Dworkin generally accuses recent positivism of going materialist but hanging on

how that concept applies in real cases.²²

I have some discomfort with this mode of arguing, in which materialism succeeds because it flatters us better than conventionalism. If materialism is to be vindicated in the marketplace of philosophy, it must do so based on logical proofs, not because the fantasy of the object sustains our desire. It is easy enough, however, to supply the proof; and Dworkin does precisely this in a later essay on objective truth.²³ According to this line of argument, conventionalism admits there *is* an object when it asserts there is no object. Conventionalism *itself* is the object. Conventionalism therefore testifies to its own impossibility. The only question now is, what is the nature of objectivity?

For Dworkin, then, there is a legal object beyond conventional agreement about it.²⁴ This is so even when law has a human origin. When, for example, Congress promulgated the Fourteenth Amendment and the states ratified it, its meaning exceeded the intent of the drafters. Congress promulgated an “object,” the contours of which are for future generations to interpret.²⁵ Dworkin sees judges and other “law finders” as implicated in a reflective equilibrium with this object. To be sure, the only way law is discovered is by revelation—what Hart misnames the “rule of recognition” and what Dworkin more accurately calls the “shock of recognition.”²⁶ In truth there is no “rule” here.²⁷ There is

to the supposedly honorable name of “positivism.” His comments on the semantic sting are part and parcel of that charge.

22. Stavropoulos, *supra* note 9, at 61 (“Lawyers disagree, Dworkin says, because they have competing conceptions of some concepts.”).

23. *Objectivity and Truth*, *supra* note 9.

24. RONALD DWORKIN, A MATTER OF PRINCIPLE 162 (1985) [hereinafter A MATTER OF PRINCIPLE] (“Any judge’s opinion about the best interpretation will therefore be the consequence of beliefs other judges need not share.”).

25. It would be silly to take the opinions of those who first voted on the Fourteenth Amendment as reporting the public morality of the United States a century later, when the racial issue had been transformed in almost every way. It would also be perverse; it would deny that community the power to change its public sense of purpose, which means denying that it can have public purposes at all.

LAW’S EMPIRE, *supra* note 2, at 365. For this reason, Dworkin attacks literary criticism that insists that the intent of the author is its sole object. Literary criticism must make the work the best it can be, even at the expense of the author’s intent. See A MATTER OF PRINCIPLE, *supra* note 24, at 146-66.

26. LAW’S EMPIRE, *supra* note 2, at 58; TAKING RIGHTS SERIOUSLY, *supra* note 9, at 39-45. Hart aptly describes Dworkin’s position: “[L]egal principles cannot be identified by criteria provided by a rule of recognition manifested in the practice of the courts[;] since principles are essential elements of law, the doctrine of a rule of recognition must be abandoned.” H.L.A. HART, THE CONCEPT OF LAW 263 (1961).

27. Hart occasionally admits that the rule of recognition is possibly unstated and exists only in practice. HART, *supra* note 26, at 110. In other words, the rule of recognition is itself unrecognized. He also claims that Dworkin’s criterion of “fit” is itself a rule of recognition. *Id.* at 266. But this is to confess that recognition does not come about by any “rule” at all. “Make it fit” provides no guidance whatever beyond requiring that there be an objective ground for

only the trauma of recognition. The judge, who must declare what the law is, just *does* it. Any "rules" allegedly followed in this act of recognition are supplied after the (f)act.²⁸ This is the difference between the judicial *act* and the judge's *opinion*. The first is the truth; the second is just *opinion*. All we know for certain is that the law is recognized. Per Wittgenstein, the rule of recognition is a product of after-the-(f)act narration and undecidable dispute.²⁹

Another way of putting the dispute between Dworkin and his conventionalist opponents is this: For Dworkin, there is an essence to law, and one judge might successfully identify it over the opposition of the howling mob. For conventionalists, this is nonsense. There is no moral reality beyond the mob.³⁰

II. THEORY AND PRACTICE

At the heart of Dworkin's description of law is the good old-fashioned distinction between being and doing. Being is on the side of philosophy, which *describes* the practice of law. Doing is on the side of actually *practicing* law. *These* are what suffer from incommensurability.³¹ *Describing* legal practice is narrative and discursive. But *doing* law operates in a different dimension.

Why is "being" on the side of discourse, and why is "doing" opposed to being? According to Hegel, being (or, more precisely, the more advanced state of "existence") is defined as entry of a noumenal thing "into the context of the totality of experience, that is, into the determination of an *otherness* and into relation to an *other*."³² That is to say, a thing "is" when we think of it. Things do not exist in nature but

decision. Dworkin has suggested that any custom that is accepted is no rule of recognition at all, but "only the tautology that law is law." TAKING RIGHTS SERIOUSLY, *supra* note 9, at 42-44.

28. Post-postmodernism loves to play with punctuation. See generally RENATA SALECL, (PER)VERSIONS OF LOVE AND HATE 151 (1998). What I mean by (f)act is that constative findings of fact are the performative *acts* of the fact finder.

29. See Charles M. Yablon, *Law and Metaphysics*, 96 YALE L.J. 613, 624-36 (1987). Even the archpositivist Jules Coleman agrees with this proposition. Jules Coleman, *Incorporation, Conventionality, and the Practical Difference Thesis*, in HART'S POSTSCRIPT, *supra* note 1, at 99, 147.

30. TAKING RIGHTS SERIOUSLY, *supra* note 9, at 53. But see Coleman, *supra* note 29, at 108 (claiming that positivism can describe the essences of law in a descriptive, unconventional way). Dworkin rightly doubts whether practitioners of essentialism can claim to be positivists at all. See *Thirty Years On*, *supra* note 21.

31. Dworkin does write "no firm line divides jurisprudence from adjudication or any other aspect of legal practice." LAW'S EMPIRE, *supra* note 2, at 90. But this does not deny the incommensurability. Rather, it says that jurisprudence is not privileged *against* this incommensurability. Philosophy is just as much a practice as practice is.

32. HEGEL'S SCIENCE OF LOGIC, *supra* note 16, at 481; see also Jeanne L. Schroeder & David Gray Carlson, *Does God Exist?: Hegel and Things*, 4 J. CULTURE & UNCONSCIOUS 1 (2004).

are constituted in thought. The *otherness* of the thing that Hegel speaks of is our thought of it. In legal terms, a thing becomes part of the symbolic order of law when it is narrated, explained, and integrated into a web of relations with other symbolic objects.

"Doing" or practicing law, on the other hand, is what psychoanalysis calls the *act*. The act (or doing) is inherently disruptive of the symbolic order of being. Only when the act is narrated is the symbolic order healed of its rift. Yet law requires the act, which is nevertheless incommensurate with law itself. This makes law a deeply contradictory enterprise, as law both requires and is destroyed by the act. It is this incommensurability on which Dworkin's theory of law turns.

The disruptive nature of the act can only be grasped in the context of a larger theory of subjectivity, as developed in the late twentieth century by Jacques Lacan. According to Lacanian theory, the subject is the overlap of three orders: the symbolic, the imaginary, and the real. By overlap, Lacan meant that the subject is *not* any of these three orders, but is rather the split between them.³³ The subject therefore is a metonym—an empty space that ties these orders together and simultaneously holds them apart.

The first of the three Lacanian orders is that of the symbolic—the social order of intersubjective relations. This is pre-given to the subject, who is born into a language and legal regime that the subject must learn. A subject in the process of learning to speak finds that it does not know what it is. It does not have the means of its own fulfillment (i.e., does not have the phallus). It must apply to the symbolic order (the Big Other) for the materials by which the subject can say what it is. The Big Other is in charge of our identity. This is what Lacan means by the neologism "ex-timacy." The most intimate part of ourselves is actually external to ourselves.³⁴

As a negativity, the subject desires a positive existence. It is, in Kant's phrase, the faculty of desire—a desire to *be*. The best way to think about the desiring subject is to focus on the fact that the subject is an empty space, or vacuum. Nature abhors a vacuum, and the subject abhors its own vacuity. Something must rush in to provide a positive existence to this vacuous subject. What rushes in to fill the void is what Lacan called the symptom.³⁵

33. BRUCE FINK, *THE LACANIAN SUBJECT: BETWEEN LANGUAGE AND JOUISSANCE* 45 (1995).

34. SLAVOJ ŽIŽEK, *THE TICKLISH SUBJECT: THE ABSENT CENTRE OF POLITICAL ONTOLOGY* 45, 375 (1999).

35. Linda Bellau, *Killing the Object: Psychosis and the Criminal Act*, 24 CARDOZO L. REV. 2229, 2237 (2003).

The subject *enjoys* her symptom.³⁶ It provides evidence to the subject that she *is*. "Enjoyment" is an important term in psychoanalysis. It is connected with the act. Enjoyment is the feeling associated with sublime unity between *being* and *doing*. When we enjoy, we feel, for a fleeting moment, that we are *alive*. At this moment we do not seem constituted by an absence. The act is all about enjoyment in the sense of fulfillment and satisfaction.

The act, however, is fraught with ambiguity. But before I say why, let me say preliminarily that, in Lacanian theory, the subject historicizes itself by acting. The subject is a kind of necklace in which the historic acts of the subject are the pearls. The subject being vacuous, it is nothing more than a narrative connecting pearls of enjoyment.³⁷

To provide itself with a positive existence, the subject uses the public materials of the symbolic order to narrate itself a story about its historic acts—a narrative in which it has a positive, stable existence. This "imaginary" story is the subject's fantasy. The imaginary constitutes the second order in the Lacanian constellation. It is the place where the subject is coherent and understandable. But the subject is, by definition, *not* the imaginary. It is rather the split between the symbolic, imaginary, and real. The fantasy therefore always fails to function.

The third order is the mysterious *real*. The real is simply the limit to the symbolic order. Being a limit, it is not a *thing* unto itself. Rather, it is entirely negative. It is basically *not the symbolic*. The real (non-meaning) underwrites symbolic meaning. Without limit, words would *have* no meaning. Non-meaning, however, not only underwrites but also forever threatens to disrupt the fantasy of meaning.

The subject simultaneously fears and desires the real. The real entails *jouissance*, in which the subject feels whole. But, equally, if the subject is united with the real, then it is alienated from the symbolic order. This is psychosis or madness.³⁸ The subject must hang on to the symbolic order. It uses words and narrations to create fantasy as the shield from psychosis and nothingness. It grows anxious when the fantasy is threatened by intrusions from the real.

Ironically, from the real comes the act. The real is forceful. It requires that the subject act. And when the subject acts, it obliterates the symbolic order for an instant. For this one moment, the subject is whole. She enjoys herself and is satisfied. But the symbolic order suf-

36. SLAVOJ ŽIŽEK, ENJOY YOUR SYMPTOM!: JACQUES LACAN IN HOLLYWOOD AND OUT (1992).

37. See GEORG W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 124 (Allen Wood ed., Hugh Barr Nisbet trans., 1991) ("What the subject *is*, is the *series of its actions*.").

38. David Gray Carlson, *Duellism in Modern American Jurisprudence*, 99 COLUM. L. REV. 1908, 1946-47 (1999).

fers when this occurs. The enjoying Maenid-like subject shatters the symbolic order when it acts. For this reason, Lacan refers to the symbolic order as a “barred other,” which means the symbolic order as traumatized by the act.³⁹

The act is non-symbolic. When it occurs, it disrupts the fantasy. Those who observe the acting subject have their fantasies disrupted. The act for them is traumatic. Trauma is defined as that which disrupts the narrative fantasy—“that which interrupts the smooth functioning of law and the automatic unfolding of the signifying chain.”⁴⁰ What must now occur is narration to re-establish the fantasy in light of the act. The imaginary reconstitutes itself after the (f)act, in which the meaning of the act is discovered and explained away. Most acts are benign and even welcomed. Everyone wants something to happen in their lives, if only to have something to talk about later. Once in a while, the act is monstrous—so monstrous that it cannot be narrated. These are the moments for which the word “trauma” is reserved in common parlance. But these catastrophic traumas are not different in kind from everyday acts, the little disturbances that make life fun.

Significantly, not only do my acts disrupt the fantasies of others, but they disrupt my own fantasy as well. I am just as much a stranger to my act as is any other. I learn who I am only by my deeds, which are basically a surprise to myself more than to any other. My act is *real* and *meaningless*, and I am precisely *not* the real. In this respect, we touch upon the reason why psychoanalysis is so disturbing and traumatic to the Anglo-American jurisprudential audience. It disputes the fact that the subject is sovereign. The idea of complete control is what Lacan called “having the phallus.”⁴¹ This is the archetypal masculine fantasy of wholeness and control. This is the fantasy by which the subject is *rational* and able to govern its acts by *reason*. And this is precisely what psychoanalysis denies. The difference between the masculine fantasy of control (“having the phallus”) and the subject’s true situation is precisely the unconscious—the source of the act. Or, to say the same thing in different terms, the difference between being and doing is the unconscious, which guarantees that these two must remain forever incommensurate.

Why should it be so that my acts are unreasoned, unconscious, and not subject to my control? Before I say why, let us admit that our lack

39. Jeanne L. Schroeder & David Gray Carlson, *Law's Non-Existent Empire*, 57 U. MIAMI L. REV. 767, 780 (2003).

40. FINK, *supra* note 33, at 83.

41. Jeanne L. Schroeder, *The End of the Market: A Psychoanalysis of Law and Economics*, 112 HARV. L. REV. 483, 511 (1998).

of control is everywhere confirmed by experience. Who has not felt emotion gain the upper hand over reason? Who has not cursed his own self when, in light of some snub or wrong, anger overwhelms our self-control? But, while this experience is certainly common, can we not also testify to the experience that, on occasion, our acts are reasoned in advance and indeed are caused by reason?

This latter point psychoanalysis describes as problematic. "Pragmatism," the view that we can give reasons for our acts, is seen by psychoanalysis as the masculine fantasy of having the phallus. In truth, we never know why we do the things we do. The admirable reasons we marshal to explain ourselves are after-the-fact narrations belonging to the realm of the imaginary. In our fantasy we are reasonable, sovereign "men" and we have the phallus.⁴² In truth, the matter is problematic in the Kantian sense. Perhaps our reasons caused our act. Perhaps we were otherwise motivated by some cause not yet rendered conscious. In the end, our intent is noumenal. We can never perceive it directly. Our "reasons" are *candidates* for causal material of our acts,⁴³ but we can never be sure that reason's hand guided us to action.

Psychoanalysis insists that our acts are over-determined. This has to do with the nature of the subject as *free*. Freedom can be defined very simply. Freedom (autonomy) is simply that which is not caused by something outside of our inner self (heteronomy). An act is free if it is *uncaused* by another. Acts are always *creatio ex nihilo*. Causation is an after-the-fact narration we tell ourselves to convince ourselves of who we are.

Bringing these thoughts back to the trauma of our acts, the subject acts, but we can never tell whether autonomy or heteronomy pricked us on. Our acts are over-determined. And it is precisely the difference between our reasons as narrated after the fact and the true cause of our acts which psychoanalysis calls the unconscious.

By definition, the act is unreflective. The act stands for *practice*. Reflection is narrative and retrospective. It stands for *theory*.

How do traumatic acts relate to the practice of law? Practice is simply something you *do* instinctively and unreflectively. When a practitioner gives an opinion, he says "*this* is the law." Such a pronouncement is very much a speech act. It is unreasoned, instinctual, and revelatory.

After the fact, the practitioner must give *reasons*. The moment of

42. In the terms of H.L.A. Hart, this is the "internal point of view." HART, *supra* note 26, at 102.

43. Dworkin properly denies that moral objectivity *causes* human actions. *Objectivity and Truth*, *supra* note 9, at 104-05. Given heteronomy, moral causality is merely *possible*.

the act, however, always contains a moment of disconnection from the reasons. But it also equally contains a moment of connection. *Why* did the practitioner declare such-and-such to be the law? The practitioner never knows for sure. One of the possibilities is that law caused the act. If so, the practitioner has remained faithful to the law. She has suppressed her heteronomy and reduced herself to a transparent oracle of the law—Hart's "internal point of view." Although it is the law that speaks, this transparency of the practitioner is on the side of autonomy. The moral obligation of legal interpretation is to remain faithful to the law. When the practitioner suppresses her heteronomy, then it is only the law that speaks. This is not to say that the legal opinion is *per se* moral. What the law requires may be immoral. Yet the law speaks for itself only when the interpreter acts according to the autonomous principle of fidelity to the law.

The legal interpretation may be transparent to the law. Or the interpreter may have corrupted the interpretation with her own heteronomy. It is the state of the interpreter that she never knows for sure what the status of her own interpretation is. She is always subjected to the ethics of the real. But this inability to perceive human intention completely, to which not only psychoanalysis but Wittgensteinian rule skepticism attests, does it not lead to nihilism? If reason does not exhaust the causal apparatus of the act, is it not true that anything goes? In fact, the opposite is true. The implication of the "ethics of the real" is that perhaps law really *did* cause the legal act. Because intent is noumenal and can never be "known," the practitioner is licensed to believe that law (rather than will) produced the answer. Nihilism, in turn, is an impossible position. Neither is there any sense in insisting on the non-relation of practice and law. Such a proposition is to adopt the non-critical position of the conventionalists. It is to assert the unity of being and doing. There is no sense in claiming an *immediate* relation between law and act, because that would amount to the claim that the noumenal self can be perceived—that the practitioner is not subject to the ethics of the real. Instead, the relation of law to practice is only one of possibility, not actuality.

Dworkin's singular contribution to jurisprudence is to emphasize the incommensurability of the judge's act and the reflective discourse of jurisprudence. In jurisprudence, theorists reflect on what law is, how it is found, and how it is "autonomous" from other disciplines, such as courtesy or morality. This is the same enterprise as reflection on whether signifiers relate to a signified. Both jurisprudence and the philosophy of language require reflection—the construction of the conditions for the possibility of the practice. Practice itself is quite blind, however. When

the judge acts, she acts without reflection. Reflection is an after-the-fact enterprise in which the judge builds a fantasy about the meaning of the act. Legal reasoning is a fantasy structure—a *virtual* reality. The judge builds an entire picture of the law in which the act was caused by the body of law that precedes the act. In this fantasy, the judge was motivated by the law and by nothing else.

Is this fantasy true? This can never be known. The judge's intention is noumenal. She is licensed to believe that the law "caused" the act, but she can never be certain of her own motives. This is precisely the ethics of the real.

III. LAW'S NEGATIVITY

The above account of the psychoanalytic act illuminates virtually every word Dworkin wrote in *Law's Empire*. So what, for Dworkin, is the law, and how does it generate right answers? In his vision, the law is entirely negative, by which I mean *not symbolized*. It is precisely the Lacanian real.⁴⁴

Dworkin never says this plainly. Nevertheless, the *real* nature of law is on display at all the important moments of Dworkin's definitional work on law. This can be seen in Dworkin's discussion of (1) ground, (2) the plain-fact theory of law (which he opposes), and (3) interpretation. Each of these points can only be understood if *real* law—the law not yet found—is negative in nature. I will refer to the negative real law as Law. The historic record of positivized law I will refer to as "the laws"—whose status as Law is always problematic.

A. Ground

Dworkin writes of the "true grounds of law."⁴⁵ At first glance this would seem to be pre-postmodern,⁴⁶ but in fact it is fully post-postmodern, in which truth is an event that disrupts the fantasy that the law has been successfully positivized. Carefully analyzed, the reference to "ground" requires the view that Law, for Dworkin, is negative.

Before I argue that Dworkinian "ground" coheres with the Lacanian real, let me say in appreciation of Dworkin that he is scrupu-

44. This view radically differs from Hart's interpretation of Dworkin. According to Hart, Dworkin's preinterpretive law is a positive entity that can be empirically recognized in an unproblematic way according to rules of recognition. HART, *supra* note 26, at 270-71.

45. LAW'S EMPIRE, *supra* note 2, at 4-5, 34.

46. This misunderstanding is the source of critical legal studies scholars' unjustified hostility to Dworkin's work. Had these scholars read Dworkin more deeply, they still would have found Dworkin unsympathetic to CLS's romantic presuppositions, but they would certainly not maintain that Dworkin is a naive empiricist. This disapproval is more appropriately aimed at the positivists whom Dworkin opposes.

lous in word usage, taking care to prevent metaphorical slippage from despoiling his conclusions. In particular, Dworkin sticks to a ruthless definition of the word "law." For Dworkin, law *precedes* the judicial decision and it *binds the judge*. Law *causes* the judicial act. Dworkin's usage coheres with that of science, which tries to discover the laws of nature. Law, for Dworkin and for science, is *that which binds*. Law is present when it compels the judicial decision absolutely and necessarily. It is very important to keep this in mind while reading Dworkin. In modern times, we tend to slip into corrupt usage. For most lawyers, law is simply what happens in law firms and in court. Legal realists feel entitled to use the word "law" even though they think that legal reasoning is just a mask for pure, subjective politics. This is not Dworkin's meaning. If Dworkin's meaning is insisted upon, the word "law" would never pass from the lips of a legal realist, because legal realism precisely denies the necessity of legal outcome given the pre-existing law.

With that said, it is possible to show that Dworkin's Law is located in the "desert of the real," to borrow Baudrillard's term.⁴⁷ To begin, let us consider what is symbolized in law. There are judicial opinions and statutes. These are the "laws" with a lower case "l." These are what a lawyer or judge "recognizes" as Law. Maybe they are Law. But they are never unproblematically so. The laws require *ground*. When the laws are grounded, they cease being problematic.

Suppose a lawyer delivers the opinion "my client should win." This conclusion is nakedly a speech act. As an act, it is unreasoned. No judge will accept the unreasoned speech act of counsel as the Law. The judge wants to see what Dworkin calls grounds. Ostensibly, "grounds" are the judicial opinions and statutes, the wise saws and modern instances that support the client's position.

The problem with "grounds" so conceived is that they are not straightforwardly the Law. They are only mere ungrounded laws. Counsel for the other side can be relied upon to cite different laws to back up their side in the dispute. In short, two lawyers are disagreeing as to the grounds of law. Putting aside, as Dworkin does, the possibility that one or both of counsel is lying about belief in the true grounds of law, how can they sincerely disagree about what are the true grounds of Law?⁴⁸

The answer is that practitioners are subject to the ethics of the real.

47. JEAN BAUDRILLARD, *SIMULACRA AND SIMULATION 1* (Sheila Flia Glaser trans., University of Michigan Press 1994) (1981).

48. One critic has written that "[t]he most fundamental challenge that Dworkin has made to H.L.A. Hart's theory of law is that it cannot account for the nature of legal disagreement." Endicott, *supra* note 9, at 39.

Any asserted grounds are not the Law as such. They are merely the *appearance* of law—candidates, as it were, for the real thing. The Law exceeds mere appearance; it must forever be distinguished from “the laws.” Indeed, what distinguishes Dworkin’s “law as integrity” from mere conventionalism is this very power to question whether the laws of the past are grounded.⁴⁹

All of this is implied by Dworkin’s use of the term “ground.” “Ground,” Hegel emphasized, is a correlative term. “Ground” never exists on its own. There is always a grounded that goes with it (just as there can be no positive without negative). To say that a judicial opinion is grounded in Law is to assert a unity between judicial opinion and Law. In Hegelese, “*there is nothing in the ground that is not in the grounded, and there is nothing in the grounded that is not in the ground.*”⁵⁰ For Dworkin, “ground” is Law itself, in unity with symbolized law. At first, the intuitive speech act of counsel appears to be grounded, if it is backed by reference to phenomenal laws. But the ground is open to challenge. There are other phenomenal laws that appear to render counsel’s opinion lawless. What appeared to be ground is now just a mistake about the law. Disagreement about grounds occurs because of a propensity to confuse Law and law.

Opposing counsel has counter-cases and counter-statutes. Suddenly, both lines of authority are in question. They are the ostensible *appearance* of law, but for a moment they are precisely *ungrounded*. They are the law only if successfully grounded. That is to say, what at first appeared to be ground is now only grounded. If they are to be the law, they must be grounded in some deeper ground. Yet whatever deeper ground can be positivized, this ground too can be challenged. And so on to infinity.

Ground, then, is elusive and negative by nature. The minute it is positivized, it needs further ground and is no longer unproblematically the law. Ground is like δx in calculus. It is not nameable or perceivable. The minute I name it or perceive it I make it into something false. Just as the identity of δx is always deferred, so is the true ground of the laws. Naming it ruins it. Since ground is never before us, it must be something negative. Yet δx becomes determinate when paired with δy . If δx and δy are unnameable, $\delta y/\delta x$ can be calculated (more or less).⁵¹ The trope of $\delta x/\delta y$ captures Dworkin’s jurisprudence well, in that an unnameable

49. LAW’S EMPIRE, *supra* note 2, at 96, 225. Integrity implies “the best constructive interpretation of past legal decisions.” *Id.* at 262.

50. HEGEL’S SCIENCE OF LOGIC, *supra* note 16, at 457.

51. In Hegel’s Logic, $\delta y/\delta x$ stands for “measure”—something outwardly discoverable but inwardly ineffable. David Gray Carlson, *Hegel’s Theory of Quantity*, 25 CARDOZO L. REV. 129 (2003).

subject meets an unnameable predicate and forms a *judgment* which is definitely determinate, even if subject and predicate are not.

B. *Law as Plain Fact*

A second example of the negativity of Law is Dworkin's denunciation of the "plain-fact" view of law. This view, which Dworkin criticizes, holds that the legal answer has already been positivized on the books and that the job of the judge is to "look up" the answer.⁵² For the "plain-fact" school, phenomenal law is *all* the law there is. There is no negative Law. Questions of law are always questions of fact.⁵³ On this view, the law is often silent. "Then the judge has no option but to exercise a discretion to make new law by filling gaps where the law is silent and making it more precise where it is vague."⁵⁴

For the plain-fact school, only the *gaps* in the law are negative; where cases and statutes speak clearly, the law is positive. This is far from Dworkin's view. Cases and statutes, no matter how clear and emphatic, are mere appearances. If they are followed, they must first be *found* or *recognized* to be the law. Precedents and statutes (laws) are never unproblematically Law. They might be wrong or unconstitutional. Rather, laws must be *grounded*. The judge must ultimately confirm that the proposed laws are indeed Law. As such, Law is by definition unsymbolized and negative. Only "laws" are symbolized and positive.

The law will not be left in its negative state. It renders itself positive in the judicial opinion. Law in its active negativity must become phenomenal law through the voice of the passive judge. For this reason, following a case that is on "all fours" appears to be a repetition, but in fact it is an original *act* of the judge. No precedent is capable of grounding a decision unless the judge decides that precedent is Law.⁵⁵

What separates Dworkin from the plain-fact school is a fundamental disagreement on whether facts are constituted by subjective activity. For the plain-fact school, the law just *is*, according to rules of recognition. For Dworkin, Kant, and Hegel, the object is incomplete—that is to say, negative—until it is thought. Objects require interpretation. They are not plain facts. And neither are legal objects plain facts. They too need interpretation.

Revealing on this score is Dworkin's insistence that there are moral facts:

52. LAW'S EMPIRE, *supra* note 2, at 9.

53. *Id.* at 109.

54. *Id.* at 9.

55. Arthur J. Jacobson, *Hegel's Legal Plenum*, in *HEGEL AND LEGAL THEORY* 97 (Drucilla Cornell et al. eds., 1991).

I do not mean that there are what are sometimes called "transcend" or "Platonic" moral facts: indeed I do not know that these would be. . . . If there are such moral facts, then a proposition of law might rationally be supposed to be true even if lawyers continue to disagree about the proposition after all hard facts are known or stipulated. It might be true in virtue of a moral fact which is not known or stipulated.⁵⁶

What this passage means is that a legal decision is always potentially right. An unarticulated moral fact (which Dworkin all but equates with a legal fact) might justify (or destroy) the legal decision. The as-yet unarticulated fact that vindicates the possibility of a right answer is by definition Law, a pre-interpretive negative proto-object around which Dworkinian jurisprudence turns.

C. *Creative Interpretation and the Negation of Nihilism*

Dworkin's account of interpretation is a third example that reveals Law's negativity. For Dworkin, interpretation is "creative" and "constructivist." Creative interpretation involves the assumption of purposiveness and the construction of an intent:

Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong. It does not follow, even from that rough account, that an interpreter can make of a practice or work of art anything he would have wanted it to be. . . . For the history or shape of a practice or object constrains the available interpretations of it. . . . Creative interpretation, on the constructive view, is a matter of interaction between purpose and object.⁵⁷

In this passage, interpretation works only if Law is a negative entity. If Law must be constructed, then it follows that, prior to its construction, it is not symbolized. Law emerges in interpretation. It has no positive existence apart from this emergence. This indicates that the symbolized law is grounded in the non-symbolic. "Meaning," or symbolization, depends on non-meaning. Being non-symbolic, Law cannot be recognized until it is symbolized in the interpretive act of the judge.⁵⁸

There is nevertheless an odd note in the above-quoted passage that must not be misinterpreted. The passage speaks of the imposition of a

56. A MATTER OF PRINCIPLE, *supra* note 24, at 138.

57. LAW'S EMPIRE, *supra* note 2, at 52.

58. Brian Leiter rankly abuses Dworkin in his claim that interpretation does no work in Dworkin's vision of law. According to Leiter, interpretation means that judges constantly try to justify the coercive force of law. Leiter, *supra* note 6, at 31-32. In fact, for Dworkin, interpretation is how law becomes positivized and visible, given its pre-interpretive negative origin. Justification of coercive power may be a *consequence* of the "best" interpretation of law, but interpretation as such is how law *comes to be* in an affirmative way. Interpretation therefore does *all* the work in Dworkin's philosophy.

purpose.⁵⁹ A careless reading would suggest that the law is absolutely indifferent to whatever alien purpose is assigned to it by an aggressive judge. But in fact, Law's negativity is the active force. It is a coming-to-be that is "not yet." It works on the judge.⁶⁰ The last part of the above-quoted passage makes this clear. Purposiveness is a collaborative effort. The law participates in its own interpretation in a process of reflective equilibrium. If this is so, then the law, though unsymbolized, resists violent imposition of any truly alien purpose. Rather the judge must be open to the force of law.⁶¹ If a judge cynically or even mistakenly imposes a purpose to which Law is not open, then what we have is *will*, not Law.

But what is this resistance—this constraint? If Law is active and the judge passive, why should past moments of law-finding constrain a judge now? If Law is negative, as Dworkin implies, can we summarize practice by saying that there is no law?

The last thing Dworkin intends is legal nihilism. So the answer to this question is of the utmost importance. I sketch the answer in the next few paragraphs. Let me say preliminarily that Dworkin's defense against the charge of nihilism takes the form of the objection I earlier sketched against conventionalism. Conventionalists claim there is no object to constrain interpretation. Yet conventionalism itself is an object that makes the very practice of conventionalism contradictory. Simi-

59. See also LAW'S EMPIRE, *supra* note 2, at 228 ("[C]reative interpretation takes its formal structure from the idea of intention, not (at least not necessarily) because it aims to discover the purposes of any particular historical person or group but because it aims to impose purpose over the text or data or tradition being interpreted.").

60. Can this be reconciled with Dworkin's recent pronouncements in *Objectivity and Truth*? There, he denies that moralists must suppose a "moral field" that interacts with the human neural mechanism, much like light particles strike the optic nerve. *Objectivity and Truth*, *supra* note 9, at 104-05. Dworkin thinks that moral objectivity requires no such *physical* theory. It suffices to believe that humans are constructed with a capacity for moral judgment. Either that, or it is okay to torture babies for fun. In short, Dworkin (unfortunately, in my view) makes a consequentialist argument for moral force.

My invocation of moral force proceeds on a different ground. The force I mention in the text is no physical force, but a logical one. Embedded within the logic of perception are the forces of attraction and repulsion. The existence of a thinking subject requires its attraction to an object (perception) but also its repulsion from the object (apperception). If either attraction or repulsion gets the upper hand, both subject and object must disappear. These are not according to physical laws but according to logical laws. For Hegel's location of repulsion and attraction in the nature of objective being, see David Gray Carlson, *Hegel's Theory of Quality*, 22 CARDOZO L. REV. 425, 570-87 (2001) (describing Hegel's derivation of these forces from the concept of the one and the many).

61. Hegel emphasizes that there must always be *two* forces—here, the judge as passive force and the law as active force. SCIENCE OF LOGIC, *supra* note 16, at 520 (force is "a relation in which each side is the same as the other"); see also HANS-GEORG GADAMER, *HEGEL'S DIALECTIC: FIVE HERMENEUTICAL STUDIES* 38 (P. Christopher Smith trans., 1976) ("[E]liciting and being elicited are the same process.").

larly, suppose a psychopathic judge claims there is no law, only *will*. This very claim presupposes there is a law—the law of *will*.

Nihilism, then, is contradictory. In fact, it is madness and psychosis—the abandonment of the symbolic order and merger with the real. The very existence of subjectivity demands that there be a symbolic law and that the judge submit herself to it. No judge could bear to do without the symbolic law. Without the imaginary realm of phenomenal law, the negativity of the Law is the *Abgrund* of madness.⁶² The judge desperately needs the laws in order to build the *fantasy* that shields the judge from the madness of the Lacanian real. This fantasy is no illusion or mistake; it is a necessary moment in Dworkinian jurisprudence, which heavily emphasizes “right answers” on the basis of “fit.”⁶³

Hegel describes the fate of the nihilist judge in his theory of the negative infinite judgment. The negative infinite judgment denies all connection between the judge and positive law. This is what Hegel says crime is.⁶⁴ Crime is the ultimate denial of positive law. Yet, in Lacanian terms, the subject is a unity of being and nothing—of the symbolic and the real. To deny the symbolic realm of the laws is to deny subjectivity itself. Therefore, the criminal judge, who denies all constraint denies her very selfhood. Logically speaking, she is a contradiction who “disappears.”⁶⁵ In short, the judge who claims to be utterly beyond the law *as it is positivized by culture* is an impossibility. The very existence of subjectivity testifies to the self-demolition of nihilism. A judge must of necessity have recourse to the laws that have been positivized through history. Any other possibility is impossible, criminal, and mad.

Just as human beings require the symbolic order to exist, so judges require positive law to exist. Judges must therefore encounter the historical record of positive law to search for evidence of what the law is. Yet law as such is never guaranteed to be found in any given “appearance”

62. See Carlson, *supra* note 38, at 1946-48.

63. See Robert M. Cover, *Nomos and Narrative*, 92 HARV. L. REV. 4, 15 (1982) (“The unification of meaning that stands as its center exists only for an instant, and that instant is itself imaginary.”). Dennis Patterson has recently written that, if law finding is akin to scientific observation, then fit becomes superfluous. He suggests that Dworkin “has to be read as saying that the effort to find the ‘true’ meaning of legal and political concepts should respect past practice not because it is past but only in so far as it gets things right. Thus, all efforts to accommodate and account for past and present (but mistaken) practice have to be abandoned.” Dennis M. Patterson, *Dworkin on the Semantics of Legal and Political Concepts*, 26 OXFORD J. LEGAL STUD. (forthcoming 2006) (footnote omitted). But fit is the judge’s only assurance that she has found the objective law, not subjective madness. Any abandonment of the fit criterion is psychosis itself.

64. SCIENCE OF LOGIC, *supra* note 16, at 642.

65. This is the fate of Dworkin’s “external skeptic,” a madman who likewise disappears. See LAW’S EMPIRE, *supra* note 2, at 80-86.

of a case or statute.⁶⁶ These moments might be “not-Law.”⁶⁷ They might be *ungrounded* moments. It is the task of every judge to *ground* these positive moments in the highly negative Law that Dworkin’s interpretive theory implies.

But how can a judge recognize the grounded moments and distinguish them from the ungrounded moments? What is the rule of recognition? There is no such rule. The judge just recognizes it. This is the act of the judge. Any symbolized rule of recognition is after-the-(f)act narration of the act of recognition. The vaunted rule of recognition, so vital to legal positivism, is a fantasy structure designed to advertise the judge’s freedom from heteronomy. In fact, every judge is in the desert of the real. There *is* no assurance for the judge that he followed the rules of recognition. For this very reason, the judge’s opinion is merely a candidate for Law. And for this very reason, future generations may reject the judge’s opinion as “bad law.”⁶⁸

To summarize, at least these three themes of Dworkin all imply that Law is negative—the Lacanian real, with which the judge merges to find the law in the *jouissance* of recognition. But have we not defined madness as merger with the real? Is the law mad? No doubt in part, because law depends on the act and the act is unreasoned and unsymbolizable. Nevertheless, the judge must inevitably construct the law, using the historicized acts of law by past legislatures and judges. Law must have a positive existence and therefore cannot be entirely mad. But there are no guarantees. Dworkin never denies that a liar or psychopath might be appointed to the bench.⁶⁹ Phenomenal laws always operate at the level of possibility—never the level of actuality. This is precisely why Dworkin is the *noir* philosopher of our age. It is no accident that Dworkin’s

66. See *LAW’S EMPIRE*, *supra* note 2, at 273 (critical legal studies reminds the Herculean judge that “nothing in the way his law was produced guarantees his success in finding a coherent [i.e., correct] interpretation of it. But neither does history guarantee his failure, because his ambitions are interpretive in the sense appropriate to the philosophical foundations of law as integrity.”).

67. Dworkin calls the appearance of law “paradigms” and says of them: “Paradigms anchor interpretations, but no paradigm is secure from challenge by a new interpretation that accounts for other paradigms better and leaves that one isolated as a mistake.” *LAW’S EMPIRE*, *supra* note 2, at 72.

68. Note should be taken of Dworkin’s account of the three stages of interpretation. According to Dworkin, there is (1) the pre-interpretive stage, (2) narration of the “fit” story, and (3) adjustment, if necessary, of the judicial act which interpretation presupposes. *LAW’S EMPIRE*, *supra* note 2, at 65-66. The pre-interpretive stage, Dworkin says, is the identification of the legal rules relevant to the case. *Id.* In my view, identification of the rules is properly assigned to the second stage (narration). The pre-interpretive stage is the judicial interaction with the negative legal object. Until the judge intuits the answer, the act of interpretation (which properly begins in the second stage) cannot even commence.

69. He does promise, however, that they will be impeached, once exposed. See *LAW’S EMPIRE*, *supra* note 2, at 88.

judge is Hercules,⁷⁰ who in spite of his great deeds, descends into madness and murders his family. Positive law is the only hope that this descent can be forestalled. Madness is not off the table for Hercules or any of us.

IV. RIGHT ANSWERS

Given the "real" nature of Law, what then is a "right answer"? To be sure, a right answer cannot be the conformance of legal result to phenomenal legal materials. At this level, where an appellate panel splits into a majority and a minority, both groups cannot be right. Yet, somehow, Dworkin holds open the possibility that *both* the majority and the minority are right. The rightness of the legal answer is therefore in its *procedure*, never in the outcome (which is fated to be controversial in hard cases). To put this matter in our previous terms, the rightness of the answer belongs to the *doing* of it, not to the *being* of it. Accordingly, Dworkin writes, "[t]he proposition that there is some 'right' answer . . . does not mean that the [legal materials] are exhaustive and unambiguous; rather it is a complex statement about the responsibilities of its officials and participants."⁷¹ And further, "any particular judge's theory of fit will often fail to produce a unique interpretation. (The distinction between hard and easy cases at law is perhaps just the distinction between cases in which they do and do not.)"⁷²

The best way to approach the nature of the Dworkinian right answer is to proceed indirectly, as is fitting with the claim that Law is located in the real. The real can never be named directly but only inferred in a process of reflective equilibrium, in a process Dworkin calls "creative interpretation."⁷³ "Creation" ex nihilo is exactly the right note for Dworkin's right answer, with the proviso that, per Hegel, "nothing is[, after all,] something."⁷⁴

Let us analyze Dworkin's proposition: *There are right answers in the law.*⁷⁵ The first thing to note is that there is a class of entities called *answers*. These can be viewed as, in the first instance, the unreasoned acts of adjudication. Second, the class implies two subclasses: *wrong* answers and *right* answers. It falls upon us to set forth the membership criteria for the subsets of right and wrong answers "[b]etween whose

70. See *id.* at 239, 264-65; TAKING RIGHTS SERIOUSLY, *supra* note 9, at 105-30.

71. TAKING RIGHTS SERIOUSLY, *supra* note 9, at 104.

72. A MATTER OF PRINCIPLE, *supra* note 24, at 161.

73. LAW'S EMPIRE, *supra* note 2, at 52.

74. Carlson, *supra* note 60, at 407.

75. LAW'S EMPIRE, *supra* note 2, at 266 ("No aspect of law as integrity has been so misunderstood as its refusal to accept the popular view that there are no uniquely right answers in hard cases at law.").

endless jar justice resides."⁷⁶

It is precisely here that Dworkin's dialectical materialism has bite. Recall that materialism asserts there is a "signified" to which signifiers refer. But materialism is not naive empiricism. Naive empiricism is the claim that there is a direct, unproblematic, *unmittelbar* relation between signifier and signified. Dworkin's "signified" is a negative pre-thing.⁷⁷ Any claim that there is an unproblematic connection between signifier and a positive signified is a philosophical *wrong*, on Dworkin's linguistic philosophy. At most, there can only be reflective equilibrium between the signifier and its highly negative, unsymbolized referent. Yet the referent perdures as a traumatic, real force that obtrudes upon the fantasy structure of meaning that the judge constructs.

As it is with language, so it is with law. For Dworkin, there can be no unproblematic connection between legal signifiers and a legal signified. There can only be a reflective equilibrium between the two.

And here is the radical payoff to Dworkin's thesis. *Any attempt to positivize Law is a wrong against it.* Law as such is negative. To be perceived, it must be positivized by the act of the judge. This is the great paradox at the heart of Dworkin's work. Law requires positivization. But any given positivization forfeits its "ground" and therefore must be *re-grounded* in the act of the judge. Unlike the "plain fact" school of jurisprudence, law must be constantly reinvented. It *insists* rather than *exists*.⁷⁸ It is this very feature of law that allows for reform from within the system and growth of the law without external legislative aid. This feature explains why the Supreme Court can overrule itself, why any case in the reporting system can plausibly be called "bad law,"⁷⁹ and why, in Dworkin's terms, the law can "work itself pure."⁸⁰

So what, then, is a *right* answer in Dworkin's system? The right answer is the dissolution of the wrong answer. Right consists of the dissolution of wrong.⁸¹

Psychoanalysis has a word for the Law that produces right answers.

76. WILLIAM SHAKESPEARE, *TROILUS AND CRESSIDA* act 1, sc. 3.

77. Dworkin is, therefore, right to deny the charge that he "was committed to a silly material theory of interpretation, according to which meanings are 'just there' in the universe . . . and interpretation is therefore the discovery of brute noninterpretive, and recalcitrant facts." A MATTER OF PRINCIPLE, *supra* note 24, at 167.

78. This is the Lacanian notion of "ex-sistence." SLAVOJ ŽIŽEK, *LOOKING AWRY: AN INTRODUCTION TO JACQUES LACAN THROUGH POPULAR CULTURE* 136-37 (1991).

79. Gregory C. Keating, *Fidelity to Pre-existing Law and the Legitimacy of Legal Decision*, 69 NOTRE DAME L. REV. 1 (1993).

80. *LAW'S EMPIRE*, *supra* note 2, at 400.

81. Incidentally, this is precisely Hegel's definition of wrong. See Jeanne L. Schroeder & David Gray Carlson, *The Appearance of Right and the Essence of Wrong: Metaphor and Metonymy in Law*, 24 CARDOZO L. REV. 2481 (2003).

It is the *superego as such*.⁸² In Lacanian theory, the superego is a law that enjoins the act. Injunction must be taken in the wonderfully ambiguous sense by which "to enjoin" means to encourage and also to prohibit. The superego, on the one hand, sets forth the incest taboo: do not merge with the real! On the other hand, the superego requires its own transgression. It requires the subject to act out and, in acting out, to merge with the real. Without transgression, the superego could not exist. Just as charity requires beggars, so the superego both requires and condemns the act.⁸³

This dual structure of the superego matches up perfectly with Dworkin's definition of Law. Law is superegoic in nature. It requires the judicial act. The judge must decide. This cannot be avoided.⁸⁴ But the act consists in giving positive content to the law. The law *must be*, yet *will not be positivized*. The only right that Law sanctions is the negation of wrong—the de-positivization of law. This is because Law is *negative*. Only de-positivization of the appearance of law is true to law's traumatic, real nature.⁸⁵

Dworkin's anti-positivist jurisprudence, in my view, opposes conventionalism in a much more profound way than is usually realized. The right answer points us to the Lacanian real. In terms of set theory, the set of answers consists of all the positive wrong answers and the null subset of right answers. But just because the set of right answers is null does not mean that it is not a subset. As set theorists know, the null subset is not just nothing. It is a positive member of the set of answers, without which set theory entirely collapses.⁸⁶ The null set precisely describes the right answer in Dworkin's jurisprudence. The null set is what holds set theory together. It is the master signifier for all mathematics. And the right answer is likewise the master signifier and null set of Dworkin's theory. This means that, for Dworkin, it is not exactly the case that there are right answers. In fact, there is only one right answer. And the answer is: "You are wrong." This is precisely the structure of the Freudian superego.

82. Alenka Zupančič, *The Subject of the Law*, in *SIC 2: COGITO AND THE UNCONSCIOUS* 41, 41 (Slavoj Žižek ed., 1998) ("[W]hat philosophy calls the moral law and, more precisely, what Kant calls the categorical imperative, is in fact nothing other than the superego.").

83. See Renata Salecl, *The Silence of the Feminine Jouissance*, in *SIC 2: COGITO AND THE UNCONSCIOUS*, *supra* note 82, at 175, 189.

84. See *A MATTER OF PRINCIPLE*, *supra* note 24, at 119-45 (arguing for the inherently bivalent nature of law, which devolves into the judge's duty to decide).

85. Again, this is Hegel's jurisprudence. Hegel writes of the Law of appearance and law, in which "[a]pppearance and law have one and the same content." *SCIENCE OF LOGIC*, *supra* note 16, at 503. The fate of appearance (and the laws that describe it) is *disappearance* (*Aufhebung*).

86. ALAIN BADIOU, *INFINITE THOUGHT: TRUTH AND THE RETURN TO PHILOSOPHY* 19-21 (2003); PATRICK SUPPES, *AXIOMATIC SET THEORY* (1972).

Once again, the last thing Dworkin would want to establish is legal nihilism—the notion that there is no Law, only will. And, once again, the self-referential paradox serves as a guarantee against the very possibility of nihilism. We must be skeptical of skepticism itself. In Dworkinian terms, there is only internal skepticism.⁸⁷ “You are wrong” is itself an answer and is therefore a wrong answer. All wrong answers bear an aspect of right. Wrongness, therefore, cannot exclude rightness. Any given answer is both right and wrong. There is nothing before us but the ethics of the real.

Hegel memorably summarizes the situation: “What is thus found only *comes to be* through being *left behind*.”⁸⁸ This perhaps summarizes all of *Law’s Empire* in a single sentence. What is found by the judge is a positive ruling of law, ungrounded and immediate. It comes to be because *real* Law is left behind. As it must, because Law is located in the desert of the real.

V. CONCLUSION

Is Dworkin guilty of fallacy for thinking that the philosophy of law and language are inter-connected? Nothing could be further from the truth. Law and language share precisely the same problems of reference. Indeed, law *is* language, and therefore it follows that it is impossible to do jurisprudence without committing oneself to a position on the relation of signifier to signified.

One critic who accuses Dworkin of fallacy unintentionally utters the truth of the matter: “Dworkin’s interpretive theory of law follows unproblematically from the interpretive theory of meaning once adjudication is misunderstood as a linguistic practice.”⁸⁹ Dworkin’s account of adjudication, however, is no misunderstanding. Language, like adjudication, *is* a practice. At its foundation, it requires the anti-theoretical moment—the Lacanian “act”—of which Dworkin is abundantly aware. Renata Salecl (who calls the act *justice*) puts the matter well:

In the terms of Lacanian psychoanalysis, the difference between law and justice is that between *symbolic knowledge* and *act as Real*. Justice is a decision, an act of judgment, which cannot be wholly founded in law. The judge must rest his judgment on a simple application of law—there is always a moment of singularity and contingency which clings to the fact. The gap separating justice from law is thus unbridgeable: justice is done with reference to the domain of

87. See *Objectivity and Truth*, *supra* note 9, at 89-94.

88. SCIENCE OF LOGIC, *supra* note 16, at 402.

89. Green, *supra* note 1, at 1923.

law, yet in its exercise it transgresses it.⁹⁰

Dworkin's entire jurisprudence swirls around this incommensurability. It is the very dependence of theory on practice—the vulnerability of theory to the trauma of practice—that makes it possible for Dworkin to argue for right answers in the first place.

Have I imposed a Hegelian interpretation to Dworkin's theory that the author never intended?⁹¹ My guess is that Dworkin knows well enough what he is doing. But in case I am wrong, I will let Kant have the last word:

[I]t is by no means unusual, upon comparing the thoughts which an author has expressed in regard to his subject, whether in ordinary conversation or writing, to find that we understand him better than he has understood himself. As he has not sufficiently determined his concept, he has sometimes spoken, or even thought, in opposition to his own intention.⁹²

Certainly Dworkin would be the last to protest my making his jurisprudence the best it can be, through the techniques of fit and interpretation. If the psychoanalytic overtone to the work was not intended, it is present nevertheless as a supra-conventional referent.

90. RENATA SALECL, *THE SPOILS OF FREEDOM: PSYCHOANALYSIS AND FEMINISM AFTER THE FALL OF SOCIALISM* 97 (1994).

91. Dworkin's only reference to Hegel is that "critical legal studies" has the goal of making students familiar with this "other discipline." *LAW'S EMPIRE*, *supra* note 2, at 271-72.

92. KANT, *supra* note 7, at 314; *see also* A MATTER OF PRINCIPLE, *supra* note 24, at 155-56 ("I have in mind an experience familiar to anyone who creates anything, of suddenly seeing something 'in' it that he did not previously know was there.").