

ARTICLE

Dworkin on Ordinary Language Philosophy and Legal Principles before the “Hart–Dworkin Debate”

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The work of Ronald Dworkin was central to the development of twentieth-century anglophone legal philosophy. This article offers the first discussion of a previously unknown and unpublished book manuscript by Dworkin which shows that he initially grounded his early legal thought in a wide-ranging methodological framework centered on ordinary language philosophy. Amidst heated debates over the draft for the Vietnam War, Dworkin developed a modified version of ordinary language analysis which, he contended, facilitated a critical stance towards what he called “conventional morality.” In this light, the widely acknowledged influence of the legal process school on Dworkin’s early work appears as a transition from an earlier engagement with ordinary language philosophy. I conclude by tracing how Dworkin shifted towards the legal process school and how this reshaped the theoretical ambitions of his legal thought.

In 1955, Ronald Dworkin sat his final exams for a BA in jurisprudence at Magdalen College, Oxford. The examiner of Dworkin’s script was the chair in jurisprudence, H. L. A. Hart. Hart was so “excited” about Dworkin’s essays that, in private conversation with his doctoral student, Herbert Morris, he “express[ed] considerable anxiety about the implications of [Dworkin’s] views for the arguments” he had been articulating in a series of lectures which would eventually become *The Concept of Law* (1961).¹ Indeed, Hart was so impressed by Dworkin’s scripts that he kept them in his possession and, decades later, presented them to Dworkin at a dinner held at Brasenose College.² When Hart decided to take early retirement from his chair at Oxford in 1968 he recalled the young American who had made such a mark on him and advocated for Dworkin’s candidacy, writing in his diary that Dworkin might produce

¹Nicola Lacey, *A Life of H. L. A. Hart: The Nightmare and the Noble Dream* (Oxford, 2006), 186. For an account of these lectures and their development into *The Concept of Law* see *ibid.*, 166–8, 222–9. The first edition of *The Concept of Law* (there have been two further editions since, issued in 1994 and 2012) was published as H. L. A. Hart, *The Concept of Law* (Oxford, 1961).

²A.W. Brian Simpson, *Reflections on The Concept of Law* (Oxford, 2011), 2 n. 3; Lacey, *A Life of H. L. A. Hart*, 186.

the “*Philosophical Investigations* to my *Tractatus*.”³ After a meeting with Hart in New York, Dworkin was offered the chair, which he took up in 1969.⁴

Two years prior to taking up the chair, Dworkin had published his famous article “The Model of Rules,” setting out the theory of legal principles which is now widely regarded as central to his early legal thought.⁵ In this essay, Dworkin contended that Hart’s conception of a legal system in *The Concept of Law* was one of a system of “rules” which are “applicable in an all-or-nothing fashion.”⁶ Dworkin claimed that judges, in practice, do not solely rely on the legal rules found in statutes and determined by judicial precedents, but also draw upon broader moral “principles,” especially in hard cases “when no ... established rule can be found” which straightforwardly dictates the judicial decision.⁷ The “fierce debate” sparked by Dworkin’s early critiques would later come to be depicted as part of a broader “Hart–Dworkin debate,” which has “dominated” anglophone legal philosophy for “more than forty years.”⁸ Indeed, an “industry of jurisprudential commentary” came to be devoted to debating the implications of Dworkin’s early theory of principles for legal positivism, as embodied in a schism—which became an important source of self-identification and orientation for many in the discipline of legal philosophy—between self-proclaimed

³Lacey, *A Life of H. L. A. Hart*, 289–93. After graduating from Oxford in 1955, Dworkin spent two years at Harvard Law School, followed by a year clerking for Judge Learned Hand and four years working as a corporate lawyer at Sullivan and Cromwell. He then attained an appointment as a professor at Yale Law School which he held from 1962 to 1969.

⁴*Ibid.*, 291–2.

⁵Ronald Dworkin, “The Model of Rules,” *University of Chicago Law Review* 35/1 (1967), 14–46. On Dworkin’s conception of principles, as explicated in his early legal thought, see Gerald Postema, *Legal Philosophy in the Twentieth Century: The Common Law World* (New York, 2011), 404–15; Neil Duxbury, *Patterns of American Jurisprudence* (Oxford, 1995), 294–7; Dennis Patterson, “Dworkin’s Critique of Hart’s Positivism,” in Torben Spaak and Patricia Mindus, eds., *The Cambridge Companion to Legal Positivism* (Cambridge, 2021), 675–94, at 677–82.

⁶Dworkin, “The Model of Rules,” 25. Whether this constitutes a fair depiction of Hart’s work has been strongly contested by later commentators. See especially Brian Leiter, “Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence,” *American Journal of Jurisprudence* 48/1 (2003), 17–52, at 20–23.

⁷Dworkin, “The Model of Rules,” 45. He also proposed that judges, in practice, draw on “policies” in hard cases, which entails adjudicating such as to best promote some societal goal that does not explicitly depend on some “dimension of morality.” See *ibid.*, 23.

⁸On the “fierce debate” that Dworkin’s essay generated amongst Hart’s defenders and detractors see Nicos Stavropoulos, “The Debate That Never Was,” *Harvard Law Review* 130/8 (2017), 2082–95, esp. 2083–6. See also Postema, *Legal Philosophy in the Twentieth Century*, 407–11; Patterson, “Dworkin’s Critique of Hart’s Positivism,” 680–82; Frederick Schauer, “Law’s Boundaries,” *Harvard Law Review* 130/9 (2017), 2434–62, esp. 2454–6. On how the Hart–Dworkin debate has “dominated” anglophone legal theory “[f]or more than forty years” see Scott Herschovitz, “The End of Jurisprudence,” *Yale Law Journal* 124/4 (2015), 1160–1205, at 1162. It should be noted that, although the so-called Hart–Dworkin debate has been widely influential amongst legal philosophers, for several decades it was largely figurative in the sense that Hart offered no sustained response to Dworkin’s critiques until the posthumous publication of his postscript to *The Concept of Law* in 1994. On this point see Stavropoulos, “The Debate That Never Was,” 2092. For Hart’s postscript see H. L. A. Hart, *The Concept of Law* (Oxford, 1994), 238–76. Dworkin’s arguments in “The Model of Rules” were further developed in a series of articles published throughout the 1970s, which were collected in his *Taking Rights Seriously* (1977). See Ronald Dworkin, “Social Rules and Legal Theory,” *Yale Law Journal* 81/5 (1972), 855–90; Dworkin, “Hard Cases,” *Harvard Law Review* 88/6 (1975), 1057–1109; Dworkin, *Taking Rights Seriously* (Cambridge, MA, 1977), 14–130.

“inclusive legal positivists” and “exclusive legal positivists.”⁹ Many inclusive legal positivists, such as, most influentially, Jules Coleman, contended that Hart’s “rule of recognition” (the master rule stipulating the validity of legal rules) could be broadened to encompass moral principles deployed in judicial practice.¹⁰ Most exclusive legal positivists, such as Joseph Raz, argued that Hart’s legal positivism allowed for the fact that judges sometimes use their “discretion” to draw on extralegal moral principles to resolve tricky cases.¹¹ The controversy over the implications of principles in Dworkin’s early work, and the connotations this bore for the role of moral norms in legal theory, thus played a significant role in setting “the terms of debate in analytic jurisprudence” for much of the rest of the twentieth century.¹² Indeed, given the continued prominence of his conception of principles within ongoing debates over “inclusive” and “exclusive” legal positivism, the controversy sparked by Dworkin’s early work continues to resonate amongst contemporary legal philosophers over half a century later.¹³

Commentators have often contended that the notion of principles which was central to Dworkin’s early legal thought was influenced by the “legal process school,” as brought to prominence by Albert Sacks and Henry Hart in the 1950s.¹⁴ Dworkin is thus often read as drawing on Sacks’s and Hart’s emphasis on explicating principles from legal practices and precedents.¹⁵ However, in the years preceding his appointment to the chair in jurisprudence, between the winter of 1965 and the summer of 1967, Dworkin was immersed in composing a previously unknown and unpublished book manuscript which reveals a very different set of origins to the methodological foundations of his legal thought and his conception of principles.¹⁶ In this manuscript,

⁹Schauer, “Law’s Boundaries,” 2454. For further discussion of the development of inclusive legal positivism and exclusive legal positivism see Wilfrid J. Waluchow, “The Origins of Inclusive Legal Positivism,” in Torben Spaak and Patricia Mindus, eds., *The Cambridge Companion to Legal Positivism* (Cambridge, 2021), 487–511; Postema, *Legal Philosophy in the Twentieth Century*, 461–7.

¹⁰Waluchow, “The Origins of Inclusive Legal Positivism,” 509–10; Jules Coleman, “Negative and Positive Positivism,” *Journal of Legal Studies* 11/1 (1982), 139–64; Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford, 2001).

¹¹Postema, *Legal Philosophy in the Twentieth Century*, 461–3; Joseph Raz, “Legal Principles and the Limits of Law,” *Yale Law Journal* 81/5 (1972), 823–54; Raz, “Legal Principles and the Limits of Law: Postscript,” in Marshall Cohen, ed., *Ronald Dworkin and Contemporary Jurisprudence* (London, 1984), 81–6.

¹²Dennis Patterson, “Fashionable Nonsense,” *Texas Law Review* 81/3 (2003), 841–94, at 867. As Coleman remarked at the turn of the twenty-first century, “it would be hard to find an essay that has been more influential in the development of contemporary jurisprudence” than “The Model of Rules.” See Jules Coleman, “Constraints on the Criteria of Legality,” *Legal Theory* 6/2 (2000), 171–83, at 172.

¹³Hershowitz, “The End of Jurisprudence”; Stavropoulos, “The Debate That Never Was,” 2084–6; Schauer, “Law’s Boundaries,” 2454–6.

¹⁴See, for example, Vincent A. Wellman, “Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks,” *Arizona Law Review* 29/3 (1987), 413–74, esp. 421–8; Stephen Feldman, *American Legal Thought from Premodernism to Postmodernism: An Intellectual Voyage* (Oxford, 2000), 128–9; Laura Kalman, *Yale Law School and the Sixties: Revolt and Reverberations* (Chapel Hill, 2006), 293–4; Duxbury, *Patterns of American Jurisprudence*, 294–7; Postema, *Legal Philosophy in the Twentieth Century*, 402.

¹⁵E.g. Wellman, “Dworkin and the Legal Process Tradition,” 421–8; Duxbury, *Patterns of American Jurisprudence*, 295–7.

¹⁶Ronald Dworkin, “Drafts and Outlines for Unidentified Book,” Folder 4, Box 58, c. late 1960s, Ronald Dworkin Papers (MS 2071), Yale University Library Manuscripts and Archives (henceforth Dworkin Papers). The earliest draft retained in the archives is of Chapter 4, in which Dworkin discusses (on page 6)

which has not yet been analyzed by commentators following the recent opening of the Dworkin archives, Dworkin devised a wide-ranging and thoroughgoing methodological framework which proffered an alternative vision of the possible ambitions and remits of legal theory.¹⁷

Over the course of 123 pages, Dworkin offered a detailed account of the methodological tenets which he perceived as central to his legal philosophy, and the relevance these might have to judicial practice in the contemporary United States. He paid little heed to the approach suggested by the legal process school. Instead, Dworkin emphasized the utility of ordinary language analysis for elucidating legal principles. Contrary to claims that Dworkin was “not, as Hart was, influenced by the predominantly fifties school of linguistic philosophy,” his immersion in ordinary language philosophy at Oxford profoundly shaped his first sustained attempt to work out the methodological foundations of his legal thought in his unpublished book manuscript.¹⁸ Amidst heated debates over the relationship between moral principles and the law in the wake of protests over the draft for the Vietnam War, Dworkin developed a modified version of ordinary language analysis which could, he claimed, accommodate a more critical stance towards “conventional morality.” These methodological premises emphasized ordinary linguistic usage, rather than legal practices and precedents, as the key to explicating principles.

It was only following extensive conversations with one of the “resident [legal] process theorists” at Yale, Harry H. Wellington, that Dworkin became discontented with the arguments in his manuscript and decided to strike out in a different direction.¹⁹ His revised attempt to work out how to elucidate legal principles, which would become “The Model of Rules,” bears the imprint of the legal process school.²⁰ Dworkin, as we shall see, abandoned his earlier attempt to

the work of “Mishkin in [t]he recent H.L.R.” Paul Mishkin published his foreword to the seventy-ninth issue of the *Harvard Law Review* in November 1965. See Paul J. Mishkin, “The Supreme Court, 1964 Term,” *Harvard Law Review* 79/1 (1965), 56–211. Dworkin’s final attempts at revising the manuscript occurred shortly after the end of July 1967, in which he noted (on page 77 of a draft of Chapter 6) that homosexuality was “until very recently” illegal in Britain, which was not the case until the passage of the Sexual Offences Act on 27 July 1967.

¹⁷The Dworkin archives were fully processed by November 2021. My thanks to Eric Sonnenberg for providing this information.

¹⁸Stephen Guest, *Ronald Dworkin* (Stanford, 2012), 15.

¹⁹Dworkin would later recollect that he had “talked a great deal about legal theory” with Wellington, and that he could “well have imbibed some of the legal process” scholars’ methodological insights from him. See Ronald Dworkin, “Letter to Neil Duxbury, 12 June 1992,” quoted in Duxbury, *Patterns of American Jurisprudence*, 296 n. 628. Wellington’s relationship with, and influence upon, Dworkin is explicated at greater length in section V of this article. On Wellington as one of Yale’s “resident [legal] process theorists” in the 1960s see Kalman, *Yale Law School and the Sixties*, 44.

²⁰For commentaries which note the influence of the legal process school on “The Model of Rules” see Wellman, “Dworkin and the Legal Process Tradition: The Legacy of Hart and Sacks,” 421–8; William N. Eskridge Jr and Philip P. Frickey, “An Historical and Critical Introduction to *The Legal Process*,” in Henry M. Hart and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, ed. William N. Eskridge Jr and Philip P. Frickey (Westbury, NY, 1994), cxvii n. 297; Anthony Sebok, “A Road Not Taken: Harry Wellington, Legal Process and Adjudication,” *New York Law School Law Review* 45/1–2 (2001–2), 207–24, at 209–10.

work out a wide-ranging methodological framework premised on ordinary language analysis in his unpublished book manuscript and came to engage with the insights regarding principles popularized by Sacks and Hart in their *The Legal Process*.²¹ He returned to his unpublished book manuscript one final time in the summer of 1967 but appears—hardly surprisingly—to have realized its incompatibility with “The Model of Rules” and decided to leave it unpublished. This article offers the first account of Dworkin’s early experimentation with ordinary language philosophy in his unpublished manuscript, and its place in the development of the theory of principles for which he later became famous amidst his disputes with Hart.

The article proceeds by reconstructing, in the first section, the intellectual terrain Dworkin encountered at Oxford and examining how he navigated it, before turning, in the second section, to the methodological premises he developed in his manuscript and how he modified these in light of contemporary debates in the United States. The third and fourth sections appraise the various ways in which Dworkin thought these premises could be useful in adjudication, and how they might be of assistance in addressing controversial legal issues, such as the right to privacy, in the American legal system. The article concludes, in the fifth and final section, by tracing how Dworkin revised his conception of principles once he came to be influenced by the legal process school, and reflects on what Dworkin’s transition away from ordinary language philosophy might tell us about the origins of the “Hart–Dworkin debate,” around which much of the Anglo-American legal philosophy curriculum continues to be “organized.”²²

I

Dworkin’s immersion in the methods and premises of ordinary language philosophy, as a means by which to elucidate concepts in legal theory, began at Oxford in the mid-1950s. He arrived at Magdalen College in the autumn of 1953 to study for the BA in jurisprudence. Oxford was then home to the “new and distinctive philosophical movement” now referred to as “ordinary language philosophy,”²³ and, in 1951, Tony Honoré and Tony Woozley had begun a “law and philosophy” seminar.²⁴ Dworkin studied under the supervision of Rupert Cross, a fellow in law at Magdalen. Although Cross’s publications centered on criminal law, specifically the English law of evidence,²⁵ he was very much involved in the burgeoning

²¹Hart and Sacks, *The Legal Process*. Facsimiles of *The Legal Process* were widely circulated in the American legal academy from the late 1950s onwards; the text was, however, only formally published in 1994. On the reception and influence of this work see William N. Eskridge and Philip P. Frickey, “The Making of the Legal Process,” *Harvard Law Review* 107/8 (1994), 2031–55, at 2045–55.

²²Leiter, “Beyond the Hart/Dworkin Debate,” 17.

²³Lynd Ferguson, “Oxford and the ‘Epidemic’ of Ordinary Language Philosophy,” *The Monist* 84/3 (2001), 325–45, at 325. For a recent account of the development of ordinary language philosophy at Oxford see Nikhil Krishnan, *A Terribly Serious Adventure: Philosophy at Oxford, 1900–1960* (London, 2023).

²⁴The reading list for this seminar is available at www.law.ox.ac.uk/research-and-subject-groups/jurisprudence-oxford/some-history (accessed 11 March 2024).

²⁵H. L. A. Hart, “Arthur Rupert Neale Cross, 1912–1980,” *Proceedings of the British Academy* 70 (1984), 405–37, at 409–11.

“law and philosophy” movement at Oxford and in 1955 he co-taught a seminar with Hart on Law and Social Justice in the Judicial Process.²⁶ By far the most significant events within this context, however, were the lectures Hart began giving annually in 1952—the year in which he was elected to the chair in jurisprudence—entitled “Definitions of Law and Related Concepts.”²⁷ It was Dworkin’s engagement with the topics of these lectures that would prove crucial to his future intellectual development.

The strongest evidence for this engagement is Dworkin’s 1955 undergraduate examination script, which made such an impression on Hart.²⁸ As one might expect in an undergraduate exam, Dworkin’s papers reflect obvious engagement with the methodological commitments espoused in Hart’s lectures. The second essay in Dworkin’s script addressed the question of whether ownership can be said to be an exclusive right, in answer to which Dworkin first considered John Salmond’s famous contention that “all ownership is ownership of a right.”²⁹ He contended that Salmond’s claim is “misleading” if one analyses “legal linguistic usage,” as such usage shows that the “question does A own X is not ... simply equivalent to ‘has or has not A a (particular) right in regard to X.’” This was, for Dworkin, “a fact of legal linguistic usage, and so the analysis of ‘ownership’ must take note of the fact.” Whether or not Dworkin’s argument *contra* Salmond is convincing, what is noteworthy here is Dworkin’s emphasis on linguistic usage as ordinarily practiced in legal contexts. In a subsequent essay in answer to a question on possession, Dworkin made explicit his understanding of Hart’s methodological emphases. He described the “approach recommended by Hart,” which was to “distinguish out different senses of possession as they are used in answering different sorts of legal questions, rather than attempting a generic definition.”³⁰ The emphasis is again on understanding how legal concepts are used “ordinarily” to comprehend and explicate them, rather than attempting to deduce an “essential” definition. Dworkin’s engagement with the themes of Hart’s lectures, and the methodological premises offered therewithin, thus played a key role in the script which so impressed Hart himself.

In the published form his lectures eventually took, as *The Concept of Law*, Hart explicitly characterized his methodology as a “descriptive” theory of jurisprudence. In the preface, he described his project as “descriptive sociology,” positing that “[m]any important distinctions ... between types of social situation or relationships may best be brought to light by an examination of the standard uses of the relevant expressions and of the way in which these depend on a social context.”³¹ On this account, legal concepts could be analyzed by asking how these terms are ordinarily deployed in a variety of different social contexts and settings. As Nicola Lacey notes, Hart was a regular attendee at J. L. Austin’s famous “Saturday morning meeting[s]” at Magdalen College from 1947 onwards, the crucible in which much of the so-called “ordinary language philosophy,”

²⁶Lacey, *A Life of H. L. A. Hart*, 168.

²⁷These lectures would eventually become *The Concept of Law*. See *ibid.*, 166–8, 222–4.

²⁸Due to Hart’s preservation of Dworkin’s undergraduate papers they still survive in the Dworkin archive at Yale. The contents of these papers have not previously been analysed by commentators. See Ronald Dworkin, “Oxford University Jurisprudence Exams,” Folder 1, Box 52, Dworkin Papers.

²⁹*Ibid.* As the pages are not numbered in the original, I have not imposed any numbering here.

³⁰*Ibid.*

³¹Hart, *The Concept of Law*, vii.

or “linguistic philosophy,” at Oxford was forged.³² Although Hart only wrote up his lectures into *The Concept of Law* in the summer of 1960, his commitment to ordinary language analysis was developed during the 1950s heyday of ordinary language philosophy at Oxford.³³

How Dworkin understood the methodological emphases of the Hartian milieu at Oxford is further clarified by his notes for lectures he gave at Yale in 1963–4 on Hart’s approach to defining the concept of law. As Dworkin put it, “the problem” for Hart is that “people search for the essence and come up with nonsense.”³⁴ On Dworkin’s understanding of Hart, “the proper way” to go about defining legal concepts is to “[r]ealize we are characterizing family resemblances—[which one can] learn from Witt[genstein].”³⁵ Indeed, Hart named Wittgenstein as the second-greatest influence, behind Austin, on his intellectual development,³⁶ and in the footnotes to *The Concept of Law* he argued that “Wittgenstein’s advice,” in the *Philosophical Investigations* (1953), “is peculiarly relevant to the analysis of legal and political terms”³⁷—specifically, Wittgenstein’s analogy that if one wants to define a term, such as “game,” one should not assume “there *must* be something common or they would not be called ‘games,’ but *look* and *see* whether there is anything common to all.”³⁸ Thus, as Dworkin outlined in his notes, Hart argued that in order to analyze legal concepts “you examine usages of words” and how they are applied in various social contexts.³⁹ Scholars should thus properly “pay attention to the function of legal language.” For Hart, as Dworkin put it, “Law is a matter of lang[uage],” and “if [we] want to characterize it—look, don’t assume.”⁴⁰ In his 1963–4 notes, Dworkin thus continued to ruminate on the methodological commitments espoused by Hart and the ordinary language philosophers he had first encountered at Oxford, and the approach to legal philosophy such commitments might be taken to convey.

Those scholars, such as William Eskridge and Gary Peller, who emphasize the importance of the legal process school in the formulation of Dworkin’s notion of principles tend to point to his time at Harvard Law School, where Dworkin completed a JD between 1955 and 1957, as a key influence on his intellectual development.⁴¹ By the mid-1950s, Albert Sacks and Henry Hart were both members of the Harvard

³²Lacey, *A Life of H. L. A. Hart*, 133–5.

³³*Ibid.*, 222.

³⁴Ronald Dworkin, “Yale Law School Jurisprudence Course Lecture Notes, Student Lists, and Syllabus, circa 1963–circa 1964,” Folder 1, Box 43, Dworkin Papers. As Dworkin did not paginate his notes, I have not imposed any numbering here.

³⁵*Ibid.*

³⁶See the 1988 interview with Hart published posthumously as H. L. A. Hart, “Hart Interviewed: H. L. A. Hart in Conversation with David Sugarman,” *Journal of Law and Society* 32/2 (2005), 267–93, at 275.

³⁷Hart, *The Concept of Law*, 234 n. 15.

³⁸Quoted in *ibid.*, Wittgenstein’s emphasis. Hart was quoting Ludwig Wittgenstein, *Philosophical Investigations*, trans. G. E. M. Anscombe (Oxford, 1953), 31.

³⁹Dworkin, “Yale Law School Jurisprudence Course Lecture Notes.”

⁴⁰*Ibid.*

⁴¹William N. Eskridge Jr and Gary Peller, “The New Public Law Movement: Moderation as a Postmodern Cultural Form,” *Michigan Law Review* 89/4 (1991), 707–91, esp. 731. See also Schauer, “Law’s Boundaries,” 2452–3.

Law School faculty and were teaching their famous course on *The Legal Process*; the manuscript on which the course was based, also entitled *The Legal Process*, was widely circulated, although not formally published until 1994.⁴² As Eskridge and Peller put it, “Dworkin graduated from the Harvard Law School in 1957, at the apogee of [the] legal process [school].”⁴³ Thus, Sacks’s and Hart’s emphasis on identifying principles by analyzing how they “underlie” legal practices and precedents supposedly influenced Dworkin during this period.⁴⁴ However, by his own admission, Dworkin did not attend the legal process course whilst at Harvard Law School and had no firsthand experience of Sacks’s and Hart’s teaching on the legal process.⁴⁵ In the introductory course to jurisprudence which he taught in his first year at Yale, Dworkin also did not see fit to include any space for the legal process school, nor for Sacks and Hart, unlike *The Concept of Law*, which was assigned reading.⁴⁶ The ordinary linguistic analysis which Dworkin had been taught at Oxford continued to take center stage—as it would in his unpublished book manuscript.

II

In 1965, Dworkin published an article responding to Harvard law professor Lon Fuller’s *The Morality of Law*, which had been published the previous year to a contentious reception.⁴⁷ Fuller had disputed Hart’s key claim, in *The Concept of Law*, that there need be no connection between legal and moral standards; for Fuller, “principles of legality”—a set of moral standards—are inextricably intertwined with how the concept of law is employed, such that legal rules which fail to meet these standards cannot meaningfully be described as constituting “law” in the ordinary sense of the word.⁴⁸ Although Dworkin disagreed with Fuller’s claim that any meaningful conception of law

⁴²Hart and Sacks, *The Legal Process*. On the reception of this work from the mid-1950s onwards see Eskridge and Frickey, “The Making of the Legal Process.”

⁴³Eskridge and Peller, “The New Public Law Movement,” 731 n. 72.

⁴⁴Wellman, “Dworkin and the Legal Process Tradition,” 423; Schauer, “Law’s Boundaries,” 2452–3; Eskridge and Peller, “The New Public Law Movement,” 731 n. 72.

⁴⁵Ronald Dworkin, “Letter to Neil Duxbury, 12 June 1992,” cited in Duxbury, *Patterns of American Jurisprudence*, 295.

⁴⁶Ronald Dworkin, “Law, Science and Policy,” 7 March 1963, in Ronald Dworkin, “Yale Law School Jurisprudence Course Lecture Notes.” Six different “Schools of Jurisprudence,” as Dworkin put it, were surveyed in this course: analytical, natural law, historical, sociological, realist, and Scandinavian realist. *The Concept of Law* was assigned, along with John Austin’s *The Province of Jurisprudence Determined* and Hans Kelsen’s *General Theory of Law and the State* (the 1945 translated edition), as the reading for the “analytical” school.

⁴⁷This work was Fuller’s final intervention in the so-called “Hart–Fuller” debate, which had been ongoing since 1958 and centrally concerned the connection, if any, between law and morality. For an account of this controversy see Nicola Lacey, “Out of the ‘Witches’ Cauldron? Reinterpreting the Context and Reassessing the Significance of the Hart–Fuller Debate,” in Peter Cane, ed., *The Hart–Fuller Debate in the Twenty-First Century* (Oxford, 2010), 1–42. This debate emerged out of a year Hart spent at Harvard as a visiting professor in 1956–7, where he engaged with leading members of the legal process school. For details see Geoffrey C. Shaw, “The Rise and Fall of Liberal Legal Positivism: Legal Positivism, Legal Process, and H. L. A. Hart’s America 1945–1960” (unpublished Ph.D. thesis, Oxford, 2013), 83–222; Shaw, “H. L. A. Hart’s Lost Essay: Discretion and the Legal Process School,” *Harvard Law Review* 127/2 (2013), 666–728.

⁴⁸Lon L. Fuller, *The Morality of Law* (New Haven, 1964), esp. 33–94.

would necessarily have to meet some set of moral standards, he did think that Fuller had been right to engage in scholarship which examined the intersection between law and the moral conventions of the community within which it operates.⁴⁹ In his article, Dworkin thus proceeded to issue his own call to arms for the combined study of legal and moral practices. Specifically, he thought that there was an “area of legal concern which would benefit ... from the joint study of features common to law and morality: this is the phenomenon called ‘conventional morality.’”⁵⁰ For Dworkin, a “competent analysis” of this phenomenon could be achieved “only by pooling the moral philosopher’s sensitivity to normative language and argument and the legal philosopher’s concern with the way in which community standards are generated and introduced into the legal process.”⁵¹ It was this study of the intersections of legal and moral conventions, and especially how the latter are entangled with the former, which Dworkin took up in his unpublished manuscript.

The most straightforward route into the methodological premises Dworkin sought to develop in his manuscript is his sustained investigation of the concepts of negligence and involuntary conduct (which comprises over fifty pages of the manuscript). His analysis of these concepts arose from what was, for Dworkin, a conundrum in the American legal system: “Many of the criminal codes of our states provide, as a general, overriding principle, that a man shall not be criminally liable for an involuntary act,” to the extent that “[s]ome lawyers, including some judges, take this to be a constitutional one”; however, “all of our criminal codes contain laws making it criminal to drive with gross negligence and providing fines and jail sentences for those who do.”⁵² The problem thus arises whether such “crimes of negligence [are] inconsistent about the general ... principle about involuntary acts.” American lawyers are faced with the problem of determining whether such negligent acts constitute “involuntary act[s] within the meaning of that principle.”⁵³

Such an investigation, Dworkin contended, required analyzing the ordinary usage of these terms within various linguistic contexts. By the time he came to compose his manuscript in the late 1960s, Dworkin had over a decade of familiarity with the ways in which ordinary linguistic usages could be conceived as a clarifying heuristic to the legal theorist. Regarding his investigation of the problem of involuntary conduct, he proposed that the legal philosopher could begin by asking “how the terms ‘involuntary acts’ and ‘involuntarily’ ... are used in ‘ordinary language.’”⁵⁴ For him, this was a “helpful way of framing his question” because these are “everyday terms used by ordinary men in criticizing one another[s] conduct.” Hence, on Dworkin’s account, when “we encounter a conceptual difficulty in dealing with this sort of legal concept ... we

⁴⁹Ronald Dworkin, “Philosophy, Morality, and Law: Observations Prompted by Professor Fuller’s Novel Claim,” *University of Pennsylvania Law Review* 113/5 (1965), 668–90.

⁵⁰*Ibid.*, 688.

⁵¹*Ibid.*, 690.

⁵²Ronald Dworkin, “Chapter VI,” 13, in Ronald Dworkin, “Drafts and Outlines for Unidentified Book,” Folder 4, Box 58, Dworkin Papers. Dworkin used Roman numerals for all of his chapter titles, apart from Chapter 6; I have imposed Roman numerals here for the sake of consistency with his other chapter titles.

⁵³*Ibid.*

⁵⁴*Ibid.*, 75.

find immediately available an experience of using these same terms in the everyday world which we all share, and which we can thus draw upon to clarify the social practices which define the principles we use these terms to express.”⁵⁵ The ordinary use(s) of these concepts in social practices within a certain community could thus illuminate the standards encoded within that community’s moral universe.

In a detailed outline for a different chapter, Dworkin attempted a systematic summary of his methodological premises and how they could illuminate the principles of a particular community.⁵⁶ He began with a “[c]larification of what we are trying to discover,” which he formulated as “what principles does the ordinary man follow (though he may sometimes break them) in using ... [a] concept?”⁵⁷ For Dworkin, one should proceed in two parts. The first part entailed developing an account of the principle that one conceives of as at stake here, which includes several interrelated points. First, as a member of a community, it involves “[f]irst person speculation and discrimination” amongst different senses in which one’s community employs a term like “involuntary,” followed by “check[ing] to protect against [one’s] own idiosyncratic or special usage.”⁵⁸ Next, one should gather together the insights gleaned to “[f]it a theory—i.e. attempt to produce a principle”; one must “fit” together the different senses in which such ordinary judgments are employed into a coherent statement of the community’s principles and standards regarding this particular issue. The second part entails ensuring that one “[a]ccount[s] for the ‘mistakes’ one knows are made” in the employment of these principles in practice.⁵⁹ This primarily entails the point that the implications of social practices must be critically assessed to accentuate cases in which people have “failed to notice ... that principles they are committed to apply here also.”⁶⁰ As an example, Dworkin posits that if someone were to suggest that “sleepwalking is voluntary conduct,” then this should not be taken as implying that the community is not committed to the principle that “no one should be punished for what he couldn’t help doing.” Rather than dismissing the principle, “we should say that he has ... failed to notice something about the sleepwalking case [he] ought to have.”⁶¹ By analyzing the ordinary usage of particular concepts, one could, Dworkin contended, extricate the principles that undergird them. Uncovering the principles underlying the usage of legal concepts would, moreover, assist legal practitioners and judges by indicating which principles they could draw upon in hard cases.

It should be noted that Dworkin was keen to “stress [the] limitations” of his approach.⁶² He did not think that every specific element in a potential legal case

⁵⁵ Ibid.

⁵⁶ Ronald Dworkin, “Chapter III,” in Ronald Dworkin, “Drafts and Outlines for Unidentified Book.” Dworkin completed detailed drafts outlining the arguments, examples, and rejoinders, delineated in Chapters III to V (this comprises forty-one pages of the manuscript). The rest of the manuscript encompasses a draft of Chapter VI and some miscellaneous sections from Part II (Chapter IV onwards); Chapters I and II do not survive.

⁵⁷ Ibid., 2.

⁵⁸ Ibid., 3.

⁵⁹ Ibid.

⁶⁰ Ibid., 6.

⁶¹ Ibid.

⁶² Ibid., 8.

would be explicable via his methodologies. His methodology would not, for example, to be able to “tell you whether people think it is unfair to exclude warranties in a contract.” However, his methodology could be of use, he contended, in elucidating “the ground rules”—the “principles sufficiently important to be embedded in the language.”⁶³ Principles which were sufficiently important to be embedded in ordinary language could be explicated via the two-step process he had outlined, and thus provide a useful resource to legal practitioners. Dworkin proceeded to summarize why he attached such importance to “linguistic philosophy.” This phrase was often employed in the 1950s and 1960s to describe what has come to be known as ordinary language philosophy.⁶⁴ Dworkin claimed that

what is called “linguistic philosophy” has a special importance for legal theory because (a) law is to a large extent, and in different ways, a matter of applying the morality of the community to issues and decisions, and (b) the techniques of linguistic philosophy—if used with this in mind—are superb techniques for discovering and illuminating the morality of a community.⁶⁵

On Dworkin’s account, if one analyses how legal concepts are used in ordinary social practices, one can discover and elucidate the standards and principles that judges might appeal to in hard cases, when legal rules do not straightforwardly dictate the decision.

He also sought to emphasize that his focus on ordinary linguistic usage should not be conflated with resorting to opinion polls or questionnaires. He was careful to distinguish his inquiry from the notion that “the institutions [of] social obligation can be understood simply by reporting, on a statistical basis what people say ... in particular circumstances.”⁶⁶ Although “[w]e must take account of such behavior in reaching our conclusions,” we must also consider “more sophisticated” facets such as “the types of arguments people make ... and the play of the various critical concepts they use in criticizing and evaluating such arguments, excuses, reactions, etc.”⁶⁷ The problem is not “how many people would say what when”; rather it is “a problem about the *implications* of a social practice.”⁶⁸ For Dworkin, “the general practice[s] of obligation in this community” are “structured [so] that one could make particular claims of obligation not merely by citing an established practice which all would agree embraces his case, but by arguing from the point of the practice, or its weight, or the accommodations which it requires in other practices, and these ... [are] the ‘implications’ of the practice.”⁶⁹ Hence, if we follow Dworkin’s methodology, “what we would be looking for is not simply what people do, or say, but the *standards* that they follow in doing so.”⁷⁰ The point of his two-step methodological framework was to explicate the standards

⁶³Ibid.

⁶⁴Krishnan, *A Terribly Serious Adventure*, 291, 306.

⁶⁵Dworkin, “Chapter III,” 7.

⁶⁶Dworkin, “Chapter VI,” 5.

⁶⁷Ibid.

⁶⁸Ibid., 51, added emphasis.

⁶⁹Ibid.

⁷⁰Ibid., 5–6, added emphasis.

entangled in the ordinary usage of legal concepts, and to suggest that these standards could assist in resolving tricky matters of legal interpretation.

Dworkin was well aware that his approach entailed the possibility for immanent critiques of conventional social practices by highlighting inconsistencies with the principles extricated via his methodologies. Indeed, Dworkin contended that he had pressing reasons to modify the methodological premises he had first been taught in the 1950s to devise a methodology capable of such critiques. By the mid-1960s, the relationship between popular moral conventions and the law had become deeply controversial within the American legal academy. Amidst civil rights marches and then widespread civil disobedience in the face of the draft for the Vietnam War, many college and law school campuses had become sites for intense debates over the obligations of citizens to obey laws they thought immoral.⁷¹ In his manuscript, Dworkin noted that when “the President commits the nation to a foreign war,” as had occurred in Vietnam, the question of whether the president had “sufficient ground upon which to expend the lives and treasures of those who disagree” with the decision, would, of course, be open to disagreement.⁷² Dworkin hoped that his methodological framework could contribute to these debates by clarifying the relevant principles at stake in contentious legal cases, such as the trial of those who refused to comply with the draft. For Dworkin, there was an important “difference between calling the community to account on its own standards of criticism, and calling those standards to account on some other scale.”⁷³ His methodological approach, he argued, offered a way of explicating the principles to which the community was committed, and thus illuminating such contentious matters of social obligation. He did not think that this would be the last word in such debates; however, it was clear what his argument was, at least partly, intended to achieve: a methodological framework which would bring greater clarity to these contentious debates wracking the American academy in the 1960s.

Dworkin only mentioned the “legal process” scholarship of “Henry Hart and Al Sachs [*sic*]” once in his unpublished book manuscript and contended that their work “cannot replace” his methodological framework as it did not resolve “the conceptual difficulties we face.”⁷⁴ This is perhaps hardly surprising, given that the methodology

⁷¹Rhodri Jeffreys-Jones, *Peace Now! American Society and the Ending of the Vietnam War* (New Haven, 1999), esp. 42–92; Michael S. Foley, *Confronting the War Machine: Draft Resistance during the Vietnam War* (Chapel Hill, 2003), esp. 51–9. On student protests and draft resistance at Yale, where Dworkin was tenured, see Kalman, *Yale Law School and the Sixties*, esp. 98–139.

⁷²Ronald Dworkin, “‘Social Obligation,’ a Draft Chapter for an Unidentified Book,” Folder 18, Box 51, Dworkin Papers, 56–7. Dworkin would later publish an article on civil disobedience in the *New York Review of Books*, which centrally addressed the issue of draft resistance. See Ronald Dworkin, “On Not Prosecuting Civil Disobedience,” *New York Review of Books*, 6 June 1968, available at www.nybooks.com/articles/1968/06/06/on-not-prosecuting-civil-disobedience (accessed 22 Feb. 2024). Dworkin also grappled with civil disobedience in his 1970 essay “Taking Rights Seriously,” which was republished in his 1977 volume of the same name. My thanks to an anonymous reviewer for noting this. See Ronald Dworkin, “A Special Supplement: Taking Rights Seriously,” *New York Review of Books*, 17 Dec. 1970, available at www.nybooks.com/articles/1970/12/17/a-special-supplement-taking-rights-seriously (accessed 6 March 2024); Dworkin, *Taking Rights Seriously*, 184–205.

⁷³Dworkin, “Social Obligation,” 66–7.

⁷⁴Ronald Dworkin, “Chapter IV,” in Ronald Dworkin, “Drafts and Outlines for Unidentified Book,” 10–11.

developed in his manuscript for conceptualizing adjudication, particularly in hard cases, differed significantly from that delineated by Hart and Sacks in *The Legal Process*. For Hart and Sacks, legal systems not only comprise rules but also include principles which judges draw upon to “guide [their] judgment in resolving [legal] uncertainties.”⁷⁵ In deciding hard cases, judges draw on “more basic principles and policies of law”—they resort to identifying principles that underlie legal practices and precedents.⁷⁶ However, as we have seen, Dworkin’s elucidation of principles ultimately rested upon a critical investigation of ordinary linguistic usage. This suggests a very different approach to explicating principles—drawing upon the broader canvas of ordinary language—to that proposed by Hart and Sacks. Dworkin’s utilization of ordinary language premises enabled an alternative starting point for expounding legal principles.

Notably, and contrary to interpretations of Dworkin’s thought which stress that it “makes sense of the whole of his work” to depict him as averse to “descriptive” analyses of law, Dworkin also drew comparisons between his thought and legal sociology in his manuscript⁷⁷—specifically with a strand that originated in the *fin de siècle* Austro-Hungarian Empire and was influentially picked up and popularized by so-called “legal realists” within the American legal academy in the 1920s and 1930s.⁷⁸ Dworkin noted that “[s]ociological” approaches to law, especially in “comparison with Ehrlich,” were “not too far from my approach, though [the] methods claimed [are] different.”⁷⁹ Here he was referring to the Austro-Hungarian legal philosopher Eugen Ehrlich (1862–1922), who had argued, most prominently in his *Grundlegung der Soziologie des Rechts* (1913), for a conception of “living law”—that legal scholars should consider not only formal legal rules but also how local social norms functioned to mold the conceptual imaginaries of judges and jurists regarding how the law should be interpreted and implemented.⁸⁰ The sources which influenced judicial rulings, such as statutes and precedents, would inevitably be parsed through the lens of the norms imbibed within the social contexts in which judges must make their rulings. Ehrlich drew here upon his own experiences of having grown up in Czernowitz, the capital

⁷⁵Hart and Sacks, *The Legal Process*, 167.

⁷⁶*Ibid.*, 165.

⁷⁷Stephen Guest, “Demystifying Dworkin’s ‘One-Right-Answer’ Thesis,” *American Philosophical Association Newsletter* 15/1 (2015), 8–11, at 9. For an extended interpretation of Dworkin’s thought in this vein see Guest, *Ronald Dworkin, passim*. Although Guest’s claim does, of course, appear largely accurate for much of Dworkin’s later published works, see, for example, Dworkin, *Taking Rights Seriously*; Ronald Dworkin, *Law’s Empire* (Boston, 1986).

⁷⁸On Ehrlich’s reception amongst the “legal realists” see Brian Z. Tamanaha, “Legal Realism in Context,” in Elizabeth Mertz, Stewart Macaulay, and Thomas W. Mitchell, eds., *The New Legal Realism: Translating Law-and-Society for Today’s Legal Practice* (Cambridge, 2016), 147–68, esp. 151–3. On Ehrlich’s influence on one of the most famous “legal realists,” Karl Llewellyn, see William Twining, *Karl Llewellyn and the Realist Movement*, 2nd edn (Cambridge, 2012), 107–8.

⁷⁹Dworkin, “Chapter III,” 8.

⁸⁰Eugen Ehrlich, *Grundlegung der Soziologie des Rechts* (Leipzig, 1913). For a recent account of Ehrlich’s thought see Franz Leander Fillafer, “Imperial Diversity, Fractured Sovereignty, and Legal Universals: Hans Kelsen and Eugen Ehrlich in Their Habsburg Context,” *Modern Intellectual History* 19/2 (2022), 421–43. For a collection of essays on Ehrlich’s work and global reception, though without mention of Dworkin, see Marc Hertogh, ed., *Living Law: Reconsidering Eugen Ehrlich* (London, 2009).

of the Austro-Hungarian province of Bukovina and a “religious and linguistic patch-work” of different “Volksstämme” (ethnic groups), where he returned to teach law at Franz Joseph University in 1896.⁸¹ The disparities between the laws promulgated at the Habsburg court in Vienna and the implementation of these in Bukovina pointed to the significance of local moral communities in shaping the interpretation of legal norms.

Although Dworkin’s reading of Ehrlich in the 1960s has not previously been noted by commentators, the former shared common ground with the latter in stressing the importance of delimited moral communities in recasting the various imputations given to legal norms. The moral intuitions grounded within such communities inevitably shaped the jurist’s conduct when it came to deliberating the “implications” of concepts like the involuntary. Given the practical need to interpret such concepts in legal cases, recourse to the senses in which they were employed by the community governed by the relevant laws offered an avenue to better grasp the particularities of the moral intuitions and standards at stake. In parallel with his mobilization and modification of Hartian premises, Dworkin here further emphasized similarities between himself and another thinker who conceived his project in terms of descriptive legal sociology.⁸²

III

It was with this set of methodological premises and ambitions that Dworkin proceeded to offer an investigation into the meaning(s) of “voluntary” and “involuntary” in contemporary American social practices. For him, it was obvious that, within the moral community of late 1960s America, if one “punishes someone for an involuntary act, one is considered to have committed ... [an] injustice.”⁸³ But what precisely did this entail, and how did the problem of negligence relate to this? As noted above, the problem which Dworkin was taking up here, in order to illustrate his methodology, was the issue of whether an act of negligence, like careless driving, is an involuntary act, and thus whether punishing such acts is consistent with the legal principle that involuntary acts should not be punished. He proceeded to identify three different senses in which the terms “voluntary” and “involuntary” are employed in social practices, to enable him to restate this principle with greater precision. This, he contended, would allow him to elucidate “what standards do in fact regulate the blame and punishment of human acts which can be summed up by this principle.”⁸⁴

The first of these senses was that in which “harm or injury results from involuntary conduct (an act that was not within the control of the actor)” and thus “blame and punishment are foreclosed.”⁸⁵ Acts judged to fall beyond the sway of the agent could not be incorporated within the structure of moral norms regarding blame and punishment. The second is that in which “harm or injury is done by someone involuntarily” whilst subject to “some coercion or pressure ... [and] then this generally means that it is

⁸¹ Fillafer, “Imperial Diversity,” 425–8.

⁸² As noted above, in the preface to *The Concept of Law* Hart described his project as “descriptive sociology.” See Hart, *The Concept of Law*, vii.

⁸³ Dworkin, “Chapter VI,” 48.

⁸⁴ *Ibid.*, 61.

⁸⁵ *Ibid.*, 62.

unfair to blame or punish the actor.” And third, the sense in which “an act has a harmful consequence which is unintentional or inadvertent ... this generally means that the actor deserves less blame or punishment than if the harmful result were deliberate, but it does not in itself mean that it is unfair to blame him for that consequence, or to punish him for it.”⁸⁶ Dworkin’s engagement with the problem of involuntary conduct was specifically framed here against the arguments of the famous mid-century American scholar of criminal law Jerome Hall.⁸⁷ On Dworkin’s account, Hall contended that there was an “enduring agreement” that “voluntary harm-doing is the essence of fault.”⁸⁸ By pulling apart the different senses in which “involuntary” is ascribed to conduct, he aimed to show that Hall’s notion of “enduring agreement” around this issue was far too simplistic. As he put it, these three “brief distinctions” represented “a much more satisfactory statement of the principles of justice our community applies,” than the “ambiguous” statement that “it is wrong to punish involuntary acts.”⁸⁹

According to Dworkin, “it is plain” that a negligent act cannot be an involuntary act in the first of the senses elucidated here.⁹⁰ “[N]egligence implies fault” in how it is employed in ordinary language,⁹¹ and “an actor who has no control over what he is doing cannot be at fault in doing it.”⁹² A negligent act also cannot be an involuntary act in the second sense, as if “we attribute the doing of a particular act to the pressure placed upon the actor, then we cannot at the same time say that the actor was unaware of what he was doing.”⁹³ According to Dworkin, negligent acts are encompassed within the third of the senses described above, because if “the harmful result were voluntary as opposed to involuntary in ... [this] sense, that would mean that the actor intended or expected, or hoped for that consequence, and in that case his wrongful act would be an ‘intentional’ wrong rather than a case of negligence.”⁹⁴ It was this third sense of involuntary which could accommodate conceptions of negligence for Dworkin, as it was only this sense which could combine acts that an agent has committed of their own volition and the inadvertent harms that resulted in cases of negligence.

Having examined these different ways in which moral norms regarding involuntary conduct and negligence can be brought together, Dworkin concluded that punishing negligent acts “does not run counter to the first practice or the second, because an act of negligence cannot be the sort of acts these practices involve.”⁹⁵ Nor does it violate the third practice, as that practice does not “foreclose or condemn punishing the acts it

⁸⁶Ibid.

⁸⁷On Hall’s life and (voluminous) works see Dorothy MacKay-Collins, “A Conversation with Jerome Hall,” *Hastings Community*, Spring 1988, 6–7, available at http://repository.uchastings.edu/alumni_mag/73 (accessed 24 Oct. 2022).

⁸⁸Dworkin, “Chapter VI,” 70.

⁸⁹Ibid., 62.

⁹⁰Ibid., 64.

⁹¹Ibid.

⁹²Ibid., 67.

⁹³Ibid., 65.

⁹⁴Ibid.

⁹⁵Ibid., 66.

speaks about, but at most speaks about the degree of punishment they deserve.”⁹⁶ Thus the “punishment of a negligent act does not violate any established principles of justice in our community.”⁹⁷ According to Dworkin, elucidating the principles underlying these various social practices, via his ordinary language premises, could assist the legal practitioner in resolving this tricky case.

The next example which Dworkin analyzed in order to illuminate his methodology concerned how one might proceed in “constructing some positive principle governing the connection between popular moral attitudes and the justification for making a law criminal.”⁹⁸ This example was very topical among legal philosophers given a highly publicized controversy between H. L. A. Hart and Lord Patrick Devlin, a British High Court judge, over the course of the previous decade.⁹⁹ The controversy was sparked by the 1959 Maccabaeian Lecture delivered by Devlin, in which he contended that the 1957 Wolfenden report (which had recommended the decriminalization of homosexuality in Britain, as occurred ten years later) had been mistaken to suppose that a society which did not enforce popular moral views through its criminal laws would remain stable and cohesive.¹⁰⁰ Hart responded, first in an essay published in *The Listener* in 1959 and then in his *Law, Liberty and Morality* in 1963, advocating in the latter for a “harm-based” approach to criminal laws, as Nicola Lacey puts it, which drew on J. S. Mill to argue that the state should accord the greatest possible sphere for individual liberty when this did not entail harming other citizens.¹⁰¹ Devlin’s final contributions to the exchange were a revised edition of his Maccabaeian Lecture, as well as several other lectures on related topics, which were collectively published as *The Enforcement of Morals* in 1965, shortly prior to the composition of Dworkin’s manuscript.¹⁰²

Dworkin took up the issue of the connection between law and popular morality with the aim of refuting Devlin’s position. To do so would require both building upon and nuancing the methodological premises developed to tackle the problem of punishing involuntary acts. The important point, for Dworkin, was that “[w]e found, when we untangled the different sense[s] of ... ‘involuntary,’ a series of principles relating conduct to fault and blame which are incontestably principles of social obligation in our community”; “We discovered, in other words, accepted principles ... about social obligation.”¹⁰³ As we have seen, Dworkin contended that his methodological premises illuminated the principles undergirding particular social and moral practices. His second example would also involve an investigation of social practices within a particular moral community (again,

⁹⁶Ibid.

⁹⁷Ibid., 70.

⁹⁸Ibid., 81.

⁹⁹For a recent account of the controversy see James Allan, “Revisiting the Hart–Devlin Debate: At the Periphery and by the Numbers,” *San Diego Law Review* 54/2 (2017), 423–40. On the influence of Hart’s spars with Devlin on the former’s intellectual development see Lacey, *A Life of H. L. A. Hart*, 256–61.

¹⁰⁰Lord Patrick Devlin, *The Enforcement of Morals* (Oxford, 1959).

¹⁰¹Lacey, *A Life of H. L. A. Hart*, 258. For Hart’s contributions see H. L. A. Hart, “Immorality and Treason,” *The Listener* 62 (30 July 1959), 162; H. L. A. Hart, *Law, Liberty and Morality* (Stanford, 1963).

¹⁰²Lord Patrick Devlin, *The Enforcement of Morals*, expanded edn (Oxford, 1965).

¹⁰³Dworkin, “Chapter VI,” 74.

that of the late 1960s United States). This example was, however, “much more complex.”¹⁰⁴ For the investigation of involuntary conduct, “we were able to concentrate upon a few highly specific sorts of situations”; indeed, “we were able to concentrate on those situations in which ... ‘voluntary’ [and] ‘involuntary’ in their various grammatical forms are used.”¹⁰⁵ This example was more complex in that “we can pick no one, or no very small group” of phrases whose “usage marks out the boundary of our problem.”¹⁰⁶ The implications of a broader range of social practices concerning obligations within this community, and how these might be taken to suggest various moral standards and intuitions, would thus form the basis for his investigation.

Dworkin took up this investigation in Chapter VI, noting that within the conventional social practices of late 1960s America there was a “crucial distinction” between “judgments of obligation” and “other sorts of moral judgments.”¹⁰⁷ He contended that it should be “noticed that although it may be appropriate to disapprove of someone who does not live up to moral ideals, or who suffers from defects of character ... it is not appropriate to punish him unless he has failed to meet some obligation or to perform some duty.” Moreover, it should also be noticed that although obligations are “creatures of society, in the sense that they depend ultimately upon some social practice or institution, it does not follow from this that whenever popular opinion considers that a man has an obligation, he does.”¹⁰⁸ Rather, Dworkin proposed a more complex sense in which the community’s social practices might be analyzed, and moral standards thus illuminated. He posited that if “we consider the practices of reasoning and arguing about controversial cases as part of the community’s moral practices ... we see that the community’s [*sic*] practices allow for challenges to popular positions about obligation, on the ground that these challenges may be right and the popular position wrong.”¹⁰⁹ There are various grounds on which a popular position might conventionally be challenged; “these include an attempt upon the popular supports of a judgment of obligation as being a prejudice, a superstition, or being some other way illegitimate, or an argument about the consistency of the claim of obligation, or about the extent or weight of some practice, or about the point of that practice.”¹¹⁰ Practices which are in tension with the prevailing moral sentiments of mid-twentieth-century Americans are also permitted by the moral practices within which those sentiments operate—challenges to conventional morality are to be heard, not suppressed.

Dworkin proceeded to apply this more complicated notion of the implications of social practices to Devlin’s argument. Devlin, on Dworkin’s account, “argues that if the vast bulk of the population strongly enough disapproves of some course of conduct ... [this] disapproval represents the moral position of the community” and thus must be enforced by the legislature if the state is to be democratic.¹¹¹ However, for

¹⁰⁴Ibid., 76.

¹⁰⁵Ibid., 81.

¹⁰⁶Ibid., 82.

¹⁰⁷Ibid.

¹⁰⁸Ibid.

¹⁰⁹Ibid., 83.

¹¹⁰Ibid.

¹¹¹Ibid., 83–4.

Dworkin, as we have seen, “enforcing the community’s moral practices” ought to entail and include the “critical and regulatory practices” which are a part of the community’s moral conventions.¹¹² This is what it means to enforce the “community’s morality in all its complexity.” The implications of the relevant social practices entail allowing expressions of conduct which are inconsistent with popular moral prejudices. The critical practices used to dispute controversial cases implicate the moral acceptance of a space within which such expressions can be made. By drawing out the imputations of the relevant social practices this is brought to the fore. For Dworkin, it is the “critical and regulatory portion of the community morality that carries ... [its] settled practices and ultimately its justification for the institution of punishment.”¹¹³ By further developing his methodology to consider how moral intuitions and standards are implicated by social practices concerning obligations, Dworkin aimed to show that Devlin had, contrary to his claims, misunderstood the moral practices at stake. Recourse to the ordinary usages within which these standards and principles were enmeshed could proffer a window into these practices and a set of intellectual resources for legal practitioners to draw upon in complex moments of adjudication.

IV

Dworkin contrasted his methodological framework with three other approaches which, he claimed, were often employed by American lawyers in explicating legal principles. He labeled these the “techniques” of intention, analogy, and policy.¹¹⁴ The “technique of intention” emphasized the investigation and uncovering of the intentions of institutional officials, such as legislators or judges.¹¹⁵ To illuminate the shortcomings of this technique, Dworkin mobilized the example of involuntary acts. Given that the “problem with ‘involuntary’ is that we are not certain what it means to say that an act is involuntary” within a broad variety of different contexts, attempting to elucidate officials’ intentions would be of only limited use, Dworkin thought, in “understanding [the] different senses in which a word may be used.”¹¹⁶ Once these different senses had been elicited, then one might “ask in what sense an official ... used the word on a particular occasion.”¹¹⁷ This would, nonetheless, be a limited resource for those engaged in attempting to fully explicate the range and possible bearings of a legal principle, as compared to the vast plethora of uses that might be parsed via his ordinary language framework. Although officials might be “recognizing the existing principle” in a certain manner, this could only represent one particular instantiation of the deployment of that principle as embedded within the practices of a certain community.¹¹⁸

Nor could the technique of analogy provide much assistance, on Dworkin’s account, as regards the problem of involuntary acts. This technique centered on the proposition

¹¹²Ibid., 84.

¹¹³Ibid.

¹¹⁴Ibid., 15–49.

¹¹⁵Ibid., 15–16.

¹¹⁶Ibid., 26–9.

¹¹⁷Ibid., 29.

¹¹⁸Ibid., 30.

that when a legal principle is unclear, uncertainties should be resolved by returning to precedence and explicating how this principle has “been used in the past.”¹¹⁹ Dworkin noted that this technique was similar to that of intention, in that it “requires, analogously, that we understand these terms well enough to know how we should take the fact that the standard has been appealed to” in a particular circumstance, but it could only proffer a limited window into how this principle was mobilized within the practices of a particular community.¹²⁰ It assumed that we know these concepts “well enough to know what meaning to give them if they are used in one particular sort of context as against another,” and only offered a window into precisely one such sort of context, rather than the multifaceted and variegated senses which might be gleaned via ordinary language analysis.¹²¹

The technique of policy, however, differed “sharply” from the preceding two techniques in that it focused not on “clarify[ing] the doubtful standard” but on “shaping that standard so as to serve another about whose force and point we are more clear.”¹²² Dworkin gave the example of how the problem of whether negligent acts, such as careless driving, might be said to be “involuntary” could be resolved by appealing to a standard upon which there was greater clarity, such as “reducing accidents on the road” and thus preserving lives.¹²³ This technique thus proceeded by “identify[ing] the uncertainty and makes no pretense to a more accurate restatement, instead it argues that, in view of the uncertainty, the force of the standard is limited to bracketing a range of possible decisions and so requiring that the particular decision to be reached be made on the basis of other principles or policies.”¹²⁴ This would not, Dworkin thought, be of much use in cases where the appeal to such an “independent” policy could not resolve the conceptual difficulties at stake; indeed, as we have seen, in some instances the case turned precisely on whether the act in question was “involuntary” as a matter of apportioning blame and responsibility—such questions could not be elided by appeal to independent standards. For Dworkin, there must at least be some methodological recourse which could address such outstanding issues.

Towards the end of his manuscript, Dworkin offered his own, alternative, account of how his methodological premises might be directly applied in adjudication, specifically in the context of American constitutional law. To illuminate this he took up another example, the then topical decision of the Supreme Court in *Griswold v. Connecticut* in 1965 that the Constitution granted a right to marital privacy such that state laws banning contraceptives infringed on this right.¹²⁵ Similarly to the debates concerning Devlin and the criminalization of homosexuality, this raised the specter of the connection between criminal law and popular morality; indeed, the very reason why the Supreme Court heard *Griswold* was because three separate courts had

¹¹⁹ *Ibid.*, 15.

¹²⁰ *Ibid.*, 37.

¹²¹ *Ibid.*

¹²² *Ibid.*, 15.

¹²³ *Ibid.*, 43.

¹²⁴ *Ibid.*, 41.

¹²⁵ For details regarding this case and its background in the Connecticut legal system see John W. Johnson, *Griswold v. Connecticut: Birth Control and the Constitutional Right of Privacy* (Lawrence, 2005).

ruled that the Connecticut legislature had the right to forbid the use of contraceptives in the state.¹²⁶ Dworkin was especially interested in the ruling of Justice Hugo Black, who had authored a dissenting opinion. Black cited a poll showing that only 46 percent of Americans supported education on birth control and thus claimed that references by Justice Arthur Goldberg, in his concurring opinion, to legal principles “ranked as fundamental” within the “traditions and ... conscience of our people” merely amounted to the judicial imposition of “personal and private notions” of morality.¹²⁷ Given that a majority of Americans did not support such principles, appeals to tradition and collective conscience could only be a mask for the subjective preferences of judges.

Dworkin noted how, in the then recent history of constitutional jurisprudence in the United States, Justices had obstructed what “are now thought to have been ... wise enactments” by the legislature during the Great Depression precisely via appeals to principles supposedly embedded within the moral practices of the community.¹²⁸ He thus contended that there was good reason to be cautious in any study of the methodological underpinnings of such appeals. Nevertheless, for Dworkin, such appeals to principles often formed a necessary and integral part of judicial practice in hard cases; as he put it, many “lawyers and judges appeal to some ... principle[s] involving community morality” in the course of legal practice.¹²⁹ The legal theorist should not, therefore, seek to avoid or elide the difficulties that principles raised, but to forthrightly address them.

According to Dworkin, Justice Black’s opinion in *Griswold* offered “two repugnant alternatives” for conceiving the role of judges in hard cases: “making the touchdown of constitutional validity popular opinion on a present particular issue ... or making the test the personal moral preferences or positions of the few judges who must decide the case.”¹³⁰ Dworkin contended that we should reject this as a “false dilemma.”¹³¹ Instead, he sought to proffer a “third possibility.”¹³² He drew upon the same principle that he used to subvert the argument of Lord Devlin, “the principle that it is unjust ... to declare conduct criminal on the ground that it is immoral unless that conduct in fact involves a breach of a moral obligation,” recalling that, in the Devlin case, closer inspection revealed that conventional social practices made no indictment against challenges to popular moral opinions.¹³³ Such challenges were to be permitted, not criminalized.

¹²⁶Ibid., 21–96.

¹²⁷*Griswold v. Connecticut*, 381 U.S. 479 (1965), 493, 519. For further discussion of Black’s judicial philosophy as applied in this case see Howard Ball, *Hugo L. Black: Cold Steel Warrior* (New York, 1996), esp. 238–43.

¹²⁸Dworkin, “Chapter VI,” 94. Dworkin alluded here to statutes prohibiting child labor and fixing maximum working periods. On the Supreme Court during the Depression see Laura Kalman, *FDR’s Gambit: The Court Packing Fight and the Rise of Legal Liberalism* (Oxford, 2022).

¹²⁹Ibid., 95.

¹³⁰Ibid.

¹³¹Ibid., 97.

¹³²Ibid.

¹³³Ibid., 96.

Crucially, however, Dworkin argued that it does not straightforwardly follow that this principle is applicable within practices of adjudication. Before such a claim can be made at least two additional steps must be taken. First, we are required, by the legal institution of precedent, to “check ... whether there is any authority in passed decisions for that principle.”¹³⁴ In the case of *Griswold*, we “naturally start by asking whether those judges who have appealed to concepts of community morality in cases like *Griswold* ... can be understood as appealing to our principle.”¹³⁵ Moreover, for Dworkin, it was only possible to apply the technique of analogy to legal precedent at this stage due to his previous efforts at elucidating the connotations of the moral standards at stake in this case. This next step is only possible once we have acquired “a certain level of understanding of the concepts we are concerned with,” such that we can distinguish “which of a number of different possible readings of a statement is the proper reading”—to understand how such concepts are employed within the moral universe of the legal community one is concerned with.¹³⁶ One should only proceed to interpreting prior judicial opinions in *light of* these prior investigations; an accurate comprehension of the intended meanings of concepts and terms will not be possible unless one has undertaken the necessary conceptual clarification. This step also included considerations regarding what Dworkin termed the “weight” assigned to different connotations of the principle at stake.¹³⁷ Such “weighing” could only be resolved by “reflecting on the social practices and legal history which we invoke in citing these principles,” the greater importance that these precedents seemed to assign to various readings of the principles at play serving to help guide judges in their rulings.¹³⁸ Dworkin acknowledged that, given that there would likely be disagreement over the range of principles which could be of relevance in determining the case, and their various possible meanings, judicial interpretations of principles would be, and in practice often were, “controversial,” and that this was “hardly surprising.”¹³⁹ Nevertheless, as judges, in practice, already drew upon such principles, as seen in his favored example of *Riggs v. Palmer*,¹⁴⁰ Dworkin hoped that his analysis could help sharpen both theoretical and practical understandings of judicial practice in hard cases.

The second, and final, stage entailed checking the principle “against the various institutional and political standards that must be taken into account in framing any legal standard.”¹⁴¹ For example, in the context of *Griswold*, and thus within the context of the American legal system, Dworkin noted that “our standards governing the extent and impact of judicial review of legislative decisions, whether state or federal

¹³⁴ *Ibid.*, 98.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*, 99.

¹³⁷ *Ibid.*, 11–14.

¹³⁸ *Ibid.*, 13.

¹³⁹ *Ibid.*, 9.

¹⁴⁰ See *Riggs v. Palmer*, 115 N.Y. 506 (1889). In “The Model of Rules,” Dworkin discussed this opinion in which the principle that “[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong,” was taken to override the New York statute of wills (which had not foreseen cases of homicide to acquire an inheritance). See Dworkin, “The Model of Rules,” 23–4.

¹⁴¹ Dworkin, “Chapter VI,” 101.

... [are] clearly important.”¹⁴² Although Dworkin claimed he did not have sufficient space to fully conduct this analysis in his manuscript, he argued that the principle he had elucidated was a “good interpretation” of the opinions of Justice Goldberg and Justice Harlan, who both wrote separate concurring opinions to the majority opinion of Justice Douglas in *Griswold*, and could “be seen to underlie the opinion in that case and its precedence.”¹⁴³ Dworkin’s methodological premises, developed throughout his manuscript, thus provided, he contended, a way of grasping the moral principles at play in hard cases such as *Griswold*. This was a fully developed account of how to grapple with the notion of principles; however, unlike Dworkin’s later published work for which he would become famous, it was situated within a methodological framework predicated on ordinary language analysis.

V

Dworkin’s famous article “The Model of Rules,” published in the *University of Chicago Law Review* in the autumn of 1967 and reprinted as Chapter 2 of *Taking Rights Seriously* (1977), is often pointed to as the “most apparent” instance of the influence of the legal process school on his work.¹⁴⁴ As we have seen, however, across the previous few years he had elaborated a methodological framework that centered on ordinary language analysis. Why did Dworkin shift from his methodological emphasis on ordinary language philosophy to focusing on the insights developed by legal process scholars? And what implications did this have for his conception of principles?

In the early 1990s, Dworkin claimed that his exposure to the methods and teachings of the legal process school had “derived mainly” from conversations with Harry H. Wellington, an associate professor of law at Yale throughout Dworkin’s seven years teaching there (between 1962 and 1969).¹⁴⁵ Wellington had served as a visiting professor at Stanford Law School in the early 1960s, where he audited a course taught by Sacks (who was also a visiting professor at Stanford during this period). On his return to Yale, Wellington taught a course predicated on Hart and Sacks’s *The Legal Process*.¹⁴⁶ In 1968, he published *Labor and the Legal Process*, which offered an account of the role of the American judiciary in determining the limits of collective bargaining, and the various social policies and principles that might justify different rulings.¹⁴⁷

¹⁴²Ibid., 102.

¹⁴³Ibid., 100.

¹⁴⁴Dworkin, “The Model of Rules”; Dworkin, *Taking Rights Seriously*, 14–45. On “The Model of Rules” as the “most apparent” instance of the influence of the legal process school on Dworkin’s thought see Wellman, “Dworkin and the Legal Process Tradition,” 421. See also Eskridge and Frickey, “An Historical and Critical Introduction to *The Legal Process*,” cxvii n. 297; Sebok, “A Road Not Taken,” 209–10.

¹⁴⁵Duxbury, *Patterns of American Jurisprudence*, 295. Duxbury cites Ronald Dworkin, “Letter to Neil Duxbury, 12 June 1992.” Wellington taught at Yale from 1956 to 1992, including as dean of the Law School between 1975 and 1985. On Wellington’s life and works see Bonnie Collier, “A Conversation with Harry H. Wellington,” Yale Law School, Oral History Series, 2014, available at https://openyls.law.yale.edu/bitstream/handle/20.500.13051/17659/wellington_oral_history.pdf (accessed 20 July 2023). See also Kalman, *Yale Law School and the Sixties*, 271–2, 291–2, 315–17; Nadine Strossen et al., *Harry H. Wellington Festschrift Issue*, *New York Law School Law Review* 45/1–2 (2000–1).

¹⁴⁶Duxbury, *Patterns of American Jurisprudence*, 296.

¹⁴⁷Harry H. Wellington, *Labor and the Legal Process* (New Haven, 1968).

As Neil Duxbury has noted, it is evident that Wellington came to regard the emphasis in *The Legal Process* on principles and policies as “distinct types of legal criteria” as “important” in understanding the process of adjudication.¹⁴⁸

Dworkin later recalled that he had “talked a great deal about legal theory” with Wellington, and that he could “well have imbibed some of the legal process” scholars’ methodological emphases from him.¹⁴⁹ He returned to his unpublished manuscript one final time in the summer of 1967, attempting to further revise his sixth chapter; by this point, however, Dworkin’s methodological emphases had come to align with those popularized by the legal process school.¹⁵⁰ Indeed, in “The Model of Rules,” published later that year, Dworkin’s conception of legal principles “parallels,” as Vincent Wellman has pointed out, that advanced by Hart and Sacks in *The Legal Process*.¹⁵¹ For Hart and Sacks, “Underlying every [legal] rule and standard ... [is] in most cases a principle.”¹⁵² Each particular area of law within a given legal system is undergirded by a set of underlying principles. They give the example of *pacta sunt servanda*—agreements must be kept—as one of the principles underlying American contract law.¹⁵³ According to Hart and Sacks, “uncertainties cannot be intelligently resolved ... without reference” to these principles. Such principles are “always available to guide judgment in resolving uncertainties about the arrangement’s meaning.”¹⁵⁴ Principles thus arise from within legal practices—they are not to be explicated by recourse to external sources such as ordinary language. In “The Model of Rules,” Dworkin similarly contended that legal principles are those which underlie particular areas of law and should thus be elucidated by examining how they have been deployed in judicial rulings, legislation, and other legal materials, rather than by recourse to the ordinary language methodologies he had developed in his unpublished work. As Dworkin put it, one makes “a case for a principle” primarily by appealing to the “implications of legislative and judicial history.”¹⁵⁵ If this principle can convincingly be construed as underlying the legal practices of the relevant legal community, then it is a valid source for judicial decision making.

Given Dworkin’s emphasis, in “The Model of Rules,” on insights popularized by legal process scholars, as well as his explicit acknowledgment of Wellington’s influence on his thought, it is perhaps unsurprising that his earlier engagement with ordinary language

¹⁴⁸ Duxbury, *Patterns of American Jurisprudence*, 296. Duxbury cites a letter with recollections he received from Wellington, dated 1992.

¹⁴⁹ Dworkin, “Letter to Neil Duxbury, 12 June 1992.” Dworkin’s letter is quoted in Duxbury, *Patterns of American Jurisprudence*, 296 n. 628.

¹⁵⁰ In this revised version, Dworkin noted that “[h]omosexual acts between consenting adults” had been “very recently” decriminalized in Great Britain (which occurred upon the passage of the Sexual Offences Act in July 1967). See Dworkin, “Chapter VI,” 77.

¹⁵¹ Wellman, “Dworkin and the Legal Process Tradition,” 422. For similar assessments, see Eskridge and Frickey, “An Historical and Critical Introduction to *The Legal Process*,” cxvii n. 297; Sebok, “A Road Not Taken,” 209–10.

¹⁵² Hart and Sacks, *The Legal Process*, 166.

¹⁵³ *Ibid.*, 159.

¹⁵⁴ *Ibid.*, 167.

¹⁵⁵ Dworkin, “The Model of Rules,” 37.

philosophy has remained overlooked. His attempt to devise a methodological framework premised on the insights of ordinary language analysis has remained unpublished and, until now, forgotten. Given his subsequent intellectual trajectory, it is readily explicable why scholars of Dworkin's thought, and his students, have often asserted that Dworkin had little interest in ordinary language philosophy.¹⁵⁶ Indeed, such assertions align with a broader origin story that is often told about the development of twentieth-century anglophone legal philosophy. On this account Hart, by drawing on ordinary language philosophy, purportedly "succeeded in rekindling the fires of the English and English-speaking philosophy of law that had nearly gone cold since the days of Bentham" with the publication of *The Concept of Law* in 1961.¹⁵⁷ Dworkin has often been characterized, as we have seen, as mobilizing the resources of alternative intellectual traditions—principally those of the legal process school in his early work—to critique Hart.¹⁵⁸ These contrasting methodological approaches would become part of the "Hart–Dworkin debate" around which the Anglo-American legal philosophy curriculum would come to be "organized" by the end of the twentieth century.¹⁵⁹

Dworkin's shift away from the methodological emphases of ordinary language analysis and towards those of the legal process school thereby not only reshaped the notion of principles he deployed to critique Hart, but also came to shape depictions of the broader methodological contours of twentieth-century legal philosophy. Whilst it must be left to future legal philosophers to explore how Dworkin's earlier conception of principles as premised on ordinary language analysis might facilitate new critiques of Hart, Dworkin's unpublished book may offer a bridge across the methodological divide opened up by the construction of the "Hart–Dworkin debate"—by illuminating a period in which both Hart and Dworkin explicated conceptions of jurisprudence grounded in ordinary language methodologies. Attempts to bridge this divide may be aided by a closer examination of Dworkin's methodological deliberations in the 1960s and the framework predicated upon ordinary language analysis which he developed in his book manuscript.

¹⁵⁶ See, for example, Guest, *Ronald Dworkin*, 15.

¹⁵⁷ Postema, *Legal Philosophy in the Twentieth Century*, 42. This familiar narrative, which depicts Hart as rejuvenating anglophone legal philosophy with *The Concept of Law*, has resonances with the role ascribed to John Rawls in anglophone political philosophy following the publication of his *A Theory of Justice* ten years later. For a paradigmatic example of such a claim as to Rawls's influence, in which *A Theory of Justice* heralded the "rebirth of normative political philosophy," see William Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford, 1990), 9. For an account of Rawls's reception which elucidates how he came to be cast in this role in the history of twentieth-century political philosophy see Katrina Forrester, *In the Shadow of Justice: Postwar Liberalism and the Remaking of Political Philosophy* (Princeton, 2019).

¹⁵⁸ Dworkin's critique of Hart's usage of ordinary language philosophy would underpin the "semantic sting" he delineated in *Law's Empire* (1986), wherein he claimed that Hart's legal theory relied on flawed assumptions as to the plausibility of explicating "shared criteria" regarding the linguistic usage(s) of the concept of law. See Dworkin, *Law's Empire*, esp. 31–46. On the role of theories of hermeneutics, especially the work of Hans-Georg Gadamer, in shaping the theory of legal interpretation which underpinned Dworkin's later critique of Hart see, for example, Kenneth Henley, "Protestant Hermeneutics and the Rule of Law: Gadamer and Dworkin," *Ratio Juris* 3/1 (1990), 14–28; Allan C. Hutchinson, "Work-in-Progress: Gadamer, Tradition, and the Common Law," *Chicago–Kent Law Review* 76/2 (2000), 1015–82, esp. 1044–5.

¹⁵⁹ Leiter, "Beyond the Hart/Dworkin Debate," 17.

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