Institutions and the Concept of Law: A Reply to Ronald Dworkin (With Some Help From Neil MacCormick)

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Abstract

Ronald Dworkin has maintained, against me and others, that thinking about law “as a kind of social institution” “has neither much practical nor philosophical interest.” This reply challenges that claim, arguing that the social and institutional status of a norm-generating institution may be essential for the identification legal norms. Anti-positivists such as Dworkin deny this, but it then turns out that the claim of a lack of practical or philosophical importance for legal institutions as institutions presupposes the falsity of legal positivism. Legal positivism may perhaps be unsound, but only if that is true, and perhaps not even if it is true, does the institutional status of law have neither practical nor philosophical interest.
CHAPTER 4
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In *Justice In Robes* (Dworkin 2006a, ch. 8), and in an earlier commentary on one of my own articles (Dworkin 2006b, replying to Schauer 2006), Ronald Dworkin makes the arresting claim that thinking about law ‘as a kind of social institution’ ‘has neither much practical nor philosophical interest’ (Dworkin 2006b, 98). The institutional question of distinguishing a legal system from the normative systems of morality or religion, or from the behavior-altering institutions of force or terror, Dworkin insists, might be of some interest to sociologists and others of that ilk, but has scant relevance to lawyers, to judges, or to legal philosophers.

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1 This paper was originally presented at the Symposium on Neil MacCormick’s *Institutions of Law*, held at the University of Edinburgh on 7 December 2007, and has benefited greatly from the audience comments on that occasion. Earlier versions of the central argument are contained in an essay entitled ‘Is There a Concept of Law?’, presented as a plenary lecture at the Congress of the International Association for the Philosophy of Law in Krakow, Poland, in August, 2007; at Ronald Dworkin’s Colloquium on Legal, Political, and Moral Philosophy at University College, London, in February, 2007; and at Seana Shiffrin’s Jurisprudence Colloquium at the University of California, Los Angeles, in January 2007. For all of its remaining errors, the current version is better for the opportunity to have discussed with such helpful audiences.
If Dworkin is correct, then thinking about law in institutional terms, as Neil MacCormick has championed for decades, and as others of us have, perhaps belatedly, come to recognize (see Schauer 2004), is a misdirected enterprise. If we legal theorists wish to decamp to sociology departments and become obsessed with labeling normative systems as law or not, Dworkin suggests, then he would have little objection. But as long as we persist in claiming to do legal theory, and in particular legal philosophy, and as long as we purport to speak to the concerns of lawyers and philosophers of law, then perhaps we are best checking our sociology and our talk of institutions at the door.

In this paper, I seek to reply to Dworkin’s dismissive attitude towards the institutional questions. Such questions, I argue, are important both to the philosophy of law and to the real concerns of real lawyers and real judges. To hold otherwise, as Dworkin so plainly does, is to assume (and not to prove) the correctness of Dworkin’s own anti-positivist and ‘seamless’ account of law and adjudication, an account that is at the very least controversial and more likely empirically and institutionally mistaken. In rejecting the philosophical and practical importance of looking at law through the lens of legal institutions, Dworkin exposes just how much his own account of law depends on a view of the irrelevance of law-identifying institutions, a view that poorly captures the way in which the legal systems with we are most familiar actually operate. Or so I argue here.

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2 Much of this work is crystallized in MacCormick 2007. The most important precursor is MacCormick and Weinberger 1986.
In large part because it is a direct reply to me, I will use the version of Dworkin’s claim that appears in the *Harvard Law Review Forum*, and not the substantially similar, but not identical version, in *Justice in Robes*. In the version on which I focus, Dworkin distinguishes two ‘questions about the nature of law.’ One he describes as ‘sociological,’ and he sees the sociological question as one about ‘what makes a particular structure of governance a legal system rather than some other form of social control, such as morality, religion, force, or terror’ (Dworkin 2006b, 97-98). This is the question that Dworkin takes to have ‘neither much practical nor much philosophical interest’ (Dworkin 2006b, 97-98).

By contrast, what is of ‘enormous practical and considerable philosophical significance’ is that which Dworkin calls the ‘doctrinal question’ (Dworkin 2006b, 97-98). This, he says, is the question of ‘what makes a statement of what the law of some jurisdiction requires or permits true’ (Dworkin 2006b, 99). What makes this question so important, Dworkin argues, is that ‘[j]udges and other political officials justify decisions of great consequence by citing propositions of law…’. Thus, ‘[i]t obviously matters very much whether any such proposition is true, and therefore what test should be used in determining its truth.’ And as a result, ‘[t]he philosophical depth and interest of the question are also apparent . . .’ (Dworkin 2006b, 99).

Dworkin contrasts the importance to lawyers, judges, and political officials of the doctrinal question with what he describes as the sociological question’s dependence on ‘the sociological question of law: it refers to law as a kind of social institution.’ But that is the concept that has little practical or philosophical importance because it ‘is vague: it has no precise or settled boundaries in ordinary language’ (Dworkin 2006b, 98). Thus,
We agree that Massachusetts has a legal system but we disagree about whether to call customary commercial practices enforced only by commercial sanctions a form of legal regulation or whether to call a frozen set of rules with no legislative or enforcement mechanisms a legal system. (Dworkin 2006b, 98)

But these issues, Dworkin claims, ‘are verbal not substantive disagreements. Social scientists, of course, need more precise definitions of law for their research,’ but ‘it would be a mistake . . . to treat these definitions as attempts to excavate the very concept of law in the sociological sense or to capture the essence of legal systems and structures’ (Dworkin 2006b, 98).

Thus, Dworkin sees the attempt to designate a system as legal or not as essentially a definitional enterprise, on which ‘[n]othing turns’ ‘so long as we make plain what further point we wish to make in speaking that way. So the issue as traditionally posed has neither practical importance nor philosophical interest.’ In this respect, Dworkin plainly sees many modern disputes about the nature, character, phenomenon, or concept of law in ways that parallel classical disputes about whether unjust law is ‘really’ law. Dworkin’s view might be seen as reminiscent of the position of Glanville Williams, who in 1945 lamented that we could transcend the debates about what is or is not law (especially in the context of international law) simply making it clear what it is that we were talking about (Williams 1945).

Dworkin says that the ‘sociological concept of law’ is ‘vague: it has no precise or settled boundaries in ordinary language.’ That is of course true, but it hardly distinguishes law from much else. And in order to see Dworkin’s argument in its best light, we ought not to
saddle him with the burden of the fallacious rhetorical move from vagueness to incomprehensibility. Ever since Wittgenstein purportedly asked whether it was still ‘chess’ if the game were played without the queen (see Wisdom 1952, 259), we have recognized that most of our words and most of our concepts have fringes as well as cores.\(^3\) Hart distinguished the core from the penumbra as a way of talking about legal language and the difference between clear and not-so-clear applications of the language contained in a rule (Hart 1994; see Schauer 2008), but the point is every bit as applicable not only to the words we use to describe clusters of social phenomena, but to the clusters themselves. Insofar as law (and not just the word ‘law’) is a sociologically differentiated institution,\(^4\) there will be phenomena that clearly are part of the institution (national courts, for example), phenomena that clearly are not part of the institution (cookbooks, for example), and phenomena whose inclusion within the institution is partial and debatable, such as, for example, the systems of informal dispute resolution, and the functions of notaries in French-speaking countries. So although it is true that neither law nor the word ‘law’ in the sociological sense has precise or settled boundaries, neither does chess, baseball, education, medicine, or, for that matter, sociology. That there are or can be disagreements around the edges says no more about the (sociological) concept of law than it says about the concept of baldness, to use Russell’s famous example (Russell 1923), or games, to use Wittgenstein’s (Wittgenstein 1958), or night, to use Burke’s.\(^5\)

\(^3\) Indeed, the point well precedes Wittgenstein. See Russell 1923.

\(^4\) And this is one of the running themes in MacCormick 2007. See also Luhmann 2004; and ‘The Unity of the Legal System’ in Luhmann 1988.

\(^5\) Though no man can draw a stroke between the confines of night and day, still light and darkness are on the whole tolerably distinguishable.’ Edmund Burke.
That we might disagree about whether commercial practices enforced only by commercial sanctions, to use Dworkin’s example, should be counted as law says little about whether a decision by the Court of Appeal interpreting an Act of Parliament counted as law, and although we might disagree about whether a professor of law was exceeding his remit if she taught and wrote about the informal dispute resolution mechanisms of medieval Iceland, there would be far less disagreement about the permissibility of the same person teaching and writing about the law of tort, and about the impermissibility of her teaching and writing about plasma physics or the future prospects of the Manchester United Football Club.

If we thus rescue the sociological concept of law from the sorites fallacy, we can see that its undeniable vagueness at the edges hardly makes it unintelligible. Universities distinguish their faculties of law from their faculties of medicine with little difficulty, just as we have a pretty good sense of what holds together most of the books published by Butterworth’s and Sweet and Maxwell (or, for Americans, the West Publishing Company), just as we do not think it nonsensical for a bar examination to test legal knowledge for purpose of granting a license to practice, and just as we immediately know the difference when someone at a cocktail party identifies herself as a lawyer and someone else identifies herself as a rocket scientist. Moreover, and perhaps more importantly, we recognize the family resemblance among lawyers, judges, bar examiners, legal publishers, and law professors, just as we recognize the non-crisp distinction between this family of individuals and institutions from the family consisting of surgeons, medical schools, pharmaceutical companies, and hospitals. The sociological concept of law, and thus the very idea of law not only as a collection of institutions but as
an institution itself, may be vague, but that it is vague at the edges hardly makes it either unintelligible or worthless.

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That there is a sociological concept of law, however, does not necessarily make it valuable for what Dworkin calls the ‘doctrinal question’, i.e., what it is that makes a proposition of law true, and what test or tests should be employed to determine whether a proposition of law is true. Dworkin is correct that this is indeed a question of great practical and philosophical importance, and he is correct that its importance lies substantially with the way in which lawyers and judges use the truth of propositions of law to justify ‘decisions of great consequence.’ But then the issue is whether the sociological concept of law can provide any assistance in answering this undeniably important question.

To pose the issue most squarely, we thus need to ask whether ‘law’ in a sociological sense is material to determining whether a proposition of law is true. This is the question to which Dworkin gives a negative answer, both in the work under discussion and in previous work (Dworkin 1986 and 1977). For Dworkin, the existence of a norm within (or the promulgation of a norm by) the social system commonly called the legal system is neither a necessary nor a sufficient condition for it being legally true. That it is so is a defining characteristic of legal positivism, and it is precisely this claim of legal positivism – the claim that the truth of a legal proposition is a function of its institutional pedigree – that Dworkin has devoted much of his career to refuting. But is Dworkin’s refutation
sound, and what is the relationship between that refutation and his newer distinction between the sociological and the doctrinal concepts of law?

Consider first the question whether the institution of Parliament (or Congress) is relevant to determining whether a proposition of law is true. Suppose the question is whether, to take a recent and controversial example at the time of this writing, it is legal for the government of the United Kingdom to detain without formal charges someone suspected of terrorism for a period of 56 days. Or, to put it in propositional form, is the proposition that it is lawful to detain, without trial or formal charges, a person suspected of terrorism for 56 days true?

The answer to this question is plainly ‘no,’ and one reason that the answer is ‘no’ is that after extensive and public discussion of the possibility of a 56 day limit, such a possibility was taken off the table and the eventual enactment passed by Parliament limited the period of such detention without charge or trial to 42 days. And we know that the limit is 42 and not 56 days because we know that Parliament is an institution understood by the relevant rule of recognition to have at least presumptive law-creating authority. I say ‘at least presumptive’ because it may be, as various versions of the natural law tradition would have it, and as Dworkin has often insisted certainly in the common law context and at times suggested even in the statutory context (Dworkin 1987), the fact of emanation from a law-making body such as Parliament may, even if on occasion a necessary condition for the creation of law, not be a sufficient condition. That is, Parliamentary enactment may produce only defeasible law, defeasible in the service of

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6 Technically, the Queen in Parliament.
morality, most obviously, but possibly also in the service of various other goals and values.

But even if enactment by Parliament is not a sufficient condition for a proposition of law being true, and, moreover, even if such enactment is not a necessary condition, it would be foolish to suggest that enactment by Parliament was not even relevant to the question of whether some normative proposition was a proposition of law. And thus the social fact of behavior by a certain institution is highly relevant, i.e., it is of great practical importance, in the determination of what is or is not law. And thus the behavior of an institution turns out to be highly relevant to the doctrinal question, the question that Dworkin describes as being both deep and important. Moreover, it is the determination that the institution is a legal one that makes it relevant, or more relevant to the doctrinal question. It may be that acceptance by the society of some norm would also make it, especially for Dworkin, relevant to the doctrinal question, but it would be hard to claim with a straight face that Parliamentary enactment of the 42 day rather than the 56 day limit was of no doctrinal importance in the face of a social determination or moral fact that 56 days was preferable to 42 days. And thus not only is the promulgation by an institution of great importance to the doctrinal question, but the determination that that institution was a legal one – the sociological question – is also of great importance to the doctrinal question.

If the social fact of production by the institution that we call Parliament is relevant to the determination of whether a proposition of law is true, and if the social fact of that institution being a legal one is also relevant to the determination of whether a proposition of law is true, then it would hardly be startling if the social fact of norm production by
some other institution would, or at least could, have the same effect. Suppose, for
even example, that one of the criteria for the truth of a legal proposition in some society were
to be the existence of the social fact of announcement, endorsement, or promulgation of
that proposition by a court, or by the society’s highest court, or by the collective opinion
of authoritative commentators. What if it were a necessary condition for a proposition
being a legal one that it had been promulgated either by Parliament or by a court? Or
what if it were a sufficient condition for a proposition being a legal one that it had been
promulgated by a legal institution? If that were the case, then the sociological question of
which institutions were legal institutions would have huge practical importance, because
the identification of those institutions as legal ones would enable judges to determine
which propositions to draw on in determining the rights of those who came before them;
would instruct law enforcement officials about which propositions to enforce; and would
enable citizens to ascertain which propositions they should permit to limit what would
otherwise be their all-things-considered decisions about what to do or what to decide.
Moreover, under such circumstances the sociological question would have great
philosophical significance as well, because the sociological question would raise the
question of when, if at all, the emanations of some institution or cluster of institutions
should be permitted to override an individual’s or an official’s best moral judgment about
what to do.

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As will be obvious by now, what I have just described is a central case of legal
positivism. The point of the exercise was to demonstrate that if legal positivism, as a
descriptive matter, were true, then what Dworkin calls the doctrinal question would depend on the answer to what he calls the sociological question, and not only would the two questions no longer be distinct, but the latter question would have a practical and philosophical importance that would be hard to deny. So Dworkin’s argument cannot be taken as an argument against positivism. On the contrary, it presupposes the descriptive falsity of a positivist account of the legal system under discussion. If positivism poorly describes such a system, and thus if the distinction between legal and non-legal institutions has no relevance to determining whether a proposition of law is true, then the sociological question – the distinction between legal and non-legal institutions – indeed has little practical or philosophical importance. But if a positivist account of some legal system is true, then the identification of an institution as a legal one becomes crucial, because it’s legal-ness, as it were, is precisely what gives the institution its capacity to render a proposition a legal one, and thus gives the institution its capacity to render a proposition of law true.

Thus, if Dworkin’s argument is intended as an argument against positivism, it fails, because it assumes the very conclusion its sets out to prove. Moreover, even the weakest of positivist claims survives Dworkin’s attack. If, for example, as McCormick himself now appears to argue in the concluding portions of *Institutions of Law* (see, e.g., 252-61 and 277-79), the institutional status of some norm or directive is a necessary, but not a sufficient, condition for its legality, it would still be the case that the sociological question of whether the institution promulgating the norm was or was not a legal one would have enormous practical importance, for the answer to the sociological question
would determine whether a judge or police officer or other official with the power to bring the state’s use of force to bear would in fact do so.

Moreover, the very fact that this could be so is of equally great philosophical interest. How is it, we might ask, that the truth of a proposition of law depends, even in part, on its source and not on its content? And if that is a possibility, is this a morally undesirable state of affairs, as generations of skeptics about source-based authority have argued (e.g., Simmons 1979)?

Implicit in the foregoing is an understanding of legal positivism that will strike contemporary legal philosophers as non-standard, but it is one that Dworkin and I appear to share. That is, rather than (or, charitably, in addition to) being a claim about the concept of law, which would be the contemporary understanding, positivism could also be a description of particular legal systems, or perhaps of families of legal systems. Under this view, a view that has its roots in Bentham and Austin, even if not in Coleman and Raz, and arguably (but controversially) not in Hart, a legal system is a positivist one to the extent that the norms that are enforced within the system are enforceable just insofar as a social fact – the pedigree, in Dworkin’s terminology – says they are. For Dworkin, therefore, the sociological differentiation between law and non-law – between legal and other sorts of institutions – is uninteresting and unimportant precisely because for him nothing about legal decisions turns on the distinction. Thus, if Dworkin’s characterization of modern legal systems as non-positivist turns out to be descriptively accurate – if the social fact of production by a legal institution was neither necessary, nor
sufficient, nor even just probabilistically causal of the legal enforceability of a norm – then it is true that the sociological concept of law would be of no legal importance. But if Dworkin’s description of modern legal systems is inaccurate – if positivism is instead the accurate description of a system in which social validation was germane to legal enforceability – then the sociological concept of law would take on enormous significance.

Thus, everything turns on the descriptive claim. I have argued elsewhere that if this conception of positivism is understood as presumptive and not absolute, then Dworkin’s claim about modern common law legal systems is largely false (Schauer 2004, and see also Schauer 1991). Even if the kinds of norms that generated the outcomes in cases like *Riggs v. Palmer*\(^8\) and *Henningsen v. Bloomfield Motors*\(^9\) were not subject to a pedigree-

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\(^7\) In *Legal Reasoning and Legal Theory* (1978), MacCormick argues with much force that many of the supposedly non-pedigreed principles that provide the linchpin for Dworkin’s claims had in fact been recognizable and recognized by a rule of recognition. This strikes me as correct, but my empirical argument is different. It is the theoretically thinner claim that some of Dworkin’s examples of principles (in his sense) trumping rules (in his sense) are exceptional, and that in the normal operation of the English and American legal systems rules often prevail in the face of loftier principles that would have produced more desirable outcomes in particular cases. I do not claim that such principled-based departures from rules are lawless, but only that an accurate description of Anglo-American adjudication (and, *a fortiori*, norm application outside of the courts) must recognize the way in which rule-of-recognition recognized legal rules often prevail even in the face of legal, political, and moral principles that would produce superior outcomes in the pertinent case. That law operates this way may or may not be morally desirable, but any description of law that ignores its positivity and consequent occasional sub-optimality cannot provide a satisfactory explanation of the phenomenon of law as it actually operates.

\(^8\) 22 N.E. 188 (N.Y. 1889).
based test, these cases are nevertheless epiphenomenal. Far more typical, even with respect to the very issues that these cases raised, is that the existence of a distinctly legal norm generates the outcome, even where the outcome is inconsistent with the best interpretation of a society’s full collection of legal, political, and moral norms, or even where the outcome is simply unjust. Unconscionable contracts are enforced because they are contracts according to pedigreed legal norms, and beneficiaries no less unworthy than Elmer Palmer inherit precisely because of the literal words of the legal institutions we call legislatures.

It thus turns out that in actual legal systems lawyers often argue on the basis of legal rules whose decision-determining capacity (whether that makes them legally ‘true’ may not be the best way of putting the issue) is a function of their promulgation or endorsement by some institution, and that judges often justify (and make) decisions according to those same institutionally legitimated rules. As a result, the difficulty with Dworkin’s argument for the practical and philosophical unimportance of the sociological question is not only that it assumes the conclusion, and that it presupposes the falsity of an account of law in which a common answer to the doctrinal question (albeit not the only answer, and not the answer in all cases) is dependent on the answer to the sociological question. It is also that in the actual operation of actual legal systems the answer to the doctrinal question genuinely does, as a factual matter, often depend on the answer to the sociological question. The keystone of Dworkin’s argument turns out, as a result, to be as empirically mistaken as it is argumentatively elusive. The doctrinal and sociological concepts of law may indeed be conceptually distinct, and Dworkin has

performed a valuable service in illuminating this useful distinction. But although the two are conceptually distinct, they are empirically and causally linked in most modern legal systems. As a contingent and not a necessary truth, therefore, to treat the sociological concept of law as being of no practical or philosophical importance is to neglect something of great significance, both practically and philosophically, about the legal systems that pervade our individual and institutional lives.

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In *Institutions of Law*, Neil MacCormick analyzes at great length and depth the central feature of modern legality – its institutional status. Much of his focus is on institutions as norm-users, but a great deal of what he has to say is relevant to institutions as norm-issuers as well. If we neglect the way in which institutions can issue norms we will have missed much of importance about the centrality of institutions in modern society. And if we neglect the way in which the norms that are issued by institutions can become important just because of their institutional issuance, we will have missed much of importance about law. It is precisely because the norms that institutions generate have much to do with adjudication that we need to attend to them, and to believe that the sociology of institutions ‘has little to do with adjudication,’ as Dworkin insists, is in the final analysis to ignore, as MacCormick decidedly has not, what may be law’s most salient characteristic.

References


Russell, B. (1923), ‘Vagueness’, *Australasian Journal of Psychology and Philosophy* 1, 84-?.


http://law.bepress.com/uvalwps/uva_publiclaw/art129


Williams, G. (1945), ‘International Law and the Controversy Concerning the Word ‘Law’’, *British Yearbook of International Law* 22, 146-?.
