

Moral and Political Values in Legal Theory: An Informational-Atomist Account of Reasoning with Values

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Signed Declaration

I, Pritam Baruah, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

(Pritam Baruah)

Abstract

The question of how indeterminate moral and political values should be applied as justifications in adjudication has fuelled persistent controversy amongst judges, constitutional lawyers, and legal theorists. Values are employed as justificatory reasons of special significance on the one hand but are notoriously indeterminate on the other. I take this to be the problem of reasoning with values. This thesis intervenes in existing debates on reasoning with values by arguing for an Informational-Atomist account (IA). IA is an alternative to two influential existing views. First, is conceptual exceptionalism about values: that values are special kinds of concepts such as interpretive concepts, thick concepts, essentially contested concepts, and placeholders. Second, is value holism: that the content of values is determined holistically by placing them in a web of values as values are necessarily united. I argue that conceptual exceptionalism is flawed, qua theories of concepts, as concepts of values do not have a special conceptual nature. Value holism faces significant challenges as an account of content-determination, even if holism is a plausible theory of justification. IA in contrast brings insights from literature on concepts and content in cognitive science and philosophy of mind to illuminate thinking on how values ought to be reasoned with by according primacy to questions of content. IA develops an account of instance-based reasons that has realist, physicalist, and cognitivists commitments. It explains how the content of individual values are determined, which further explains connections between values, if any. IA bolsters arguments for reason-giving accounts of adjudication by opening avenues for how the content of indeterminate values can be justifiably determined in a transparent and accountable way.

Impact Statement

This thesis may have impact within academia, and to thinking about judicial reasoning and training outside academia. Within academia it contributes to scholarship in legal theory. It intervenes in debates about how moral and political values ought to be employed by decisionmakers such as constitutional courts to adjudicate moral and political disagreement. By critically evaluating existing accounts in legal theory, the thesis draws upon literature in cognitive science and philosophy of mind to propose a novel theory of how values must be employed as justifications. Such an interdisciplinary connection has not been previously made. The thesis draws attention to close connections between issues addressed by paradigmatic views in legal theory such as Ronald Dworkin's, and those by WVO Quine and Jerry Fodor in philosophy. It then proceeds to highlight shortcomings of prominent accounts in legal theory and in turn proposes an account that avoids those weaknesses. The novel account advocates transparent and responsible reasoning with values since values are relied on to determine constitutional and human rights of individuals.

Apart from two chapters of this thesis being published in an international journal and an edited volume, the research in the thesis has led to developing a course on constitutional values that has been taught in China and India. Application of theoretical arguments in this thesis to how human dignity has been employed by the Supreme Court of India has also led to another chapter in an edited volume to be published by Cambridge University Press.

Outside academia, the arguments in this thesis hold promise for thinking about how constitutional courts constituted by judges who predominantly have legal training can justifiably employ moral and political values despite such values not having enough legal materials to support claims of cognitive expertise. This may inform how judicial training materials may be designed and what interpretive approaches judges ought to consider.

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Chapter 1. Reasoning with Values: Conceptual Exceptionalism and the Primacy of Content

1.1 The problem of reasoning with values

How should concepts of moral and political values figure as justifications in decisions? The generality of this question does not undermine its significance. Moral and political concepts such as dignity, autonomy, democracy, equality, liberty or justice, are employed as justifications for decisions on controversial moral and political disagreements. They are employed by political and legal institutions as well as by other participants in socio-political discourse. The application of moral concepts, however, routinely turn out to be controversial.¹ There are controversies over the content of such concepts,² the conclusions they require,³ and the suitability of their application in law by decision-making institutions.

Controversies over the application of moral and political concepts are so widespread that the importance of the questions I raise are arguably too

¹ See Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford: Proceedings of the British Academy and OUP, 2013) Ch. 1 (for a menu of issues arising out of the application of human dignity as a value).

² See Peter Westen, 'The Empty Idea of Equality' (1982) 95: 3 Harvard L. R. 537 (for controversies over the concept of equality); Steven Pinker, 'The Stupidity of Dignity', *The New Republic*, May 28, 2008, available at http://www.tnr.com/story_print.html?id=d8731cf4-e87b-4d88-b7e7-f5059cd0bfbd; M Bagaric and J Allan, 'The Vacuous Concept of Dignity' (2006) 5: 2 J Human Rights 257; Ruth Macklin, 'Dignity Is A Useless Concept: It Means No More Than Respect For Persons Or Their Autonomy' (2003) 327 (for controversies over the content of dignity); James Fyfe, 'Dignity as Theory: Competing conceptions of human dignity at the Supreme Court of Canada,' (2007) 70 Sask. L. Rev. 1

³ This conclusion is theoretically grounded in a concept-conception distinction. John Rawls, *A Theory of Justice* (OUP, 1999) at 5; Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) at 103. See Christopher McCrudden, 'Human Dignity and the Judicial Interpretation of Human Rights' (2008) 19: 4 E.J.I.L. 655 (for evidence from judicial decisions yielding conflicting conclusions when applying the concept of human dignity).

obvious to be research questions. Someone in a conversation remarked that its obviousness was of the kind that demanded a search for the holy grail of legal theory; and if the allegation sticks, of much of moral and political philosophy. I have however persisted in looking for answers given my view that the obviousness of the questions is not underscored by as systematic attempts at answers that they would presumably invite. I am happy to report that there have been notable, though scarce, theoretical attempts at examining how value concepts figure as justifications in decisions.⁴ Let me categorise these attempts as accounts of 'reasoning with values'.⁵

The question of reasoning with values is focussed on justification: what is a justified manner of employing concepts of values as reasons for decisions? In this, it is distinct from questions about how disagreement involving value concepts should be understood, even if the questions overlap on some issues. Accounts of disagreement involve multiple considerations, including:

- a. What makes disagreement substantive as opposed to radical?
- b. Is disagreement rooted in the content of specific concepts, as opposed to beliefs that participants hold about an issue that might involve other concepts?
- c. Are such beliefs about the content of a value concept, or about how we *should* apply such concepts.

⁴ I identify three such attempts: Ronald Dworkin's view of interpretive concepts, WB Gallie's idea of essentially contested concepts, and the idea of thick concepts brought to prominence by Bernard Williams.

⁵ This might sound counter-intuitive given the presence of Joseph Raz's work on values, particularly in Joseph Raz, *The Practice of Value* (OUP 2003), Joseph Raz, *Value Respect and Attachment* (CUP 2001). However, it will be my contention that the attention of Raz's work has been on the existence of value, and the universal nature of values, and not on the question of 'reasoning with values' as I put it. Much of Ronald Dworkin's work on values however is squarely about reasoning with values, and thus is at the heart of the critical chapters in this thesis.

Reasoning with values on the other hand involves specific focus on how specific value concepts can serve as a source of justificatory reasons for a conclusion. In other words, the question is focussed on what a decision-maker ought to do when employing a value concept as a justification, as opposed to explaining what is going on in disagreements where value concepts figure.

That value concepts are employed as justifications for decisions, and controversially so, needs little establishing. Take for example the recent debates over the application of human dignity in adjudication. Debates over human dignity involve issues on whether it is best understood as a place-holder, providing severely limited normative guidance;⁶ dignity figuring as a justification for opposing sides to a dispute;⁷ the contested content of dignity;⁸ the contested historical roots of dignity;⁹ whether dignity is the foundation of human rights;¹⁰ and how dignity figures in the determination of particular rights. Though not all debates involve questions of how dignity figures, or should (not) figure, as a justification for decisions, the rich contemporary literature on dignity has been spurred by decisions of authoritative institutions such as constitutional courts that have employed dignity as a justification in controversial cases.¹¹ These

⁶ McCrudden, 'Human Dignity and the Judicial Interpretation of Human Rights' (n 3) (For an overview of such controversies in law)

⁷ McCrudden, 'Human Dignity and the Judicial Interpretation of Human Rights' (n 3); David Feldman, 'Human Dignity as a Legal Value: Part 2' (2000) Public Law 61.

⁸ See J Waldron and Meir Dan-Cohen, *Dignity, Rank, and Rights* (New York: OUP, 2012) (For a status-based conception of dignity in contrast to the Kantian conception); M Rosen, *Dignity: Its History and Meaning* (Cambridge MA: Harvard University Press, 2012) (For an account of the varied ways in which dignity is understood). Tarunabh Khaitan, 'Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea' (2012) 32: 1 OJLS 1 (For an expressivist account of dignity.)

⁹ McCrudden (n 1)

¹⁰ John Tasioulas, 'Human Dignity as a Foundation For Human Rights' in McCrudden (n 1).

¹¹ This is evidenced by the fact of how dignity literature in law has multiplied after McCrudden's seminal piece the most controversial claims of which related to judicial decision making. See McCrudden, 'Human Dignity and the Judicial Interpretation of Human Rights' (n 3); See chapter 2 of this thesis (for a criticism of McCrudden's views on adjudication). Similarly, dignity literature

debates have thus been fuelled by controversies over the *application* of dignity as a value to resolve disagreements. What should count as relevant considerations in thinking about such controversies? In moral and political philosophy, accounts of particular values have primarily been about their content. For example Kant's account of dignity identifies dignity as a status beyond price.¹² The reason for such a status is the capacity of human beings to reason independently of their biases, prejudices and inclinations, coupled with their ability to imagine the implications of universalising the norm they think they ought to follow. Though this is a crude summary of the categorical imperative and the universal law, it might be enough to point out that the Kantian concept of dignity represents a capacity of human beings to reason in a manner, that according to Kant, enabled them to give laws unto themselves. This was an articulation of the content of dignity. Similarly, Aristotle's account of Justice as being a virtue that is other-directed in nature; as justice in holdings (distributive justice) and justice in transactions (corrective justice); and their geometrical and arithmetical modes of operation, is an account of what the content of justice is.¹³ Examples of this nature abound, whether it be Raz's account of autonomy,¹⁴ or Rawls' account of justice, it is the content of particular values that has invited the attention of philosophers.

in bio-ethics is spurred by controversial claims about the normative bankruptcy, and vacuous nature of dignity, both of which limit its relevance for decision-making on ethical issues. See M Bagaric and J Allan, 'The Vacuous Concept of Dignity' (n 2); "Human Dignity, Human Rights, and Simply Trying to Do the Right Thing" in McCrudden, *Understanding Human Dignity*, (n 1), 470-490.

¹² Immanuel Kant, *Groundwork of the Metaphysics of Morals*, translated by Mary Gregor (Cambridge University Press, 1998) at 4:423, 4: 435-436.

¹³ Aristotle, *Nicomachean Ethics*, V, 4 (Martin Ostwald, trans., 1962).

¹⁴ Joseph Raz, *The Morality of Freedom* (Clarendon Press: Oxford, 1986); John Rawls, *A Theory of Justice* (OUP, 1999).

Legal theory has however been influenced by accounts of values in another direction. Theorists have emphasized on the special conceptual nature of values themselves. Ronald Dworkin's interpretive concepts and WB Gallie's Essentially Contested Concepts have been particularly influential. To be sure, philosophers of law have also offered rich substantive accounts of what the *content* of some values is. Joseph Raz's account of autonomy, Ronald Dworkin's account of equality, and his recent account of dignity are some prominent examples.¹⁵ The question about values being special kinds of concepts has however assumed substantial importance in law, as theories such as Dworkin's claim that it controls how value concepts figure in the adjudication of moral and political disagreement. The core chapters of this thesis critically examine accounts that characterize moral and political values as special kinds of concepts, and prescriptions about reasoning with values that emerge from them. Before I introduce those accounts, let me clarify what I mean by 'moral and political values', and 'value concepts'. I will henceforth be employing the latter as it is sensitive to the distinction between values as properties, the concepts that represent values, and words that label them.

1.2. Values and value concepts

Enquiries into the nature of moral and political values has invited considerable philosophical attention. The ambition of the thesis is not to intervene in such debates, even if it is inevitable that some of my arguments would at times presume existing views on the matter. I state those presumptions as an when

¹⁵ Raz (n 14); Ronald Dworkin, *Justice for Hedgehogs* (Cambridge MA: Belknap Press, 2011) 191-218.

they bear upon my arguments. For now, it might suffice to point out first the 'positive evaluative nature' of values that I take to be central in their role as justifications for decisions, and then the distinction I maintain between the nature of values as properties and the nature of concepts that represent those properties

Moral and political values include values such as dignity, liberty, autonomy, justice, democracy, and equality, which are articulated as values that societies aim at realising.¹⁶ They are moral values because they are employed to identify what is good and what we therefore ought to do. They are political values because to a large measure they are values that articulate the purposes, and justify the authority, of our political institutions.

Being values, they are invoked as justifications for decisions including political and legal ones, crucially so, on moral and political disagreements that appear to be potentially divisive for societies. They are values because they provide a 'pro', as opposed to a 'con' consideration in arriving at any decision on what we ought to do.¹⁷ In other words, moral and political values are the sorts of things that are to be protected and promoted in decision-making. They are evaluative since they apply in evaluating what decisions we ought to make, and they are positive because they always provide a 'pro' as opposed to a 'con' reason. One might ask if it is not the case that often decision-makers must

¹⁶ This usage is perhaps not as idiosyncratic as it appears. In legal theory in particular, values have been usually employed in much wider senses than these and perhaps a bit indiscriminately. See Joseph Raz, 'The Hedgehog's Unity of Value', in Wil Waluchow and Stefan Sciaraffa (eds) *The Legacy of Ronald Dworkin* (OUP 2016) 3-24 at 3 (for attributing such a practice to Ronald Dworkin's work on values).

¹⁷ In this sense moral and political values are 'positive evaluative properties', to borrow Joseph Raz's term. They are different from evaluative properties that provide a negative or 'con' reason for what we ought to do. The sense in which I employ moral values here is that they are 'good-making' properties. For a discussion of this view of values see Joseph Raz, *Value, Respect, And Attachment* (Cambridge University Press 2001) 43-45.

sacrifice some value to achieve others. If so, then values do not always provide a 'pro' consideration. Responses to this objection have ranged from Ronald Dworkin's view that value conflict is impossible and involves a misunderstanding of values,¹⁸ through views about balancing values in adjudication when values conflict,¹⁹ to accepting a quintessentially value pluralist account that values might indeed conflict. However, even accounts that admit the possibility of value conflict do not yield a view that values are not the sorts of things that are to be realised, promoted, and protected. Indeed, Isaiah Berlin's account of value pluralism imagines the possibility of resolving value conflicts by converting others to one's own viewpoint.²⁰ If some value indeed has to be sacrificed, such sacrifice provides reasons for regret.²¹ For a value pluralist such as Berlin, the more values we are able to realise, the more we live well.

The question about value conflict is undoubtedly a perennial source of disagreement in moral and legal philosophy. My remarks here were limited to the extent of pointing out that even opposing views about value conflict do not raise doubts about the view that values are valuable in that they are to be realised, preserved, and promoted. We could therefore safely assume that the role of values in justification is one where they provide reasons for conclusions on what we ought to do. That role however has been fraught with controversies

¹⁸ Ronald Dworkin, *Laws Empire* (Hart Publishing 1998) Ch. 3 (for the view that to think that values conflict is to hold mistaken views about the values involved); Ronald Dworkin, *Justice for Hedgehogs* (n 15) (for the view that values form a mutually supporting network and therefore cannot be in conflict).

¹⁹ The idea of balancing finds the most elaborate treatment in constitutional theory, particularly in Robert Alexy's work which offers an analytical structure to balancing. I mention this here since rights are typically articulated by employing moral and political values. See Robert Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16 *Ratio Juris* 131.

²⁰ Isaiah Berlin, 'The Pursuit of the Ideal' in Isaiah Berlin et al (eds), *The Proper Study of Mankind: An Anthology of Essays* (Farrar, Straus and Giroux 1997) 1 at 9-11.

²¹ *ibid.* 9.

giving rise, *inter alia*, to theories that account for the role of values by focussing on their special nature.

This is where an oft-overlooked distinction must be appreciated on what accounts for the special nature of values. I pointed out earlier that legal theory is influenced by views that take values to be special kinds of *concepts*. This is distinct from the special nature of values as *properties*. Value concepts represent value properties to our minds. For sure, there is a necessary connection between value concepts and value as properties. My remarks on the positive-evaluative nature of values apply to both properties of values and concepts of values. In fact, the argument in this thesis has it that the content of value concepts is necessarily dependent on value properties. Appreciating that relationship however requires sensitivity to the distinction between concepts and properties. This opens up several possibilities e.g. that values are properties that are not fully explained by conceptual knowledge alone, or that only the conceptual content of value properties are relevant to justification, even if as properties, values may necessarily involve non cognitive aspects. In these ways, and more, the distinction is both illuminating and liberating, yet is often overlooked in thinking about the application of values in justification.

My argument in this thesis pays close attention to the distinction as it yields insights into how value concepts should figure in justification. It is therefore important to clarify at the outset that my arguments in Parts I and II of the thesis first bear upon the nature of value *concepts*, as opposed to values as properties. In Part III, whenever I make claims about values as properties, I mention that expressly. It is my contention, that in legal theory, the distinction has been overlooked due to excessive focus on the special nature of value

concepts. I call such views ‘conceptual exceptionalism’ about values. The argument in this thesis begins with a critical examination of such views in Part I.

1.3 The critical project: Critiquing conceptual exceptionalism

1.3.1: Placeholders and Essentially Contested Concepts

Conceptual exceptionalism (CE): values are special kinds of concepts. Their special conceptual nature determines how we ought to employ them in reasoning.

Part I of this thesis argues that CE is false. It does so on the following grounds:

- (1) Concepts are mental particulars i.e. mental representations of properties.
- (2) CE fails to account for how value properties are represented to our minds in some special way.
- (3) Theories of concepts do not allow for categorization of kinds of concepts based on the criteria identified by theories embracing CE.
- (4) CE takes the focus off the material question involved in reasoning with values: the question of content.

I specifically examine three instances of CE in Chapters 2 and 3: Ronald Dworkin’s account of interpretive concepts, WB Gallie’s Essentially Contested Concepts, and Christopher McCrudden’s account of dignity as a placeholder.

Part I begins by laying the legal-institutional background against which CE has assumed importance in legal theory. In legal theory, disagreements over the application of specific values have invited proposals on *whether* decision-makers, particularly courts, should employ value concepts; and if they do, *how* should they approach questions of value. Such proposals have typically occupied themselves with questions about the proper role of

institutions, chiefly that of courts: should judges employ values such as dignity, autonomy, liberty or equality for justifying decisions?²² If they should, then should they stick to shallow and narrow reasons on which agreement can be reached amongst disagreeing parties?²³ Or should they offer full substantive accounts of such values, since adjudication is a reason-giving exercise that demands offering the full array of reasons that judges are capable of?²⁴ Are cases warranting the application of moral and political values instances of engaging in moral reasoning, and if they are, then are judges better/worse moral reasoners than legislatures?²⁵

Chapters 2 and 7 of the thesis engage with questions about the role of institutions in employing values as justifications. In chapter 2 I engage with them more to raise questions than provide answers, while in chapter 7 I return to the question of institutions to gauge how the theory I develop throughout the thesis fares in the light of existing views concerning decision-making institutions. In chapter 2 I highlight the problem of employing value concepts in judicial decision-making through an example. As much as the intractable problems posed by moral and political values are already recognised in theoretical literature, the example is aimed at sharpening the focus on issues that I argue should assume more importance.

²² Cass Sunstein's *Incompletely Theorised Agreements* is one such proposal. See Cass Sunstein, *Legal Reasoning and Political Conflict* (OUP 1996) 35-37.

²³ *ibid.*

²⁴ A prominent example is Dworkin's view of judicial reasoning first set out in Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) Ch. 4. Other reason-giving accounts of adjudication too display this commitment, for example see Frederick Schauer, 'Giving Reasons' (1995) 47: 4 *Stan. L. Rev.* 633; Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4: 2 *Law and Ethics of Human Rights* 142.

²⁵ Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 7 *I•CON* 2.

The example I choose is that of understanding the application of human dignity in constitutional adjudication. I consider dignity to be a good example since academic debates about the application of dignity by courts clearly identify linkages between the indeterminate content of dignity, the challenges it throws up for institutions, and attempts at understanding dignity through CE. In particular, the chapter critically examines Christopher McCrudden's influential views on dignity that clearly, though perhaps unintentionally, draw these links.

McCrudden argues that dignity is best understood as a placeholder with a thin minimum core as its content, analogous to an empty shell. Despite its place-holding character, dignity as a value has an important institutional role to play; and that role can be understood by the feature of dignity as a concept capable of yielding several conceptions i.e. by understanding dignity as an essentially contested concept.²⁶ I argue in chapter 2 that McCrudden's explanation of the role of dignity in adjudication is at odds with the understanding of adjudication as a reason-giving exercise. Committed to the view that any institution that claims to issue authoritative directives must be a legitimate one, the chapter argues that on a reason-giving account of adjudication, judges (or any other decision-maker) must account for the content of values that they rely on. This limits the place-holding account and role of dignity to pathological cases of adjudication at best.

The chapter then takes up McCrudden's reference to W.B. Gallie's essentially contested concepts which he thinks justifies the claim that the

²⁶ The view was first proposed in what has become a seminal piece on human dignity. See McCrudden, 'Human Dignity and the Judicial Interpretation of Human Rights' (n 3). The piece spurred numerous academic debates on dignity which have in turn diversified scholarship on dignity in the English language. For example, see Christopher McCrudden (ed), *Understanding Human Dignity*, (n 1).

content of dignity is akin to an empty shell that allows for several conceptions of the same concept. This quick recourse to Gallie is a slip into CE that I argue has gone unexamined but has acted as the foundation for several accounts of values in legal theory. The second part of Chapter 2 argues that Gallie's criteria for identifying essentially contested concept do not carve out a special category of concepts. Nor does it provide any cues to provide normative guidance in employing such concepts. His account is an external-descriptive one that points out features that are visible to an external observer as to what goes on when participants in a practice employ such concepts. The chapter concludes on the note that both Gallie and McCrudden's attempts at characterising dignity as a special kind of concept are unsuccessful. There is however another influential account in legal theory that makes such an attempt: Ronald Dworkin's account of interpretive concepts.

Despite differences, CE ties Dworkin's and Gallie's accounts. Unlike Gallie, who thinks that some values have the special nature of essential contestability, Dworkin argues that all values are interpretive concepts. This view has turned out to be a paradigm in thinking about values in law.²⁷ Critically examining Dworkin's claims are the project of chapters 3 and 4 of this thesis.

²⁷ I say parts of his view being contested as it is Dworkin's, 'one right answer thesis' and his views about the nature of *law* as an interpretive concept that has been contested. See, Joseph Raz, 'Dworkin: New Link in the Chain', *California Law Review* 74 (1986) 103. (for criticism of the one right answer thesis); Joseph Raz, 'Can There be a Theory of Law?', in M. P. Golding and W. A. Edmundson (eds) *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing: Oxford, 2005) (for a discussion of Dworkin's views on criterial and interpretive concepts); see also Joseph Raz, 'Two Views on the Nature of Law: A Partial Comparison' in *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009) Ch. 3. Dworkin's views on the nature of values as interpretive concepts have not received the critical attention that it deserves. Indeed, in recent work Joseph Raz has engaged with Dworkin's views on the unity of value, and endorsed the interconnected nature of values. Raz has not however focussed on the question of the nature of interpretive concepts and the role that it plays in understanding Dworkin's views on the unity of value. See Joseph Raz, 'The Hedgehogs Unity of Value', (n 16).

Chapter 3 criticises three distinctive ways in which Dworkin argues for the idea of interpretive concepts: interpretive concepts as a feature of constructive interpretation through paradigms in *Taking Rights Seriously* and *Laws Empire*; interpretive concepts as having a 'deep structure' with a normative core in *Justice in Robes*; and interpretive concepts being dependent on how we share such concepts, in *Justice for Hedgehogs*.

The chapter points out difficulties in each of these attempts at explaining what interpretive concepts are. In the process it argues that Dworkin's attempts in *Law's Empire* are about explaining how 'theoretical disagreement' is genuine and not radical. His views on constructive interpretation based on paradigms on the other hand was a promising start, but not towards identifying a special category of concepts. Rather it was an account of how the content of concepts is determined. Dworkin, however, restricts that claim to the realm of disagreement where conceptions are anchored by paradigms, and does not extend it to the realm of concepts. In speaking of the realm of concepts/values (he employs the terms interchangeably), he relies on the idea of interpretive concepts, but is silent on how they are a special category of concepts.

His attempts in *Justice in Robes* are under-described but can be supplemented by Nicos Stavropoulos' views about theoretical concepts.²⁸ Stavropoulos' is, however, a view about how the content of theoretical concepts are to be determined, and not about identifying special kinds of concepts. Indeed, I argue that Stavropoulos' views apply with greater rectitude to questions about the content of mental states, rather than to the content of concepts. If it were a view about the content of concepts, then it is closest to a

²⁸ Nicos Stavropoulos, *Objectivity in Law* (Clarendon Press: Oxford 1996) Ch 2.

holist view of conceptual content. I take that view up in chapter 4, but for the purposes of chapter 3, I argue that such a view does not easily lead to a conclusion that interpretive concepts are a distinctive class of concepts.

Concerning Dworkin's views in *Justice for Hedgehogs*, I argue that his arguments fail to carve out a special category of concepts on the basis of how we share such concepts.²⁹ Theories of concepts do not allow for sharing concepts to be a basis for categorising some concepts as interpretive concepts. Indeed, I argue that Dworkin's account does not maintain important distinctions between words, concepts, beliefs and properties, which in turn make interpretive concepts suspect as a category of concepts. I do however point out that Dworkin's view on values as interpretive concepts holds more promise in his prescriptive arguments: that values ought to be reasoned with in terms of each other. That is the question I take up in chapter 4.

1.3.2 Values, concepts, and conceptual Content: A critique of holism about values.

Chapter 4 examines Dworkin's core claim about values as interpretive concepts: that values are woven together in a web and must be mutually understood. In other words, it challenges critical aspects of Dworkin's view about the unity of values. The challenge is not to the claim *that* values are united, but about understanding *how* they are united. The question is germane to the central concerns of the thesis since Dworkin's claim about the unity of values serves as the germinating ground for his prescription that one ought to

²⁹ Ronald Dworkin, *Justice For Hedgehogs* (n 15) at 160-163.

reason with values in an interpretive manner. The chapter first argues for the following claims about how to understand Dworkin's claims:

- (5) Dworkin's claims about the unity of value are not about the special conceptual nature of interpretive concepts, but about how the content of value concepts ought to be determined.
- (6) His prescriptive claims about content are content-holism: value concepts mutually determine content in a web of values.
- (7) Dworkin's content-holism relies on the following ontological claims:
 - a. O1: Values are in a realm independent of the 'scientific realm'.
 - b. O2: Values are interwoven in a network forming an interrelated system.

The chapter then argues for the following conclusions:

- (8) O1 is under-described, while O2 is not accounted for.
- (9) His content-holism is a problematic account of conceptual content.

In arguing for (8) I compare Dworkin's holist claims to paradigmatic holist theories in 20th century analytic philosophy namely WVO Quine's meaning holism and Wittgenstein's belief holism. A close analysis reveals that Quine's holism does not support Dworkin's views about values. In fact, Quine's watered-down holism, found in his later works, overcomes several challenges that Dworkin's holism faces. I argue that is so because of Quine's holism allowing for a picture of initial content within his holism, while Dworkin's content holism is insular.

Despite Dworkin's account departing in crucial ways from Quine's, the chapter points out that there are other respectable holist views that might support Dworkin's account. The hallmark of these views is the centrality they attribute to the idea of inferences in determining conceptual content, thus supporting the interconnectedness of values. I take up such views, particularly

versions of 'Conceptual Role Semantics' that lead to holism to argue that such views are flawed accounts of the content of concepts and thus also of value concepts on the following grounds:

- a. They do not have an account of the initial content of holist systems within which inferences are drawn.
- b. They cannot explain the productivity and systematicity of concepts.
- c. They cannot account for the publicity of concepts.
- d. They cannot avoid the total change problem: that change to the content of any concept would affect the content of all other concepts.

The aim of chapter 4 is to make explicit the holist underpinnings of Dworkin's views on values and pointing out the inadequacies of a holist account. The search for non-holist accounts are therefore in order, but not before addressing some serious objections that critics might raise in my attribution of holism to Dworkin's work on values.

In Chapter 5 I turn to address objections that arise from other philosophical views attributed to Dworkin, namely, value monism and coherentism. The objections are, that my characterisation of Dworkin's work is mistaken, as his holism is not aimed at explaining how the content of concepts is determined, but first at elucidating the nature of morality as a monist enterprise as opposed to a pluralist one; and second, at highlighting the requirement of coherence in our moral beliefs and concepts, thus being understood as confirmation-holism as opposed to content holism.

I answer the first objection by arguing that Dworkin's holism is independent of his monism, and indeed his holism might endorse value

pluralism of a sort that might contradict value monism. I tease out, at length, the implications of understanding Dworkin's enterprise as a monist one in more than one senses.

In addressing the objection from coherentism, I argue that most forms of coherentism, whether as a theory of justification or of truth (confirmation holism), can be agnostic about content determination. Those coherentist theories that tie themselves to content-holism must face up to the criticisms about content-holism. Those that do not, cannot support the claim that value concepts must be reasoned with in terms of each other. This is because I argue that non-holist coherence theories are not constrained to restrict coherence to value concepts alone, they can spread the net wider to include non-value considerations and thus may not support the view that the test of truth about values is restricted to the world of values. I do recognise that Dworkin's reliance on coherence is aimed at establishing objective moral truth based on responsible construction, rather than on intuitionism or foundationalism as grounds for moral realism. For him, constructing moral arguments responsibly requires coherence between moral beliefs. But that, I argue, is improbable without relying on his beleaguered content-holism.

Chapter five concludes the critical chapters of the thesis. Their aim was to argue that accounts relying on conceptual exceptionalism about values in legal theory are intellectually opaque in not being explicit about theories of concepts they employ. They are unsupported by plausible theories of concepts either. Except for Dworkin's account, they also fail to realise that the problem of reasoning with values is rooted in questions about conceptual content. Despite Dworkin having brought the focus on content, his prescriptions are

undermined by his shaky value holism. In chapters 6 and 7 therefore, I propose and defend an alternative account of reasoning with values. It avoids conceptual exceptionalism and relies on a non-holist account of conceptual content. The account agrees with strong reason-giving accounts of adjudication, including Dworkin's, which hold that judges ought to provide uninhibited accounts of values when employing them as justifications. The difference between my account and Dworkin's lies in *how* judges should provide such uninhibited accounts.

1.4. The constructive project: An Informational-Atomist account of reasoning with values

Part III of the thesis offers an alternative account of reasoning with values that eschews CE and avoids the problems of value holism. The account is transparent about its theory of concepts and conceptual content by drawing upon Informational Atomism (IA) as a theory of concepts and content. The underlying philosophical commitments of IA are realist, physicalist, and cognitivist about concepts and content. On IA, if there are concepts of values, then there are properties of those values in the world that are represented to our minds. In chapters 6 and 7 I propose and defend a theory of reasoning with values building on IA. In employing IA and defending it against objections that travel through to my account, I rely on Jerry Fodor's account of IA as he is its foremost contemporary proponent.³⁰

³⁰ Jerry Fodor, *Concepts: Where Cognitive Science Went Wrong?* (OUP 1998) Ch. 1.

My account stems from the following premises about concept and content:

- (10) *Concepts*: Concepts are mental representations of properties in the world. (This is a view held by all theories of concepts, except the theory-theory of concepts. It is therefore not unique to IA).
- (11) *The informational claim*: Conceptual content is information held by our minds about properties through mind-world relations.
- (12) *Properties*: Properties are universals in the limited sense that they are unvarying across instances.
- (13) *The Atomist Claim*: To investigate the content of any concept, we must track the property it represents as opposed to exploring its relationship with other concepts. Atomist tracking of the property assumes priority over exploring interconnectedness.

On IA, concepts are key ingredients of thought. Thought is explained on the Representational Theory of Mind as computational relationships between mental representations of properties in the world. Concepts are mental representations of properties in the world. In other words, thinking is a cognitive process in which concepts figure in computational relationships.

We have a concept when we have a mental representation with information that is locked in a law-like manner to the property that it represents in the world. For example, experience of an instance of the property *doghood* would activate the concept DOG in my mind, if I have that concept.³¹ Fodor employs the word 'tokening' to articulate this law-like or 'nomic' relationship. If I have a concept, an experience of the property the concept represents would

³¹ Following conventional style in the literature on concepts is psychology and cognitive science, throughout the thesis references to concepts is in capital letters, references to properties are in italics, and references to instances will be in single inverted quotes. For example: 'dogs' (instance), DOG (concept), *doghood* (property).

cause a tokening of the concept in my mind in a law-like manner. Concepts are in this sense nomically locked to properties.

Despite the stringency of this requirement, IA can explain cases where we mistakenly apply concepts, e.g. in cases where a wolf, or the shadow of a fox, can token the concept DOG.³² IA can also explain concepts that are constructs such as UNICORN or GRUFFALO. It can do so because first, it maintains a concept-belief distinction. Second, and more significantly, its strength as a theory of concepts primarily lies in its ability to explain two aspects of concepts that holism was unable to explain: compositionality, and publicity.

In brief, concepts are compositional in the sense that simple concepts can compose complex ones. Concepts are therefore productive. They can combine to systematically compose complex concepts. For example, the concepts BLACK and DOG can compose BLACK DOG. We can add the concept FRIENDLY and we have the concept FRIENDLY BLACK DOG.

IA can explain publicity since individuals could have the same mind-world relations to properties in the world, even though they might have exposure to different instances of it. Their concepts can have identical information. They can therefore build common complex concepts from simple ones.

For example, I might have the concept DOG through my experience of the many dogs that I have had as pets, while others might have only seen them in pictures and videos. Those others might possess concepts such as LAMA or

³² This is called the disjunction problem. For an articulation of this problem see Jerry Fodor, 'Semantics, Wisconsin Style,' *Synthese* (1984) 59 231–250, reprinted in Fodor, *A Theory of Content and Other Essays* (Cambridge: MIT Press, 1992). Fodor responds to it through his 'Asymmetric Dependence Thesis', and I think successfully so in Jerry Fodor 'A Theory of Content' in *A Theory of Content and Other Essays* (Cambridge: MIT Press, 1992) 90-91. I discuss this problem in Chapter 6.

EMU, which I might not possess. However, we can still share the concept DOG because of our experience of the property of *doghood* through instances of 'dogs'.

Given the many positives of IA as a theory of concepts, I accept it as a sound theory of concepts, though with modifications and caveats, and thus accept an atomist approach as a lesson well-learned in thinking about concepts.

A significant implication of accepting IA is that to track the content of concepts, we must track the properties which are accessed through instances. To track the content of value concepts therefore the focus must be on instances of that value rather than its relationship with other values. This is not to deny that there might be relationships between the properties that the concepts represent. To be sure, properties in the world will be related to other properties in a variety of ways. Similarly, they will differ from other properties in significant ways. But that would be a theory of the nature of those properties, and that too after we have some information of the individual properties that we claim are related or distinct. In sum, to determine the content of a concept, and therefore also of value concepts, an atomist approach is necessary. Appreciating the relationships and differences between properties that concepts represent enhances our understanding of the world no doubt, but this must follow from an account of content determination. Not precede or be equivalent to it.

Let me now turn to the 'informational' aspects of IA. The roots of its informational character lie in Fred I Dretske's views of knowledge as information.³³ Briefly put, on this view, information is something that is 'capable

³³ Fred I Dretske, *Knowledge and the Flow of Information* (Cambridge: MIT Press, 1981)

of yielding knowledge'.³⁴ In other words, information tells us something about a state of affairs. For example, when my dog wags its tail and puts its ears down, it conveys information about its mental state of being happy. The claim that IA makes based on the idea of information is that conceptual content is information. Concepts are capsules of information that are stored in our minds by virtue of mind-world relations.

Chapter 6 fleshes out the idea of information and situates the claims of IA within existing literature on the nature of values that allow values to be atomist. In this it particularly compares IA to Joseph Raz, John Gardner, and Timothy Macklem's views on values to argue that values are facts in the world that we respond to, and facts convey information to our minds. Having demonstrated that the claims of IA are reflected in respected views in moral and legal philosophy, I proceed to state and illustrate the following prescriptions that IA has for reasoning with values:

- (14) In employing values as justifications, it is information about values that play a central role.
- (15) In case of disagreement about the content of values, one ought to focus their attention on instances of the value rather than falling back upon other values as holism prescribes.

A more detailed account of these prescriptions as prescriptions for judicial reasoning are left for chapter 7. In the rest of chapter 6, I turn to anticipating objections on my reliance on IA specifically from irrealist and non-cognitivist views about values as thick concepts. IA holds that if we have concepts of values, then there must be properties in the world they represent,

³⁴ *ibid* 44.

which must be capable of cognisance by our minds, as concepts are mental representations. In contrast, on irrealist/anti-realist views about values, there are no such properties as values in the world, and for non-cognitivists about values, even if there were properties such as values in the world, they are not cognition-apt.³⁵

I defend IA against non-cognitivist and anti-realist challenges emanating from the literature on thick and thin concepts by arguing for the following conclusions.³⁶

- a. To have concepts of values, there must necessarily be properties that the concepts represent. If values are unrelated to properties in the world, then there can be no concepts of values.
- b. IA can accept that having concepts of some properties such as values are belief/attitude mediated. Those beliefs are, however, about other concepts, and not the one at issue.

By the end of chapter 6 I hope to have offered a convincing argument for a non-holist account of concepts and their content that applies to concepts of values. In chapter 7 I proceed to examine how such an account bears upon theoretical questions about reasoning with values by decision-making institutions.

³⁵ Simon Blackburn, 'Rule-Following and Moral Realism', in Stephen Holtzman and Christopher Leich (eds.) *Wittgenstein: To Follow a Rule* (London: Routledge and Kegan Paul, 1981) 163–87.

³⁶ The view I try to accommodate is that of John McDowell's in John McDowell 'Non-Cognitivism and Rule-Following', in Stephen Holtzman and Christopher Leich (eds.) *Wittgenstein: To Follow a Rule* (London: Routledge and KeganPaul)141–62.

1.5 The Informational Atomist Account of reasoning with values and the role of institutions.

In Anglo-American legal and constitutional theory, the question of reasoning with values underlies debates about the proper role of institutions, especially courts and legislatures. Debates on the role of courts in reviewing legislation, and the extent to which courts should theorise foundational constitutional values are of particular significance. For example, the debate between Jeremy Waldron and Ronald Dworkin on judicial review boils down to the question of which institution is suited for moral reasoning.³⁷ The thesis intervenes in these debates to argue for reason-giving accounts of adjudication that prescribe full reason-giving by highlighting the relevance of questions about the content of values to debates about institutions. It does so in Chapter 7 by first laying out the constituents of an Informational Atomist Account of reasoning with values that focusses on the question of content. These are features that any decision-maker employing values as justifications for decisions must incorporate in their reasoning in order to legitimately reason with values. It then defends that account from anticipated objections from prominent accounts of judicial reasoning.

Chapter 7 first clarifies what I mean by ‘justification’. In this I rely on both Joseph Raz’s and John Gardner’s views on the nature of justificatory reasons. I then flesh out the central role of instances in employing values as justifications by drawing upon Wittgenstein’s views on family resemblances to emphasize the importance of *showing* or *demonstrating* or *drawing ones attention to*

³⁷ Jeremy Waldron, ‘Judges as Moral Reasoners’ (2009) 7 I•CON 2.

something, in learning.³⁸ This might appear counter-intuitive to many as usually the later Wittgenstein is read as an argument for holism about meaning. I clarify how Wittgenstein's counsel, just like Quine's, favours IA when thinking of conceptual content. In this I lay emphasis on Wittgenstein's spare remarks on how the meaning of words are *learnt*, to the extent that they travel through to how the content of concepts is determined. Just as in my discussion of Quine's holism in chapter 4, in chapter 7 I argue that Wittgenstein's remarks that bear upon conceptual content lean towards an atomist approach, thus watering down a central role for holism. In those remarks, as in the case of Quine's 'observation sentences', Wittgenstein indicates the importance of instances of a property.

Having laid out what I mean by instances, I proceed to explain the kinds of instances that are material for reasoning with values, and what they would look like when decision-makers, particularly judges, employ them. The three kinds of instances I identify constitute what I call *instance-based reasons*, which any legitimate authority ought to supply when reasoning with values.

In the second part of chapter 7 I turn to objections that might arise to IA as a theory of reasoning with values. The first set of objections I anticipate arise from some versions of 'judicial minimalism' particularly from Cass Sunstein's notion of Incompletely Theorised Agreements which exhort shallow and narrow reasoning.³⁹ Such reasoning contradicts IA's counsel that judges ought to offer instance-based reasons. The second set of objections that I anticipate arise from views, particularly that of Jeremy Waldron's, which extol democratic

³⁸ Ludwig Wittgenstein, *Philosophical Investigations*, GEM Anscombe, PMS Hacker and Joachim Schulte trans. (Oxford: Wiley-Blackwell, 2009) at 66.

³⁹ Sunstein (n 22).

legitimacy as opposed to judicial supremacy in adjudicating moral and political disagreements.

In meeting the objections from minimalism, I first point out that several arguments for judicial minimalism stem from concerns other than content-determination. They rely, for example, on the nature of polycentric disputes, requirement of disciplinary expertise, as well as structuring of decision-making within institutions.⁴⁰ They do not take content determination of values as a focal concern, even though they consider uncertainty about moral concepts and principles an important reason for judicial restraint. Given their distinct concerns, I refrain from entering those debates that are legitimate and significant in their own right. I also recognise that decisions, in fact, are influenced by attitudinal and other reasons. Applying IA to specific institutions considering such concerns is beyond the remit of this thesis, but such concerns must be addressed by any comprehensive theory of adjudication. That is not the ambition of this thesis.

Minimalist views such as Sunstein's that I take up, have an added dimension in that they prescribe that judges should not theorise, and should engage in shallow and narrow reasoning. This militates against the IA account since IA asks for substantive content determination. I defend IA by arguing that Sunstein's understanding of the consequences of theorisation is shallow and his fears about the dire consequences of theorisation are misplaced. Indeed, I argue that IA and other existing reason-giving accounts of adjudication that advocate providing unhindered substantive justifications by judges, can achieve the goals that Sunstein cherishes. I do recognise that underlying

⁴⁰ Jeff King, *Judging Social Rights* (Cambridge University Press, 2012).

Sunstein's account is the concern of meeting the challenge of reasonable pluralism that Rawls raises in *Political Liberalism*. My response does not deny those concerns. Rather, the disagreement lies in how such problems of pluralism should be addressed when disagreeing parties demand reasons based on moral and political values from decision-makers.

In meeting the objection from democratic legitimacy exemplified by Waldron's views, I argue that IA has a non-discriminating nature as a theory of reasoning with values. It does not discriminate between institutions in placing the burden of providing justificatory reasons. This entails that IA would apply to electorally democratic institutions too if they lay a claim to legitimately employing values as justifications for decisions. Arguments from democratic legitimacy are therefore not opposed to IA if they consider reason-giving to be a virtue that democratic decision-making bodies must possess.

1.6 Methodology

The thesis engages with the question of reasoning with values within the tradition of analytic legal philosophy. Philosophical works that it engages with and relies on, squarely fall within the analytic tradition. Given the plural approaches within the tradition, many might question whether it still is an identifiable category.⁴¹ Simultaneously however, it is admittedly the dominant philosophical tradition in the Anglo-American world.⁴² I stake my claim of falling within this tradition on three grounds. First, that thinkers around whose work

⁴¹ Michael Beaney, 'What is Analytic Philosophy' in Michael Beaney (ed.), *The Oxford Handbook of Analytical Philosophy* (OUP 2013) 3-30 at 5.

⁴² *ibid* 4.

the arguments in this thesis take shape are identified with this tradition. Jerry Fodor, Joseph Raz, Ronald Dworkin, WVO Quine, Ludwig Wittgenstein, and Bernard Williams are considered as analytic philosophers. Secondly, the major intellectual traditions that they represent are also identified with the analytic tradition: legal interpretivism, atomism, holism, logical positivism, and liberal moral and political philosophy. Third, I engage with their views in the same analytic method that they adopt. This method is to examine claims by breaking them down to their fundamental constituents in order to analyse their soundness. The claimed virtues of this approach are the rigour and clarity in analysis to narrow clear questions. The thesis aims to attain these virtues of analysis and the method is inspired by 'decompositional analysis' attributed to Bertrand Russell and GE Moore, who are the forbearers of the analytic tradition.⁴³

This thesis also adopts an incremental approach. Though not a methodological point, stating it might clarify how it approaches literature in different disciplines. Literature in law, e.g. McCrudden's view on dignity, that engages with problems with applying values as justifications by courts relies on literature in legal philosophy on the nature of values. Literature in legal philosophy, in turn, makes claims about the special nature of values as special kinds of concepts. This invites an enquiry into what concepts are and whether it is the special nature of some concepts that is germane to debates about reasoning with values. Literature in cognitive science, psychology and the philosophy of mind have explored these questions at greater depth, and hence my engagement with them. Having identified conceptual content as the relevant

⁴³ *ibid* 7-11.

issue in the literature, this thesis engages with literature in cognitive science, philosophy of mind and moral philosophy that bear upon the content of concepts and values. In this sense, the justification for theoretical ascent and interdisciplinarity lies in the content of claims made by the views the thesis engages with.

Chapter 2. Human Dignity in Adjudication: The Limits of Placeholder and Essential Contestability Accounts

2.1 Introduction

Disagreement on what moral values mean, and what decisions they warrant, has been an intractable issue for both lawyers and philosophers. The presence of moral values in constitutions and legal instruments has particularly accentuated the problem for lawyers, and rich debates have regularly ensued either over particular values, or on the role of values in law generally. Recently, debates over human dignity have assumed the centre stage.¹ Views have differed on dignity's meaning and utility, and its suitability for application by courts has been both doubted and defended.² Within contemporary debates, Christopher McCrudden's account of dignity as a placeholder is regarded as a

¹ Christopher McCrudden, 'Human Dignity and the Judicial Interpretation of Human Rights' (2008) 19: 4 E.J.I.L. 655 [McCrudden "Human dignity"] (For a detailed account out of the problematic issues involving dignity in adjudication).

² Neomi Rao, 'On the Use and Abuse of Human Dignity in Constitutional Law' (2008) 14 Colum. J. Eur. L. 201; Paul Carozza, 'Human Dignity and the Judicial Interpretation of Human Rights: A Reply' (2008) 19: 5 E.J.I.L. 931 (arguing against McCrudden's view that the content of dignity is largely culture-relative); Kai Moller, 'On Treating Persons as Ends: The German Aviation Security Act, Human Dignity, and the German Federal Constitutional Court' (2006) Public Law 457 (arguing that the application of the Kantian notion of dignity is problematic in the public sphere); David Feldman, 'Human Dignity as a Legal Value: Part 1' (2000) Public Law 682 (expressing scepticism about using dignity in adjudication, especially as a right); David Feldman, 'Human Dignity as a Legal Value: Part 2' (2000) Public Law 61 (providing an analysis of the many ways in which dignity has been used in English law, yet expressing scepticism about its use); David Kretzmer and Eckart Klein, *The Concept of Human Dignity in Human Rights Discourse* (Hague: Kluwer Law International, 2002) [Kretzmer and Klein, "The Concept of Human Dignity" at, "The Concept of Human Dignity"]; Stephanie Hennette-Vauchez, 'When Ambivalent Principles Prevail: Leads for Explaining Western Legal Orders' *Infatuation with the Human Dignity Principle*, (2007) 10: 2 Legal Ethics 193.

benchmark for research on dignity in law.³ Simultaneously, a general trend has emerged in theoretical accounts seeking to explain problems posed by values generally, this trend also being visible in the foundational ideas underlying McCrudden's account. The trend is conceptual exceptionalism: that values such as dignity are special kinds of concepts that can support several conceptions of themselves, including competing ones. This feature is a part of their very nature and explains why there are persistent disagreements about their meaning and use.

Though the idea of a concept supporting various conceptions has been employed by influential legal, political, and moral philosophers,⁴ its roots are unequivocally traced to W.B. Gallie's notion of essentially contested concepts that provided a detailed treatment of why certain value concepts hosted persistent disagreement.⁵ Though Gallie's account might appear dated for philosophy today, the influence his idea has had negates this assumption for both lawyers and philosophers. His work finds both consistent mention, and detailed treatment, as a source for explaining the contested nature of values.⁶ The relevance of Gallie's account rests on its twin claims of explaining the phenomenon of a single concept having differing conceptions, and in explaining

³ See J Waldron, 'Is Dignity the Foundation of Human Rights' NYU School of Law, Public Law Research Paper No. 12-73 at 1, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2196074 (last visited 10/08/2013); Conor O' Mahony, 'There is No Such Thing As a Right to Dignity', (2012) 10: 2 I•CON 551; Emily Kidd White, 'There is No Such Thing as a Right To Human Dignity: A Reply to Conor O' Mahony' (2012) 10: 2 I•CON 575.

⁴ John Rawls, *A Theory of Justice* (OUP 1999) at 5; Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) at 103.

⁵ WB Gallie, 'Essentially Contested Concepts' (1955) Proceedings of the Aristotelian Society 167 [Gallie, "Essentially Contested Concepts"].

⁶ J Waldron, 'Is Dignity the Foundation of Human Rights' (n 3) at 8; Kenneth Ehrenberg, 'Law is not (Best Considered) an Essentially Contested Concept' (2011) 7: 2 IJLC 232; McCrudden, "Human dignity" at 679-680; Folke Tersman, *Moral Disagreement* (New York: Cambridge University Press 2006) at 113; Ronald Dworkin, 'Thirty Years On' (2002) 115: 6 Harvard L.R. 1655 at 1686; Susan Hurley, *Natural Reasons* (New York: OUP, 1999) Ch. 3; Ronald Dworkin, *Taking Rights Seriously*, (n 4).

why there exists genuine persistent disagreement about certain concepts. A hitherto unexamined implication of his account has been its gravitating force in shifting the explanations of disagreement over value concepts to some special characteristic rooted in the concepts themselves. McCrudden's account thus takes concepts such as dignity to have a place-holding nature, while Ronald Dworkin takes value concepts to be interpretive concepts that have a particular nature.⁷

This chapter begins to rethink this strategy of rooting explanations of disagreement about value concepts such as dignity by adopting conceptual exceptionalism. In this, I adopt an incremental approach, starting with the literature in law by critically evaluating Christopher McCrudden's account at length, and establishing its connection to the literature in philosophy. I then assess the soundness of Gallie's account given its paradigmatic role in sustaining accounts such as the place-holding one. I subsequently examine Dworkin's interpretive concepts in Chapter 3.

In evaluating McCrudden's account, I argue that it is illuminating in terms of the role of dignity in the UDHR but fails in successfully transposing that explanation to the role of dignity in adjudication. I then demonstrate that his claim about dignity's essential contestability is unsupported by Gallie's idea of Essentially Contested Concepts. Though McCrudden only makes a passing reference to Gallie, the idea of dignity as a placeholder is sustained by accepting a concept-conception distinction sustained by the notion of essential contestability. Thus, a comparison of both accounts.

⁷ Ronald Dworkin, *Justice for Hedgehogs* (Cambridge MA: Belknap Press, 2011) at 102.

A critical examination of Gallie's account follows, where I argue that it is unable to identify any special property of value concepts that makes them essentially contested. Rather his account is an external-descriptive one that reports cases where disagreement already exists. The chapter is thus critical in nature, and also seeks to clear the grounds to advocate scepticism about the strategy of locating some special property of value concepts that explains disagreements about them and the problems they pose for adjudication. The aim is to demonstrate that at least a place-holding nature, and essential contestability, are not identifiable as some special characteristic of values like dignity on the arguments of their proponents.

It might be thought that research on the problems posed by value concepts like dignity would benefit more from novel proposals for how dignity should be understood, rather than from critical and ground clearing exercises.⁸ The contribution of novel proposals is undeniable. However, a critical evaluation of dominant ideas is equally relevant given that there is little challenge to the conceptual foundations of Gallie's and McCrudden's proposals for understanding issues posed by values like dignity generally, and those they pose for adjudication in particular.⁹

⁸Recent philosophical thinking about dignity has developed many such proposals. See J Waldron, 'Is Dignity the Foundation of Human Rights', (n 2); J Waldron and Meir Dan-Cohen, *Dignity, Rank, and Rights* (New York: OUP, 2012); M Rosen, *Dignity: Its History and Meaning* (Cambridge MA: Harvard University Press, 2012); J Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (2010) 41: 4 *Metaphilosophy* 464. Stephen Riley, *Human Dignity in Law: Legal and Philosophical Investigations* (Routledge 2018).

⁹ Tarunabh Khaitan has criticized McCrudden's account on the ground that dignity's function in human rights adjudication is best understood as an expressive norm, and not as a placeholder. His account however does not evaluate the conceptual foundations of McCrudden's account. Rather his claim is, that only an expressive conception of dignity allows it to play any meaningful role in law, distinct from the role of other values, such as autonomy, or equality. See Tarunabh Khaitan, 'Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea' (2012) 32: 1 *OJLS* 1.

2.2 The Placeholder Argument

Scepticism about the role and utility of dignity is widespread in law, philosophy, and bioethics.¹⁰ In law, as in other disciplines, such scepticism is rooted in the indeterminacy of the concept of dignity. Defenders of dignity have adopted varied strategies to meet the indeterminacy-based challenges posed by dignity sceptics. Their defence includes pointing out the content of the concept¹¹, providing evidence of how it is being successfully used by courts¹², pointing out its expressive function,¹³ separating the sensible from the rhetorical conceptions of dignity,¹⁴ and prescribing a desirable manner of applying it¹⁵. The sceptical challenge however has been reinvigorated by McCrudden's persuasive version, which explains dignity's role in terms of a placeholder, and locates this place-holding nature in dignity's nature as an essentially contested concept. This claim about dignity's conceptual nature seeks to explain why

¹⁰ Steven Pinker, *The Stupidity of Dignity*, *The New Republic*, May 28, 2008, available at http://www.tnr.com/story_print.html?id=d8731cf4-e87b-4d88-b7e7-f5059cd0bfbd; M Bagaric and J Allan, 'The Vacuous Concept of Dignity' (2006) 5: 2 J Human Rights 257; Ruth Macklin, 'Dignity Is A Useless Concept: It Means No More Than Respect For Persons Or Their Autonomy' (2003) 327: 7429 British Medical Journal 1419; R Brownsword, 'Bioethics Today, Bioethics Tomorrow: Stem Cell Research and the "Dignitarian Alliance"' (2003) 17: 1 Notre Dame J L, Ethics & Public Policy 15; R Gibbins, 'How in the World can You Contest Equal Human Dignity?: A Response to Professor Errol Mendes' "Taking Equality into the 21st Century: Establishing the Concept of Equal Human Dignity"' (2000–01) 12 National J Constitutional L 25.

¹¹ G Moon and R Allen, 'Dignity Discourse in Discrimination Law: A Better Route to Equality?' (2006) 6 EHRLR 610; J Waldron, *Dignity, Rank, and Rights*, (n 8), Lecture 1.

¹² P Carozza, "My Friend is a Stranger": The Death Penalty and the Global *Ius Commune* of Human Rights' (2002) 81 Texas Law Review 1031; G Moon (n 11); Eckart Klein, 'Human Dignity in German Law', in Kretzmer and Klein, "The Concept of Human Dignity" at 145; Arthur Chaskalson, 'Human Dignity as a Constitutional Value', in Kretzmer and Klein, "The Concept of Human Dignity" at 133.

¹³ Tarunabh Khaitan, 'Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea' (2012) 32 OJLS 1.

¹⁴ Conor O' Mahony, (n 3) (arguing that dignity makes more sense as a foundational principle of constitutional law rather than as a right in itself). For a reply see Emily Kidd White, (n 3). Mahony has a rejoinder to White in the same edition of the journal.

¹⁵ Catherine Dupre, 'Unlocking Human Dignity: Towards a Theory for the 21st Century' (2009) 2 EHRLR 190; Susan Baer, 'Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism' (2009) 59: 4 UTORLJ 417.

judges arrive at diverging conclusions about dignity's meaning and requirements. In other words, it explains the possibility of the *concept* of dignity supporting differing *conceptions* of it. In what follows, I lay out the central features of McCrudden's account.

2.2.1 Historical background

Notwithstanding the controversies regarding the meaning of dignity today, there is surprising agreement on facts about the etymology and historical use of the concept.¹⁶ Disagreements on how to make sense of these facts are however abundant, e.g., on whether there is any continuity or not between them.¹⁷ In setting up the indeterminacy challenge, McCrudden too starts with the uncontested account of human dignity in the history of ideas.¹⁸ For the present purposes a summary of this history should suffice to locate where McCrudden's account is coming from. Panaetius of Rhodes and Cicero coined the Latin term *dignitas hominis* or 'dignity of man' in Stoic anthropology. The term denoted status attached to an office, rank, or personality that evoked respect.¹⁹ Cicero

¹⁶ For a mapping of this evolution see Hubert Cancik, 'Dignity of Man and *Persona* in Stoic Anthropology: Some Remarks on Cicero, *De Officiis* I', at 105-107, in Kretzmer and Klein, "The Concept of Human Dignity". Most scholars who have referred to the history of the idea do not disagree with this account. See also, Oliver Sensen, 'Human Dignity in Historical Perspective: The Contemporary and traditional Paradigms' (2011) 10: 1 *European Journal of Political Theory* 71-91. For a recent and more detailed history of dignity that affirms most of this account, see Michael Rosen (n 8), chapters 1 and 2.

¹⁷ James Q. Whitman, 'On Nazi "Honour" and the New European "Dignity"' in Christian Joerges & Navraj Singh Ghaleigh (eds.), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism Over Europe* (Oxford: Hart Publishing, 2003) at 243 (arguing that there is such a continuity); For a contrasting view see Gerald L. Neuman, 'On Fascist Honour and Human Dignity: A Sceptical Response' in Christian Joerges & Navraj Singh Ghaleigh (eds.), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism Over Europe* (Oxford: Hart Publishing, 2003) 267. Stephen Riley, 'Human Dignity: Comparative and Conceptual Debates' (2010) 6 *IJLC* 117 at 119-120 (For a discussion of the debate between James Whitman, Gerald Neuman and Roger Cotterrell on whether there is continuity between 'aristocratic dignity' and 'contemporary dignity' in nineteenth and twentieth century German Law).

¹⁸ McCrudden "Human dignity" at 656-664.

¹⁹ Hubert Cancik, (n 16) at 19.

defined the term dignity as ‘...Someone’s virtuous authority which makes him worthy to be honoured with regard and respect’.²⁰ Use of the term was extended to the Roman people, the government, and the state.²¹ Cicero also referred to the term ‘*human* dignity’ which he claimed resided in human nature by virtue of the rational capacity of human beings.²² This capacity (*ratio*, reason) differentiated humans from animals. Such a notion of human dignity based on reason was later developed by Gianozza Manetti as ‘man in the image of God’, which brought into focus the potential of man to strive for excellence in all fields.²³ The view was further developed by Humanists like Pico della Mirandola, Lorenzo Valla, Marsilio Ficino, and Ludovico Vives, that placed man at the centre of the world,²⁴ celebrating ‘The penetrating force and swiftness of the human mind and its rule over the world’.²⁵ This trend was subsequently developed by Samuel Pufendorf’s anthropology and Immanuel Kant’s philosophy, both paying their debts to Cicero.²⁶

This much is common ground. McCrudden adds to it in two significant ways, charting out the major factors influencing dignity’s incorporation into the UDHR. First, he points out that the autonomy-based Kantian conception of dignity became a rallying cry for social reform movements in Europe. This phenomenon had unexpected spiralling effects. Increasing enthusiasm with dignity-as-autonomy attracted a fair share of criticism from philosophers such as Schopenhauer (dignity is contentless), Nietzsche (dignity as an outpouring

²⁰ *ibid* 23.

²¹ *ibid*.

²² *ibid* 24.

²³ McCrudden “Human Dignity” at 658.

²⁴ Yehoshua Arieli, ‘On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of the Dignity of Man and His Rights’ in Kretzmer and Klein, “The Concept of Human Dignity”, 1 at 10.

²⁵ Hubert Cancik (n 16) 30.

²⁶ *ibid* 30-36.

of sentimental egalitarianism), and particularly Marx (dignity as a refuge from history in morality).²⁷ These criticisms, associated with nihilism, perspectivism, and communism, prompted the Catholic Church to adopt the concept as a central feature of its social philosophy to counter the three anti-church trends.²⁸ It reformulated the concept as a communitarian one, stressing on the need for solidarity between different interests in society with the idea of man in the image of God remaining at its centre.²⁹ It was this version of dignity that found its way into the UDHR through the influence of the French-Catholic philosopher, Jacques Maritain. The influence of dignity thereafter has been significant in an array of social and political movements, in turn reviving the interest of philosophers and political theorists.³⁰

McCrudden's second contribution is his elaborate survey of the use of dignity by domestic constitutions, and human rights texts- both regional and international.³¹ The survey highlights the widespread use of dignity across jurisdictions, and identifies the significantly different ways in which it has been put to use. This, according to McCrudden, indicates a 'Pluralistic and culturally relative approach to the meaning of dignity'.³² McCrudden concludes that different jurisdictions use dignity to 'Express a comprehensive moral viewpoint', which however, differs from region to region. He then poses the first of the two questions that are the legs on which his scepticism stands: Is there a minimum core of human dignity that cuts across the different strands of philosophical thinking that inform its use in the texts? McCrudden answers this question in

²⁷ McCrudden "Human dignity" at 661.

²⁸ McCrudden "Human dignity" at 662.

²⁹ *ibid* 663.

³⁰ *ibid* 664.

³¹ *ibid* 664-674.

³² *ibid* 674.

the affirmative but only to argue that this minimum core is no more than an empty shell. He reaches this conclusion through two versions of the 'placeholder argument', which leads him to conclude that dignity is an essentially contested concept. A different version of the argument is employed later to argue that dignity plays an important role in human rights adjudication.

2.2.2 The Placeholder Argument I: human dignity's minimum core

This argument is a historical one. It establishes that dignity was introduced to the UDHR to act as a placeholder, not in the sense that it holds no semantic content, but in that it could carry an enormous amount of different and varying content. The argument is rooted in historical reasons for which dignity was introduced to the UDHR. At the time of the UDHR's drafting, the drafters found themselves faced with an impasse. Though there was considerable agreement on the practices that should be prohibited as violations of human rights, there was serious disagreement on questions about the foundations of human rights. To overcome this, a strategy suggested by Jacques Maritain was adopted: that parties should concentrate on practices that they agreed should be prohibited, and not on controversial matters such as a theoretical basis for human rights. Dignity played an important role in this strategy:

(It) was included...where the absence of a theory of human rights would have been embarrassing. Its utility was to enable those participating in the debate to insert their own theory. Everyone could agree that human dignity was central, but not why or how.... In other words human dignity is used as a linguistic-symbol that

can represent different outlooks, thereby justifying a concrete political agreement on a seemingly shared ground.³³

McCrudden explains the viability of this use on the basis of certain family resemblances, in the Wittgensteinian sense, between the differing ways in which dignity was historically and philosophically viewed. Due to these resemblances, McCrudden states that arguably, dignity has a minimum core agreed to by everyone. This core consists of three elements:³⁴

- a. The ontological claim: Human beings have an intrinsic worth
- b. The relational claim: Others should recognise the intrinsic worth of human beings and thus, some treatments by others are required, while some are prohibited by it.
- c. The limited-state claim: Human rights texts have added to the relational claim by recognizing that intrinsic worth requires that the state exists for the individual and not vice-versa.

Dignity's content does not offer more than this minimum core. McCrudden illustrates this through an analysis of judicial decisions across jurisdictions. He convincingly concludes that courts have used dignity to arrive at diverging conclusions about human rights. These conclusions reaffirm the existence of a pluralistic and culture-relative approach to dignity despite its minimum core. The minimum core of dignity is unable to guide courts in

³³ *ibid* 678.

³⁴ *ibid* 679.

providing any universal content to dignity. Rather, it seems to have generated multiple conceptions of what dignity requires. McCrudden conceptualizes these features of dignity in terms of essential contestability being internal to dignity's nature. He relies on WB Gallie's framework of essentially contested concepts to conclude that the concept of dignity consists of a minimum core that admits many different conceptions, these conceptions often being diverging and conflicting.³⁵ In short, dignity is an essentially contested concept.

What does this conclusion mean for dignity? For sure, McCrudden's analysis shows the content of dignity to be indeterminate as there is no consensus on how its core is to be best understood.³⁶ This leads us to the other leg of dignity-scepticism: Does its indeterminacy mean that dignity has no role to play in adjudication? Certainly, if there is grave indeterminacy about its meaning, then there seems to be a case for questioning its application in adjudication. McCrudden, however, does not take a position on whether the application of dignity in adjudication is legitimate. Instead he argues that dignity plays an important role in adjudication (it is unclear whether he thinks it *should* play this role). This is an institutional role, which constitutes the second version of the placeholder argument.

2.2.3 The Place Holder Argument II: human dignity's institutional role

³⁵ *ibid* 679-680.

³⁶ *ibid* 679.

McCrudden's analysis of judicial decisions demonstrates that the concept of dignity does not successfully act as a basis for a catalogue of rights. Neither is it a determinate basis for judicial decisions in any other way. Rather, in various ways, its use has led to incoherent, culture-relative results. A few illustrations of the incoherent understanding of dignity's minimum core are: differences in the weight and status conferred to dignity,³⁷ the articulation of both individual and communitarian conceptions of dignity,³⁸ using dignity sometimes as rights-constraining and at others as rights-supporting,³⁹ disputes on the point of view from which dignity has to be assessed (the victims or from an objective point of view),⁴⁰ disputes on who should be judging dignity claims,⁴¹ and who or what deserves the protection of dignity (living humans, dead humans, legal entities, animals?).⁴² Incoherent and opposing decisions on these issues and more establish that dignity cannot guide judges on what is required in particular cases. Despite these difficulties, McCrudden argues that dignity has an important 'legal-institutional' role to play in adjudication:

'(T)he judicial use of dignity...should not be seen only from the perspective of universalistic naturalism...or pluralistic cultural relativism. Rather we should see the role that dignity plays in adjudication at least partly from an institutional perspective. If this analysis is correct...(then) the use of dignity in human rights adjudication may, therefore, be rather different from its use in other contexts and social systems.'⁴³

This legal-institutional role is three pronged:

³⁷ *ibid* 698.

³⁸ *ibid* 699.

³⁹ *ibid* 702.

⁴⁰ *ibid* 706.

⁴¹ *ibid* 707.

⁴² *ibid* 707-710.

⁴³ *ibid* 713 (citations omitted).

(a) It provides a language for judges to mediate conflicts between incommensurable rights and values.⁴⁴ It provides a metric to mediate between them.

(b) It provides a language for judges to mediate between the poles of universality and cultural relativism in a global context. For instance, it is used as providing reasons for domesticating international human rights standards and contextualizing such standards to a particular culture.

(c) It justifies the creation of new, and extension of, existing rights.

What enables dignity to play this role? Again, the answer lies in its placeholder nature. It allows each jurisdiction to use dignity as a basis to develop its own practice of human rights, without disagreeing on the foundational questions. McCrudden suggests that this use of dignity, is similar to the one played by it in the drafting of the UDHR.⁴⁵ He however does not take sides on the desirability of this use or its implications for the legitimacy of judicial review. His limited aim is to point out that the placeholder feature has created a unique role for dignity both in adjudication and in the UDHR. In this sense McCrudden does not qualify to be a dignity-sceptic given his professed stoicism about

⁴⁴ This includes mediating between incommensurable rights, incommensurable values, and between incommensurable rights and values.

⁴⁵ McCrudden (n1) 720.

legitimacy issues.⁴⁶ However, he can surely be one by implication if the following analysis is correct.

2.3 Incompatibility of The Placeholder Argument with the reasoning feature of adjudication

McCrudden's analogy between the use of dignity in adjudication and in the UDHR is difficult to establish. Dignity plays two significantly different roles in each case. In the UDHR, dignity allowed parties to put foundational disputes aside and agree on specific practices. It stood as a symbol of agreement on issues that would generate deep disagreements if required to be determined. Lack of disagreement on dignity's meaning allowed it to play a cloaking function that did not raise serious questions about the legitimacy of the UDHR. Not because dignity's meaning was known, but because its vagueness generated agreement by not presenting anything concrete to disagree on. Practices that parties agreed on were incorporated, and wherever theoretical reasons were required, dignity was inserted. Dignity was not employed to generate agreement on issues involving serious disagreement. Neither was it a basis for normative, binding directives in the face of disagreement. There was thus no pressure to spell out how the practices agreed upon were related to and required by dignity.⁴⁷ In the context of adjudication however, this is what is precisely required when dignity is employed. It is used as a reason for arriving

⁴⁶ *ibid* 722: 'My only purpose, I repeat, is to identify what seems to me to explain the increasing popularity of the concept of dignity among judges and advocates'.

⁴⁷ See Johannes Morsink, *The Universal Declaration of Human Rights* (University of Pennsylvania Press 200) Ch 8: for how the drafters approach to the overall structure of the Preamble was a pragmatic one.

at specific determinations of people's rights and duties in the face of disagreement about them. It is impossible in this scenario to separate the theoretical questions about human rights, keep them aside for the time being, and decide on the specific questions before the court.⁴⁸ Answers to the theoretical questions are the basis for decisions on specific issues before a court and it thus becomes important to establish a connection between them. This demands an explanation of the concepts that a court employs to answer the theoretical questions involved. An explanation in terms of reasons, which explain why courts take one view of the concepts involved and not another. Courts need to establish a connection between what they take the concepts to be, the specific rights that are being debated, and what is required by the application of those concepts.⁴⁹ Here one might object that courts often do not fully explain the reasons for a decision, and in such cases the placeholder argument explains what courts actually *do*. As I explain later in this section, such a factual truth restricts the placeholder argument to only pathological cases of decision-making and compels it to necessarily claim that judges employ dignity as a smokescreen; a position that McCrudden is unwilling to subscribe to. The placeholder argument, and the institutional role it reserves for dignity, would be accurate descriptions of judicial decisions on dignity only if most such decisions are pathological. I say pathological, because adjudication

⁴⁸ For a similar view critical of Sunstein see R Dworkin, 'Looking for Cass Sunstein', *The New York Review of Books*, 30 April 2009, available at <http://www.nybooks.com/articles/archives/2009/apr/30/looking-for-cass-sunstein/>? (last accessed 05/08/2013).

⁴⁹ Klaus Dicke argues that even the founding function of dignity under the UDHR depends on relations between dignity and single human rights. Though Dicke's arguments are towards demonstrating a universal, foundational function of human dignity, he argues that dignity can play its legitimizing function in legal reasoning only if a relationship between dignity and rights is applied. See Klaus Dicke, 'The Founding Function of Human Dignity in the Universal Declaration of Human Rights', in Kretzmer and Klein, "The Concept of Human Dignity", 111 at 118-119.

is understood to be a reason-giving exercise. At the heart of a reason-giving view of adjudication lies a commitment to the justification of authoritative decisions by reasons. As opposed to being descriptive, if someone were to prescribe the institutional role for dignity in adjudication based on the placeholder argument, it will require pushing reason-giving to the fringes of a theory of adjudication.

Most dominant theories of adjudication, however, take reason-giving to be central to adjudication. Inspired largely by Lon Fuller's account of adjudication⁵⁰, and Frederick Schauer's analysis of 'Giving Reasons'⁵¹, the role of reason-giving has been extensively explored in various ways by scholars examining the justification of judicial decisions and the legitimacy of adjudication.⁵² In particular, debates on judicial candour, judicial sincerity, accountability, and deference assign a central role to reason-giving in explaining the nature of adjudication.⁵³ On a slightly different note, Mattias Kumm has added to the ranks of reason-giving by introducing the idea of 'Socratic Contestation', and employing it to defend the legitimacy of judicial review.⁵⁴ What I argue in the next section supports a reason-giving view of adjudication. I argue that if reason-giving is central to adjudication, then any

⁵⁰ Lon Fuller, 'Forms and Limits of Adjudication' (1978) 92: 2 Harv. L. Rev. 353.

⁵¹ Frederick Schauer, 'Giving Reasons' (1995) 47: 4 Stan. L. Rev. 633.

⁵² See, AD Perry & F. Ahmed, 'Expertise, Deference and Giving Reasons' (2012) Public Law 221.

⁵³ G. Edward White, 'The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change' (1973) 59: 2 Va. L. Rev. 279; Melvin Aron Eisenberg, 'Participation Responsiveness, And The Consultative Process: An Essay on Lon Fuller' (1978) 92: 2 Harv. L. Rev. 410; Fredrick Schauer (n 51); Glen Staszewski, 'Reason-Giving and Accountability' (2008) 93: 4 Minn. L. Rev 1253; Micah Schwartzman, 'Judicial Sincerity' (2008) 94: 4 Va. L. Rev. 987; Vlad Perju, 'Reason and Authority in the European Court of Justice' (2008) 49: 2 Va. J. Int'l L. 307; Mathilde Cohen, 'Sincerity and Reason-Giving: When May Decision Makers Lie' (2009) 59: 4 DePaul L. Rev. 1091.

⁵⁴ Mattias Kumm, 'Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review' (2007) 1: 2 EJLS 1; Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4: 2 *Law and Ethics of Human Rights* 142.

account of how certain concepts figure in adjudication requires focusing on reasons that courts give for their decisions and not merely on their conclusions.

2.3.1 The reason-giving feature distinguishes adjudication from constitution-making

Legal theory has witnessed several avatars of the reason-giving feature of adjudication, many of which answer separate questions surrounding the role of reasons within adjudication and the nature of adjudication itself.⁵⁵ Lon Fuller, for example, spoke of the rational character of adjudication as a distinctive form of social ordering, along with contract and voting.⁵⁶ The distinctiveness of adjudication lay in litigants participating in the process by providing proofs and reasoned arguments. The decisions of adjudicators therefore, had to engage with reasoned arguments, in turn providing a reasoned basis for their decisions. Though Fuller acknowledged that certain existing forms of dispute resolution did not provide reasoned decisions,⁵⁷ in general, he thought of adjudication to be a “device which gives...expression to the influence of reasoned argument in human affairs.”⁵⁸ Adjudication thus assumed “a burden of rationality not borne out by any other form of social ordering”.⁵⁹ Fuller explained the rationality underlying adjudication in terms of intellectual activity involved in tracing out the

⁵⁵ For a comprehensive round-up of the various view points and issues in the debate see, William Lucy, ‘Adjudication’, in Jules Coleman and Scott Shapiro, ed, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) at 206. For a detailed treatment see William Lucy, ‘Adjudication for Pluralists’ (1996) 16: 3 OJLS 369.

⁵⁶ Fuller, ‘Forms and Limits of Adjudication’ (n 50) at 363.

⁵⁷ *ibid* 365. For my purposes in this chapter, the spotlight is on appellate adjudication, particularly constitutional adjudication, where the considerations for non-reasoned decisions identified by Fuller do not apply.

⁵⁸ *ibid* 366.

⁵⁹ *ibid*.

implication of shared purposes.⁶⁰ This was both ingenious and controversial as this account of rational discourse, according to Fuller, was in addition to the two Humean ones of empirical fact and logical deduction.⁶¹ Notwithstanding the controversy surrounding Fuller's account of rationality, it is his articulation of adjudication's distinctiveness in terms of its reason-giving feature that is appealing, and would prove to be a hurdle for the placeholder argument. Fuller's account identifies reasons that parties bring to the table, and those that courts provide for their decisions, as one of adjudication's distinctive features.

A similar focus on reasons, without Fuller's claim about forms of social ordering, is also the concern of what William Lucy calls the orthodox view of adjudication.⁶² The major proponents of this view are Neil McCormick, Joseph Raz, and Ronald Dworkin. These towering figures of analytic jurisprudence have provided different accounts of how judges decide, and should decide, especially when faced with hard cases. Their territory is to be carefully tread as there are multiple tasks each theorist has at hand, including, explaining the phenomena of judicial law making, explaining the forms of reasoning employed by courts, examining the possibility of justifying judicial decisions in the face of value pluralism, and evaluating the legitimacy of authoritative judicial decisions. Here I am concerned with the first two, both related to how courts do and should arrive at decisions, and thus having a direct bearing on the placeholder argument.

⁶⁰ *ibid* 381.

⁶¹ For criticism of Fuller's claim see Thomas Nagel, 'On the Fusion of Fact and Value: A Reply to Professor Fuller' (1958) 77: 3 *Natural Law Forum* 77.

⁶² See William Lucy, *Understanding and Explaining Adjudication* (OUP 1999) at 1.

McCormick's, Dworkin's and Raz's accounts differ in significant ways about the kind of reasons, and the role that they play, in judicial reasoning.⁶³ None of them however hold a view that judges do not, or do not need to justify their decisions. Even in hard cases, which most cases discussed by McCrudden appear to be, judges go to great lengths in explaining the basis for their decisions.⁶⁴ For McCormick and Dworkin, a large part of such reasons are constrained by existing principles and rules and thus they argue that judges do not have strong discretion.⁶⁵ For McCormick, when 'rules run out', judges engage in 'second-order justification' which involves 'justifying' choices between rival possible 'rulings'.⁶⁶ In such justification, judges employ consequentialist arguments, arguments of coherence and those of consistency. Consequentialist arguments are explained in terms of 'what makes sense in the world', while arguments of coherence and consistency are explained in terms of what makes sense in the legal system as an existing body of knowledge.⁶⁷ Notice that in all three kinds of arguments however, a judge must spell out the reasons that justify a ruling on the basis of what makes sense in the world, or what makes sense in the legal system. If judges therefore had to choose to use dignity as a justification for their decisions, they must provide an account of how it makes sense in either one of these ways. Why McCormick's account is an anti-thesis to Sunstein's even on second-order justification is that the choice between rival rulings are to be made based on 'testing' it against what is known

⁶³ *ibid* 5-6.

⁶⁴ I adopt Dworkin's definition of hard cases. See Lucy (n 62) 5, and Ronald Dworkin *Taking Rights Seriously* (n 4) 83.

⁶⁵ Ronald Dworkin, *Taking Rights Seriously* (n 4), Ch. 4; Ronald Dworkin, *Laws Empire* (Oxford: Hart Publishing, 1998) Ch. 7; Neil McCormick *Legal Reasoning and Legal Theory* (OUP 1978) Ch. 5.

⁶⁶ McCormick, *Legal Reasoning and Legal Theory* (n 65) at 100-101: 'A ruling is a universal and generic justification of a decision that judges develop to decide hard cases.'

⁶⁷ *ibid*.

in the world, or what is known to the legal system. Even about ‘consequentialist’ reasons for choosing a ruling, McCormick shows that judges must compare how one ruling would compare to other hypothetical rulings. The burden of justification even on consequentialist second-order reasons is therefore high.

Likewise, in Dworkin’s account, justification of decisions in hard cases takes place both by virtue of the ingredients from institutional history, and an exercise in morality.⁶⁸ Judges for him must construct a political theory that justifies the decisions they make, and it is important that they give theoretical accounts of what they take the right decision to be.⁶⁹ On this view, if judges employed dignity, then they must discharge the burden of articulating the value of dignity, satisfy the dimension of fit, explain dignity in its best light, and articulate how in all these senses their decision is the right one. All of these are to be in different measures depending on the case at hand and the existing state of knowledge. Such a conception of the judicial role demands theoretical reasons to avoid arbitrariness and further the values of legality and integrity. Reason-giving is thus a given in Dworkin’s account of adjudication. In Raz’s account of adjudication centrality is accorded to the *ratio* of a decision, and the *justification* for a rule that a court arrives at, both in its law-applying, and law-making functions.⁷⁰ In explaining the piecemeal nature of common law adjudication Raz explains how in both regulated and unregulated cases, court decisions need to justify a rule, whether that be in the form of a precedent, or a

⁶⁸ Dworkin, *Taking Rights Seriously*, (n 4) at 126-127; Dworkin, *Law’s Empire*, 255-256.

⁶⁹ Dworkin, *Taking Rights Seriously*, Ch.4; *Law’s Empire*, (n 65) Ch. 3 and 7; Ronald Dworkin, *Justice in Robes*, (Cambridge MA: Harvard University Press, 2006) Ch. 6. For a reiteration of his views *vis-à-vis* judicial minimalism, see R Dworkin, ‘Looking for Cass Sunstein’, *The New York Review of Books*, 30 April 2009, available at <http://www.nybooks.com/articles/archives/2009/apr/30/looking-for-cass-sunstein/>? (last accessed 05/08/2016).

⁷⁰ Joseph Raz, ‘Law and Value in Adjudication’ in *The Authority of Law* (Oxford: Clarendon Press, 1979) 180 at 186-188, and 203.

modified rule that the court creates in order to fill gaps in the law. Raz consistently maintains the need for justification when he points out that reasoning by analogy is widespread in courts, and that such reasoning is ‘...[A] form of *justification* of new rules laid down by courts in the exercise of their law-making discretion’.⁷¹

Reason-giving thus appears to be central to adjudication and unlike drafting processes such as constitution-making or the UDHR drafting process, it is not possible to postpone the need for pointed decisions. The crucial difference while employing concepts like dignity lies in the former necessarily requiring a statement of what dignity means and requires, albeit with qualifications, while the latter affording to do without it. The placeholder argument ignores this distinction while drawing the analogy between dignity’s role in the UDHR and in adjudication. Accounts of adjudication that discount the reason-giving feature of adjudication are also careful in maintaining the distinction between adjudication and drafting of legal instruments like the UDHR or constitutions. Take, for example, two of Cass Sunstein’s views on adjudication. First, Sunstein claims that a large part of law-making is explained by the phenomenon of ‘incompletely theorized agreements’.⁷² Secondly, he prescribes that judges should consciously refrain from theorizing, and decide one case at a time, to preserve the benefits of incompletely theorized agreements. Such agreements are incomplete in the following sense: there is agreement on a principle, but what it entails in individual cases is unspecified.⁷³ Sunstein argues that incompletely theorized agreements of this sort (he speaks

⁷¹ *ibid* 205 (emphasis supplied).

⁷² Cass Sunstein, *Legal Reasoning and Political Conflict* (New York: OUP, 1998) Ch. 2.

⁷³ *ibid* 35.

of another kind later) provide numerous advantages to lawyers and judges in preserving a plural society. Notably, they allow people to agree that they are embarking on shared projects without having to spell out their exact requirements. It also allows them to show a high degree of mutual respect by announcing that their society shall not take sides on fundamental issues unless it is absolutely necessary. Though this aspect of incompletely theorized agreements might have a place for the placeholder argument in the context of the UDHR, it does not extend much support to the placeholder argument in adjudication. It might have a place because dignity as a placeholder in the UDHR allowed agreement on particular rights leaving theoretical questions and questions on other rights open for the future. However, unlike in the placeholder argument, Sunstein offers separate accounts for constitution making (akin to drafting of the UDHR), and adjudication, by introducing the role of mid-level/intermediate agreements.⁷⁴ Unlike in constitution making, where the benefits of incompletely theorized agreements can be explained in its own terms, for adjudication, he presents a more complex picture comprising the second sort of incompletely theorized agreements. Here the scene is set by incompletely theorized agreements on particular outcomes accompanied by 'Agreement on... low level principles that *account for them*'.⁷⁵ Thus, Sunstein works within a partial reason-giving account of adjudication where justification is mandatory, even though in the form of low, intermediate, or sometimes even theorised reasons.⁷⁶ Sunstein's view is therefore not a denial of the fact that judges must provide an explanation of the concepts that they use. Rather he

⁷⁴ *ibid* 36-37.

⁷⁵ *ibid* 37 (emphasis added).

⁷⁶ *ibid* 48-58.

argues that judges do not and should not theorise fully. Undoubtedly, Sunstein's overall account of legal reasoning and adjudication is in opposition to reason-giving accounts, which make reason-giving, including theorization, central to adjudication. Constraints of space restrict me from evaluating this position here. It is a reason-giving account that I subscribe to, and Ronald Dworkin's reply to Sunstein provides a sample of how some reason-giving accounts may respond to Sunstein's arguments.⁷⁷

McCrudden states that Sunstein's views do not explain the role of human dignity in adjudication.⁷⁸ He argues that the evidence from judicial decisions suggest that there is no agreement even on what results human dignity requires, and thus incompletely theorized agreements of the second sort do not exist in cases involving dignity. This might be true. However, my point here is not to adjudicate on whether judicial decisions on dignity evidence incompletely theorized agreements. Rather the argument is about whether incompletely theorized agreements of the first sort, which is similar to the placeholder argument, can be transplanted to explain the role of dignity in adjudication. The point I want to drive home is that Sunstein exercises some restraint in transplanting the role of incompletely theorized agreements in constitution making, to adjudication. He opts for separate explanations to account for adjudication's reason-giving feature, even though only in a limited and implied manner. McCrudden however executes this transplantation without explaining how it relates to the reason-giving feature of adjudication. The reason-giving feature would resist any attempt at employing concepts without

⁷⁷ Dworkin, 'Looking for Cass Sunstein' (n 69).

⁷⁸ McCrudden "Human dignity" at 697.

stating their meaning, and their relation to the issues at hand. Especially so, when the concepts act as ultimate justificatory reasons in a decision. Only a theory of adjudication holding that adjudication can be largely arbitrary can envisage a place-holding role for concepts in the sense that McCrudden does. In such a theory, judges could employ placeholders without establishing a reason-based connection between the concepts employed and the conclusions arrived at. This is not to say that judges do not employ placeholders at all. They might very well do. But such judging would be frowned upon on any reason-giving account of adjudication. This might be reason enough to be cautious in employing the placeholder argument as a ready explanation for a large body of decisions.

Unlike in the case of the UDHR and other constitution-drafting processes, the relationship that a court establishes between dignity and the specific rights in issue comes under sharp scrutiny, as court decisions act as a source of authoritative, binding, directives demanding particular actions. Using dignity as a placeholder in such a context would require clever, yet demanding camouflaging of dignity's lack of meaning by apparent reasons about what it means. McCrudden's conclusion that dignity is a placeholder allowing judges to make substantive human rights decisions, then amounts to saying that judges are successful in using dignity as a cover for their own substantive judgments.

McCrudden might take this to be putting words into his mouth, but his analysis might be controversial and attractive precisely because he indicates the possibility of judges employing dignity as a smokescreen, although he does

not commit himself to that view.⁷⁹ This option of being non-committal is not open for his account if we were to accept that dignity is a placeholder that plays an institutional role. When we contrast McCrudden's scepticism about dignity's ability to act as a basis for a catalogue of rights (dignity's thicker sense)⁸⁰ with his claim that judges employ it precisely for this purpose, his dignity-scepticism becomes visible. It follows from this contrast that either judges are unknowingly, but miserably, failing at employing dignity in the thicker sense, or they are invoking it deliberately to disguise their own substantive views on issues. In the latter case, dignity would not be necessary if what judges were doing in its garb were considered to be legitimately required, at least by judges themselves. In the former case, one could grant that perhaps judges do not *intentionally* use dignity as a placeholder and genuinely believe that dignity requires the conclusions that they arrive at. They might be mistaken in thinking that dignity is the basis for their conclusions, but they are at least genuinely mistaken. By pointing out that they are *in fact* mistaken, and that dignity *is* a placeholder, McCrudden ends up being a sceptic in two ways. First, he is sceptical about judges being successful in employing dignity in the thicker sense. Secondly, he must conclude that dignity would stand to lose its institutional role if it received determinate content, thus breeding scepticism about its application in adjudication.⁸¹ He would not be a sceptic in these senses if he believed in a theory of adjudication that advocates the use of concepts as placeholders. Such a theory would prescribe that judges should employ indeterminate

⁷⁹ McCrudden "Human dignity" at 722 Here he mentions the possibility of such an allegation but distances himself from it.

⁸⁰ *ibid* 680-681: 'In its thicker sense, dignity is a value on which human rights are built and thus helps in the identification of a catalogue of rights'.

⁸¹ McCrudden "Human dignity" at 724.

concepts as a garb for subjective interpretations of human rights. I take it that McCrudden does not subscribe to such a prescriptive theory and thus he is sceptical about dignity's application in adjudication. Not by clearly arguing for abandoning its use, but by raising questions of its ability to be a determinate source of human rights requirements. To argue for abandoning its use in adjudication requires a belief that judges should only use determinate concepts. McCrudden carefully refrains from displaying such a belief. His analysis however is enough to incite determinacy-enthusiasts to take up cudgels against the use of dignity in adjudication.

My criticism of McCrudden's account may presumably be objected to on two grounds. First, that I have criticised a descriptive account on prescriptive grounds.⁸² On this objection, McCrudden was only offering a *description* of how dignity is employed by courts, and not a *justification*, either for dignity being used as a placeholder, or for its institutional role. My criticism based on the reason-giving view of adjudication, on the other hand, is a prescriptive one, where I argue that the placeholder account does not go well with a reason-giving account of adjudication, which is how adjudication *should* be. Indeed, the objector might point out, that McCrudden might as well agree with me that judges ought to give reasons for their decisions, but unfortunately, they have not in the case of employing dignity, and that was the limited nature of his argument. This objection however does not squarely apply to my criticism of the placeholder argument. The placeholder argument is not strictly a description. It is a *conceptualisation* of the role of dignity in adjudication, drawing upon the fact of varying conclusions by courts on the basis of the

⁸² I thank Jeff King for pointing out this possible objection.

concept of dignity. My arguments were aimed at demonstrating the implausibility of the conclusions of this conceptualisation, on the ground that adjudication is not generally understood as an activity that supports placeholder roles for concepts. I invoked the reason-giving account of adjudication to demonstrate that McCrudden's analogy between the role of dignity in the UDHR and in adjudication is implausible, precisely because he does not claim that judges intentionally employ dignity as a placeholder. In fact, he distances himself from the claim. Given the nature of adjudication as a reason-giving activity, it is difficult to presume that diverging conclusions about dignity is proof of the core of dignity not offering any guidance to decision-makers. It is more likely that judges will try and establish a reason-based connection between dignity and its requirements. Argument is required to demonstrate that when judicial decisions rely on dignity as a justification, the core meaning of dignity is unable to guide them. In fact, it is unnecessary to presume that different conclusions in human rights cases, based on dignity, are motivated by different conceptions of the concept. Evidence is required to dispel the doubt that the operative reasons for diverging conclusions are perhaps unrelated to dignity, even though dignity also finds mention in the list of justificatory reasons. Given the reason-giving feature of adjudication, we would treat cases lacking a reason-based connection between justifications and conclusions as pathological ones. I explain in greater detail why diverging conclusions are not clinching evidence for an un-guiding core of a concept in section 5 C below, where I argue that the placeholder argument provides no reason to believe that diverging conclusions about dignity are an indication of the concept supporting different conceptions of itself.

The second objection is, that McCrudden does *not* claim that dignity can *never* have determinate content. His account can accommodate cases where there is consensus on a conception of dignity within a jurisdiction. Thus, dignity will not be a placeholder in that jurisdiction, and it can be a determinate basis for rights. This objection does not apply to my arguments; rather it is a clarification of McCrudden's position. However, its purpose is unclear. In any event, the clarification itself in no way comes to McCrudden's aid. The evidence for dignity being a placeholder is largely a cross-jurisdictional one, dependent on the existence of diverging conclusions about dignity, which McCrudden takes to be an indication for the existence of different conceptions of dignity. It, therefore, does not make a difference if there is consensus on a particular conception of dignity in a jurisdiction. Dignity is arguably a placeholder only if there are diverging conclusions about its requirements, whether within or across jurisdictions. The point being, that the placeholder argument feeds on the existence of diverging conclusions about dignity. Though the argument need not deny that in some jurisdictions dignity may slowly gather determinate content, the basis for its existence would, however, be extinguished if there was complete agreement on the content and requirements of dignity within and across jurisdictions. In such an event, dignity would no longer be a placeholder; it will also lose its institutional role; and a claim that it is a concept that can support different conceptions would become unsustainable. The idea of a placeholder will then become redundant for the purposes of explaining dignity.

So, what can we valuably retain from McCrudden's analysis of the role of dignity in adjudication? McCrudden's studies reveal that judges do use dignity in cases where incommensurable rights and values are involved. He

also establishes that judges arrive at diverging conclusions when dignity is employed. With the help of valuable evidence, he demonstrates the varied ways in which decisions based on dignity diverge. However, this evidence does not lead to his conclusion that dignity plays a place-holding role. Envisaging a place-holding role requires establishing intentional use of a sort that was demonstrated in the UDHR. It requires positive evidence of the fact that judges *knowingly* use the indeterminacy of dignity as a garb for their own opinions rooted in other reasons. In other words, it requires something more than just indeterminacy to be a placeholder. Indeterminacy is a necessary, but not sufficient, condition for something to be a placeholder. A place-holding role can be envisaged for an indeterminate concept, and it can thus be inserted into legal documents to perform such a role. In the case of the UDHR McCrudden successfully proved this role by referring to Jacques Maritain's strategy. Probably such a role can be proved for every text employing the term dignity. That, however, has to be proved by referring to specific evidence in each case. It might make sense to say that judges are able to use dignity in a *flexible* manner because it was incorporated into a text as a placeholder. But a concept does not always have to be a placeholder to be used in a flexible manner. Any indeterminate concept can be interpreted in flexible and creative ways, subject to context. The idea of a placeholder therefore does not add much to explaining human dignity's role in adjudication.

McCrudden however also provides a second, and deeper basis, for thinking of dignity as a placeholder. He anchors his claims about dignity's place-holding character in law, to a philosophical account of the nature of some concepts. The claim is, that human dignity is best characterized by W.B. Gallie's

idea of an essentially contested concept (ECC).⁸³ This argument has it that being an ECC, diverging conclusions about what dignity is, and what it requires, stem from its very nature. It is the essentially contested nature of dignity that suits it for a place-holding and institutional role. In a nutshell here is the argument from essential contestability: Dignity has a common core for its meaning that admits different conceptions of what it requires. Thus, it is an essentially contested concept. Due to its essentially contested nature, it cannot conclusively guide decisions on what it means and requires.

To be fair, McCrudden may not place great emphasis on ECC in building his placeholder argument. But in mentioning Gallie, he has added himself to the long list of theorists who take Gallie's account to be vastly illuminating. That in itself justifies a closer examination of his account. In what follows, I argue that McCrudden's reliance on ECC is not supported by Gallie's account. I will also argue that Gallie's account itself does not explain why persistent disagreement arises when concepts like dignity are employed, nor does it explain how participants in a practice employing such concepts reason with them. Thus, the notion of essentially contested concepts is not helpful either explanatorily, or as a basis for developing normative accounts, of how we should think about the problems posed by concepts like human dignity in adjudication.

2.4 Essentially Contested Concepts (ECC) and the Placeholder Argument

⁸³ McCrudden "Human dignity" at 679-680.

Through the notion of ECC WB Gallie describes the possibility of ‘perfectly genuine’ endless disputes about the proper use of some concepts.⁸⁴ His stated project is to explain disagreement on the ‘proper general use’ of a concept/term.⁸⁵ Disagreement of this kind is special, as there seems to be no locus of agreement on the general use of the term itself. This is different from disagreement about the use of concepts where there is ‘an assumption of agreement, as to the *kind* of use that is appropriate to the concept in question’.⁸⁶ Gallie employs the following example to illustrate this. One may contest the statement, ‘this picture is painted in oils’, with the rival claim that it is painted in tempera.⁸⁷ Here there is agreement on the general use of the concepts involved: ‘picture’, ‘painted’, ‘tempera’, and ‘oils’. In contrast, disagreement about the statement ‘this picture is a work of art’ involves a contest about the general use of the term ‘work of art’.⁸⁸ Other examples of such ECC are justice, democracy and a Christian way of life.

Susan Hurley provides an insightful analysis of how to understand and categorize disagreements of this kind.⁸⁹ She plots Gallie’s ECC on a background comprising ‘conceptual’ and ‘substantive’ disagreements. Conceptual disagreements are those where the participants in a practice do not even share a *locus of disagreement*.⁹⁰ They are, in Wittgenstein’s terms,

⁸⁴ WB Gallie, “Essentially Contested Concepts” at 169. Some commentators on Gallie take ‘proper use’ to mean ‘correct use’ of the concept. See John Gray, ‘On the Contestability of Social and Political Concepts’ (1977) 5: 3 Political Theory 331 at 331. Others take Gallie to be speaking of a ‘best interpretation’, see Christine Swanton, ‘On the “Essential Contestedness” of Political Concepts’, (1985) 95: 4 Ethics 811 at 813-814. For my purposes reading it either way does not make any significant difference, as I am not testing Gallie’s accuracy in capturing the feature of essential contestedness.

⁸⁵ Gallie “Essentially Contested Concepts”. He uses the two synonymously.

⁸⁶ *ibid* 1 at 67 (emphasis in the original).

⁸⁷ *ibid*.

⁸⁸ *ibid*.

⁸⁹ Susan Hurley, *Natural Reasons* (OUP, 1999) Ch. 3 [Hurley, *Natural Reasons*].

⁹⁰ *ibid*.

disagreements about 'forms of life'.⁹¹ Such disagreements do not mean that we cannot understand the descriptions of the concepts that some people apply in strange ways. Rather what we cannot understand is 'what reasons could anyone have to act in the particular ways described'.⁹² Substantive disagreements, in contrast, are within a form of life. This means that here there is a *locus of disagreement* that is identifiable which makes it possible for participants in a practice to appreciate the arguments and interpretations of rivals, i.e., to see reasons in them: to see them as arguments and interpretations about the same concept. Hurley describes the difference succinctly in the following terms: conceptual disagreement is about cases of different meaning, whereas substantive disagreement is about same-meaning-different-belief cases.⁹³ Hurley takes ECC to be cases of substantive disagreement.⁹⁴ This means that disagreement about ECC has an identifiable locus of disagreement. Entailing, that disagreeing parties are able to identify agreement in forms of life within which their disagreement ensues. It is this valuable insight that I will employ later in the section to show why ECC cannot support McCrudden's suggestion that such concepts are placeholders. I will then argue that within the framework of substantive disagreements itself,

⁹¹ Ludwig Wittgenstein, *Philosophical Investigations*, GEM Anscombe, PMS Hacker and Joachim Schulte trans. (Oxford: Wiley-Blackwell, 2009) at sections 23 and 241.

⁹² Hurley (n 89) 31. For Wittgenstein's discussion on strange ways of going on see, Wittgenstein (n 91) sections 185-190.

⁹³ Hurley, *Natural Reasons*, (n 89) at 34.

⁹⁴ Hurley also identifies other kinds of concepts that host disagreements within a form of life: uncontested concepts, and conceivably contested concepts. *ibid* 43-45. Samantha Besson has used the term 'conceptual disagreement' that is akin to Hurley's use of 'substantive disagreement'. She uses it in contrast to 'verbal or semantic disagreement' and states that conceptual disagreement is about meaning. I follow Hurley's use here as it is clear that in disagreeing about how a concept is to be employed we must have some agreement on its meaning. Thus calling such disagreement 'conceptual disagreement', which is about the meaning of the concept, creates space for confusion. Besson therefore has to distinguish later between degrees of disagreement about meaning. See Samantha Besson, *The Morality of Conflict* (Oxford: Hart Publishing 2005) at 48-49.

Gallie's account is an external-descriptive account that cannot explain how decision makers employ certain concepts. To prepare the ground for the two arguments let me first describe in greater detail Gallie's account.

2.4.1 Gallie's account

Gallie's objective is to propose a 'single method of approach' that would illuminate the phenomenon of essential contestability. He claims that his explanation of why there might be endless disputes about the use of some concepts shows that the correct explanation need not be either a psychological, or metaphysical one.⁹⁵ By psychological explanations Gallie refers to explanations that treat disagreements as conflicts of interests, tastes, or attitudes that no amount of discussion can dispel.⁹⁶ Thus, in such cases, the arguments of rival parties for their beliefs are 'at best unconscious rationalizations and at worst sophistical special pleadings'.⁹⁷ In short, Gallie takes such explanations to be stating that the arguments of parties in cases involving ECC are attempts to express their tastes, attitudes, and other *unreflective* reactions in terms of some other reasons.⁹⁸ By metaphysical, Gallie means that we attribute essential contestability to 'some deep seated and profoundly interesting intellectual tendency whose presence is "metaphysical"- something to be exorcised with skill or observed with fascination according to our philosophical temperament'⁹⁹. Here Gallie seems to indicate that, as

⁹⁵ Gallie "Essentially Contested Concepts" at 169.

⁹⁶ *ibid.*

⁹⁷ *ibid.*

⁹⁸ Gallie does not employ the term *unreflective*. It is my own formulation of what Gallie means.

⁹⁹ Gallie "Essentially Contested Concepts" at 169.

opposed to tastes or attitudes, there might either be some deep intellectual tendencies that disagreeing participants have, which need careful explanation, or at best such tendencies are phenomenon that attract fascinated observation but not rational explanation. Without denying that such explanations might explain certain kinds of disagreement, Gallie proposes that the disagreements he has in mind may not be correctly explained by these reasons. For him such reasons are evidence of disagreements that are not on the basis of the concepts involved and thus not genuine. In contrast to the psychological and metaphysical explanations, Gallie offers his own. I recount Gallie's explanation under four abstract grounds that help clarify the purposes of the criteria that he enumerates to explain the idea of essential contestability. In brackets are the numbers he assigns to the criteria.

(i) *Overriding Condition*: That there is no need for a decision on the contests between the parties. Thus, there are no judges, nor are there any mechanisms to count towards the success of any contesting reason.¹⁰⁰

(ii) *Nature of ECC*:

- The concept must be appraisive in the sense that it signifies or accredits some kind of valued achievement.
(Gallie's criteria I)¹⁰¹
- This achievement must be of an internally complex nature.
(Criteria II)¹⁰²

¹⁰⁰ *ibid* 171.

¹⁰¹ *ibid*.

¹⁰² *ibid* 171-172.

- Any explanation of its worth must include reference to respective contributions of its various parts or features, which could be described and arranged in various ways. Yet, none of these should seem absurd or contradictory prior to ‘experimentation’. In other words, the concept is liable initially to be ambiguous.¹⁰³ (Criteria III)
- The concept should be open in character, i.e., it should admit considerable modifications in light of changing circumstances that cannot be predicted in advance. (Criteria IV)

(iii) *Conditions generating agreement in form of life:*

- Parties offering rival applications of the concept should recognize the fact that others contest their application, and that there is some appreciation by all parties of the different criteria on the basis of which rival claims are made.¹⁰⁴ (Criteria V)
- There must be some paradigm cases, or *exemplars* as Gallie put it, that all rival parties should recognize as the proper way of applying the concept. The parties must claim to be imitating or adapting the exemplar.¹⁰⁵ (Criteria VI)

¹⁰³ *ibid* 171 at footnote 1.

¹⁰⁴ *ibid* 172.

¹⁰⁵ Gallie “Essentially Contested Concepts” at 176. Brian Bix speaks of Gallie’s reference to paradigm cases as an instance of ‘guidance by ostensive definition’. He thinks, and rightly so, that this criterion of Gallie’s offers nothing new to explaining disagreement. What it does is to push the problem of disagreement one step back. See Brian Bix, *Law, Language, and Legal Determinacy* (Oxford: Clarendon Press, 1993) 57. Bix adds that Gallie fails to explain the reasons why we agree on a paradigm and yet have different understandings of it. I arrive at a conclusion similar to Bix’s about Gallie not being able to explain why disagreement ensues. The difference between mine and Bix’s enquiry is, that Bix is interested in what causes disagreement, and valuably points out that Wittgenstein’s remarks on rule following have

(iv) *The consequence of contestation*: There must be acknowledgment between the users that the fact of their continuous contest enables the exemplar's achievement to be sustained and/or developed in the optimum fashion. (Criteria VII).

Within this scheme, substantive disagreement is possible because of the conditions generating agreement in forms of life. While the reason why disagreement ensues is directly explained by Gallie's criteria II and III. Here is why. The concept being internally complex has several features that are capable of being arranged in various differing ways in order to claim what is a proper application of the concept.¹⁰⁶ Gallie thinks that these different ways of arranging the features of a concept can be equally justified and based on evidence. This means that for him, the fact of differing conclusions on what is a proper use of a concept does not indicate that there are no good reasons to arrive at such conclusions. Contrast this to the placeholder argument, which holds that the fact that dignity admits different conceptions is a good reason to believe that the core, or the concept of dignity, does not guide judges. The core is at best an empty shell.¹⁰⁷ Being empty, it cannot offer guidance to what dignity means, or what it requires in differing circumstances. This contrast leads to the first reason for why Gallie's account does not support McCrudden's.

probably been over read to suggest that it sheds light on the issue. My project on the other hand, is to point out that Gallie's account does not explain the perspective of participants when they disagree. Though this overlaps to some extent with Bix's conclusions, I part ways with Bix to investigate a different feature of the implications of this inability to explain the participant's perspective. I explain this towards the end of the next section. *Infra* note 128.

¹⁰⁶ Hurley, *Natural Reasons* (n 89) at 46, Brian Bix (n 105) at 55-56.

¹⁰⁷ McCrudden "Human dignity" at 698.

2.4.2 Reasons for disagreement in ECC and the Placeholder Argument

For the placeholder argument to be supported by Gallie's notion of ECC, it must be demonstrated that Gallie too claims that the core of the concept does not control the different conceptions of an ECC. Gallie's account, however, speaks to the contrary. In fact, Gallie argues that it is possible to demonstrate the *rationality* of differing applications of an ECC to contesting users.¹⁰⁸ It is possible to show the logical force of one's application to other contesters, to an extent that they might convert and adopt your views about what the correct application is.¹⁰⁹ Gallie rejects psychological reasons to explain such conversions.¹¹⁰ This makes clear that he takes reasons associated with the complex features of the concepts as the basis on which a particular contestant might convert. Gallie thus believes that ECC can admit different conceptions, but not because the reasons for disagreement are not rooted in a genuine claim about how the concept is to be applied. He therefore offers no support to the placeholder argument.

2.4.4 Disagreements about dignity and foundationalism about intrinsic worth

The placeholder argument is driven by a notion of ECC based on a concept-conception distinction.¹¹¹ McCrudden employs this distinction in a manner

¹⁰⁸ Gallie "Essentially Contested Concepts" at 189.

¹⁰⁹ *ibid* 190.

¹¹⁰ *ibid*.

¹¹¹ McCrudden "Human dignity" at 679-680.

similar to how John Rawls employs it in *A Theory of Justice*.¹¹² Like Rawls, McCrudden speaks first of the *concept* of dignity. This consists of the three agreed claims, namely, the ontological claim, the relational claim, and the limited-state claim.¹¹³ He argues that despite this core, there exists no agreement on how these claims are best understood, and thus dignity is essentially contested.¹¹⁴ An unpacking of these claims will reveal that McCrudden's core of dignity is at best understood as a complex formulation with complicated constituent parts.¹¹⁵ One of them (the ontological claim) is justifiably about the concept of dignity, while the others are claims that might be related to dignity, but may turn on much else. Disputes on these claims may lie in reasons other than the indeterminacy of the concept of dignity. Endless disputes about them therefore do not lend support to dignity being an ECC.

Recall, that for McCrudden, the core of dignity is constituted by three claims. The 'ontological claim' refers to the intrinsic worth of the individual that probably attempts at capturing the meaning of dignity. The 'relational claim' consists of considerations that determine the treatment that intrinsic worth deserves. The limited-state claim points towards a set of considerations determining the appropriate role of the state vis-à-vis the individual, presumably governed by intrinsic worth, and the treatment it deserves.

A closer look yields that amongst the constituent claims, intrinsic worth has a primary role that controls the treatment it demands and impacts the role

¹¹² John Rawls, *A Theory of Justice*, *supra* (n 4) at 5. Rawls however does not associate his comments with essential contestability. He also remarks that the concept-conception distinction does not answer any important questions about justice.

¹¹³ Text to footnote 34 above.

¹¹⁴ McCrudden "Human dignity" at 679-680

¹¹⁵ If it were a concept, then it would be akin to an internally complex concept. See, Kenneth Ehrenberg, (n 6) at 222. Ehrenberg, citing Collier suggests, that some concepts can be over aggregated and disaggregation should therefore precede any saddling of the concept with the feature of essential contestability.

of the state vis-à-vis the individual. In this arrangement, the vagueness of intrinsic worth will severely undermine the possibility of imagining the treatment due to the individual, both by other individuals, and by the state. If intrinsic worth were a fairly determinate concept, there would be clarity to an extent on what treatment intrinsic worth requires by itself, and what the state ought to do in order to further the limited-state claim as an ideal. This however does not warrant a belief that intrinsic worth is the sole consideration to determine how individuals should be treated, and what the role of the state vis-à-vis the individual should be. To arrive at such a conclusion would require strong arguments for the absolute and unyielding protection that intrinsic worth deserves, and its monistic and foundationalist role in determining how individuals ought to be treated. In the absence of such presumptions, it is plausible that there are plural considerations for deciding what intrinsic worth requires and what it demands of the state.

It follows, that the relational and limited-state claims are relatively autonomous of intrinsic worth. For the relational claim, how we ought to recognize and treat the intrinsic worth of individuals will depend on reasons that count for what is good and desirable treatment of individuals. Despite the relevance of intrinsic worth to many such reasons, it is implausible that intrinsic worth is a monistic source of such reasons. What treatment intrinsic worth deserves might well be controlled by plural considerations. Our disagreements or contests on those reasons might be endless, and these contests are not limited to the meaning of intrinsic worth or dignity. A similar argument applies to the limited-state claim, where reasons that determine the relationship between the state and the individual might depend on considerations including

the legitimate purposes of the state, the requirements of leading a coordinated and value-based social life, and legitimate sources of obligations that individuals might have towards others. Intrinsic worth, again, is not the sole foundational value governing the relationship between the state and the individual.¹¹⁶ Other values might equally constrain or enable the state to act for or against particular interests of individuals.

Many contests about the constituents of dignity's core are thus not contests about dignity's meaning and proper use, which is what contests about ECC are about.¹¹⁷ For Gallie, disputes about concepts like art, democracy, or championship, are disputes about their 'proper general use' or 'standard use'.¹¹⁸ The kind of disputes he refers to are largely dependent on what he calls the 'description' that a user holds of the concept.¹¹⁹ This is significant, because, the source of the dispute then is not the different *applications* of the concept. For Gallie disagreements on ECC are rooted *in* the concepts. Since disagreements about at least two components of the core of dignity may not be disagreements about dignity itself, McCrudden's reasons for dignity being an essentially contested concept do not meet Gallie's bar.

¹¹⁶ For an analogous argument on how there might be plural sources of human rights see John Tasioulas, 'Taking Rights out of Human Rights' (2010) 120: 4 *Ethics* 647 and James W. Nickel, *Making Sense of Human Rights* (Malden MA: Blackwell Publishing 2007) Ch. 4. Though Tasioulas' and Nickel's views are on the plural foundations of human rights, my argument here, that there might not be one foundational value that determines the appropriate relationship between the state and the individual, bears strong resemblance to theirs. There might be various reasons that strengthen the claim that the state exists for the individual and not vice-versa, and there is no compulsion to presume that all such reasons emanate from intrinsic worth.

¹¹⁷ Gallie, "Essentially Contested Concepts" at 168 and 169: '...[T]here are concepts which are essentially contested, concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users.'

¹¹⁸ *ibid.*

¹¹⁹ Gallie "Essentially Contested Concepts" at 172 at footnote 1.

2.5 Essentially Contested Concepts: an external-descriptive account

Does the notion of ECC capture some unique feature of concepts like dignity that improves our understanding of them? Given its popularity, it might be worthwhile exploring whether it provides enough justification for its core claims. Gallie claims that he identifies a class of reasons that explains why certain concepts lead to persistent disagreement, independent of psychological reasons rooted in the beliefs and preferences of the disagreeing parties.¹²⁰ At the heart of his account is the view that the seven criteria that he identifies are the reason for endless disagreements. There are, however, good reasons to be doubtful of the success of Gallie's criteria; both in terms of explaining the reasons for disagreement and proving that certain concepts possess are essentially contested by their very nature.

2.5.1 Gallie's account presumes rather than explains disagreement

The claim that persistent disagreement is explained by a class of reasons rooted in the concepts, as opposed to the concept appliers, is a novel one. Ordinarily disagreement is thought to arise due to conflicting *beliefs* that persons have about a concept. For example, some might believe that respecting human dignity requires permitting abortion, while others might believe that it requires the prohibition of abortion. Here it is beliefs about dignity

¹²⁰ Gallie "Essentially Contested Concepts" at 169. For a discussion see 5A above.

that causes disagreement rather than the concept of dignity itself. The distinction between a concept, and beliefs about the concept, is well developed in the literature on concepts in cognitive science. There is general agreement on the fact that having a concept is about having a mental particular that represents phenomena to our minds that in turn figures in our cognitive processes. There is disagreement though, on what the nature of that mental particular is.¹²¹ Simply put, concepts are mental particulars that enable us to think. Having a belief about a concept is therefore possible only when we already have the concept.¹²² Gallie does not maintain the distinction between concepts, the object that it represents, and beliefs about it.¹²³ For my purposes here, thus, I will take Gallie not to be speaking about concepts as such, but about the phenomenon that the concepts represent. Though the literature on concepts might have considerable implication for the nature of Gallie's claim, exploring that is a project on its own. I will therefore stick to the question of disagreement for now.

Gallie thinks that some concepts are essential contested by their very nature. In this sense he might be pointing out something deeper about such concepts than the fact that we have conflicting beliefs about them. For him, the concepts of justice, democracy, or championship, possess characteristics that explain why there is persistent disagreement about them. Let me now test

¹²¹ Eric Margolis & Stephen Laurence, ed, *Concepts: Core Readings* (Cambridge MA: MIT Press, 1991) Ch. 1 (for a discussion of leading theories of concepts, each claiming that a concept is a particular sort of mental particular).

¹²² Jerry Fodor, *Concepts: Where Cognitive Science Went Wrong?* (OUP 1998) Ch. 1 (for a discussion of what concepts are and how they relate to beliefs.)

¹²³ I am grateful to James Penner for pointing me towards how the literature on concepts might bear upon Gallie's account. Responsibility for the claims here are of course mine.

whether the criteria that Gallie identifies as characteristics of these concepts are reasons for persistent disagreement.

It appears, that Gallie's seven criteria describing ECC instruct us on how to spot cases of disagreement where ECC are in operation, rather than explain why disagreement ensues.¹²⁴ Recall, that in criteria I-IV, Gallie makes descriptive claims about what an ECC is: appraisive, internally complex, initially ambiguous, and open. These are criteria that may be observable when there is persistent disagreement, but they neither guarantee disagreement, nor explain why disagreement ensues. For example, a concept might be appraisive, but our appraisal of the concept might be similar and thus no disagreement might ensue. To take one of Gallie's examples, the concept 'Christian way of life' is surely appraisive, but people might perfectly agree on what a Christian way of life is. Similarly, the fact of a concept being internally complex does not *generate* any disagreement until persons take opposite views of what the complex features mean or require. Something more than these two features is required for disagreement to kick in, and those are the reasons that are missing from Gallie's account.

The criteria of 'initial ambiguity', where a concept may have more than one meaning, does not come to Gallie's assistance either. The fact of ambiguity, and the concept being 'open' to several interpretations, does not generate disagreement. In effect, what Gallie does through these criteria, is report cases where disagreement exists. To say that a concept is ambiguous means that it has more than one meaning in existence.¹²⁵ Gallie reports this

¹²⁴ Gallie himself takes his first five criteria to be 'formally defining criteria' of ECC. Gallie "Essentially Contested Concepts" at 180.

¹²⁵ Timothy Endicott, *Vagueness in Law* (OUP 2000) at 54.

fact about some concepts. Indeed, to be precise, concepts do not have meaning, but only the words that stand for them; so it is words that can be ambiguous. Be that as it may, the plural meanings of an ambiguous word must already exist to know that a word is ambiguous. Given that there are at least two meanings to the word, holders of different meanings might plausibly disagree. However, the reasons for disagreement lie in the reasons for why they hold different meanings, which is not explained by the *fact* that there are different meanings. Those are the reasons that need attention in Gallie's account to explain the characteristic of essential contestability, if there is one. Similarly, to say that the concept is 'open' to interpretation means that there are no agreed rules that settle how it is to be understood and applied. The only manner in which the concept makes sense to its appliers is in terms of the different understandings of it that they subscribe to. These understandings must be in existence to claim that the concept is 'open'. For example, for us to know that the concept of art is 'open', means, that there are no fixed rules for what a correct application of the concept is. If there are no fixed rules, then what is it that we know about the concept? What does our knowledge of art consist of? Perhaps the interpretations of what art has meant for people at different times and places. These are *existing* interpretations of art, and their existence is evidence of the fact that the concept of art *is* open. This does not amount to explaining why subscribers to certain interpretations disagree with each other. That would require explaining the reasons for why persons hold differing interpretations.

To sum up, the first four criteria for ECC are factual reports about concepts over which disagreement already exists. These criteria do not explain the reasons that *generate* disagreement.

Can then criteria V, VI and VII do this work? The answer is clearly in the negative. These three criteria again presuppose disagreement. Their function is to explain when disagreement is *genuine*, i.e., they explain why parties are disagreeing about the same things and not talking past each other. Here is why.

Gallie's criterion V is a descriptive statement about the attitude of participants in a disagreement: participants acknowledge that rival participants contest their use, and they appreciate the reasons for which rivals hold their conceptions. Here Gallie presupposes that disagreement exists and describes the attitude of participants that makes the disagreement genuine. Having such attitudes is evidence of participants arguing about the same concept. They acknowledge that the claims of contesting users are sensible, and about the same subject matter. Identifying such attitudes does not explain why disagreements arise. Criterion VI is a similar sort of statement. It states that disagreeing parties must recognize an exemplar of what is a proper use of the ECC. Again, the reason for disagreement is not explained. Rather it is described that there are some agreed paradigms of what a 'correct use' of the concept is. Their existence is evidence for Gallie that the parties are talking about same thing. Notwithstanding the rectitude of this belief, Gallie again presupposes that disagreement exists. Similarly, criteria VII is a description of a belief that users hold while disagreeing. They must acknowledge that their continuous contestation enables the exemplar's achievement to be sustained, and/or developed, in the optimum fashion.

It is important to note that criteria V-VII are not claims about properties of concepts, but beliefs that participants hold in a disagreement about the concept, and indeed some of them are beliefs about the attitudes of other disagreeing participants. They, therefore, do not contribute towards the claim that reasons for essential contestability lie in the nature of the concepts themselves. As argued for before, criteria V-VII are conditions that generate the indispensable agreement that acts as the *locus* of genuine disagreement.

Gallie's criteria for ECC thus appear to be external-descriptive statements about states of affairs that exist when there is disagreement. They certainly do not explain the reasons that generate disagreement. They can be said to be external-descriptive statements about some practices that host disagreement. By external-descriptive I mean that they do not invoke a *participant's view* of what is the *reason* for disagreement. Gallie does, however, invoke the participant's view to explain why there is a locus of agreement: because participants recognize common exemplars and see the reasons of rivals as being rational. For disagreement, however, Gallie can explain only externally and descriptively, by observation, of what conditions exist when disagreement occurs. Not how disagreement occurs because of these conditions.

2.5.2 The explanatory and normative limits of ECC

Gallie's account has been previously criticized for furthering moral and conceptual relativism.¹²⁶ It has been accused of providing no leads on how

¹²⁶ John Gray (n 82).

disagreement can be resolved, as on his account, no rival conceptions of a concept are more valid than others.¹²⁷ Interestingly, other theorists are of the view that it is possible to accept that some concepts are essentially contested and yet argue that some conceptions are correct and others not.¹²⁸ The criticisms I have levied here approach Gallie from a different perspective. They demonstrate that the explanatory potential of his account is limited to describing certain practices where persistent disagreement already exists. In criteria I-IV, he has listed out some features that usually do exist when disagreement occurs. In criteria V-VII he explains how genuine or substantive disagreement is possible. It is the latter three criteria that are a valuable contribution to understanding the problem of disagreement. Gallie paints a picture where it is possible that people can disagree despite recognising the rationality of rival arguments. None of Gallie's criteria however explain why such concepts generate disagreement, as disagreement is presupposed in his account. To be fair, but contrary to how he is generally understood, it could be said that Gallie only seeks to answer the question about genuine/substantive disagreement: how is it possible that people who disagree about a concept are yet not talking past each other. His project was perhaps not to explain *why* certain concepts support different conceptions. Rather it is to accept *that* certain concepts support different conceptions, and there are good reasons to believe that the conceptions are about the same concept. Difficult that it might be, this the best way Gallie should be understood. However, notice that this also means that Gallie's account has limited normative potential. His criteria about the nature of

¹²⁷ Barry Clarke, 'Eccentrically Contested Concepts' (1979) 9: 1 *British Journal of Political Science* 122 at 125–126.

¹²⁸ Andrew Mason, *Explaining Political Disagreement* (Cambridge: CUP 1993) Ch. 2.

ECC (I-IV), being external and descriptive, cannot explain how participants reason with such concepts, which leads them to disagreeing conclusions about the concept. Consequently, we are not in a position to evaluate the merits of their reasoning. Analogously, his account sheds no light on why judges arrive at diverging conclusions about some concepts, and thus, does not provide a framework to understand and assess the manner in which judges arrive at decisions. It does however make a very limited, negative claim about the kind of reasons participants/judges have for disagreeing.¹²⁹ Gallie thinks that those reasons do not necessarily have to be only psychological. By this he indicates that there might be some other reasons at play when disagreement ensues. I do not want to speculate on what Gallie thinks those reasons might be. But there is an important insight to retain from Gallie's remark on such reasons. Though Gallie offers no explanation for diverging conceptions from the participant's perspective, he thinks that there *are* such reasons, and that they can each be rationally explained, providing hope that there is agreement in forms of life. Those reasons might even appeal to other contesting participants and thus cases of essential contestability are not cases of radical indeterminacy. The hope of the existence of such reasons needs more evidence and argument than what Gallie provides.

2.6 Conclusion

¹²⁹ This is where I part ways with Brian Bix as I mentioned in note 105 above. While Bix goes on to enquire what makes disagreement possible, I conclude that the lack of an account of reasons for disagreement in Gallie's account makes it unsuitable for explaining how participants reason with ECC.

I have argued that the conceptualization of dignity as a placeholder or as an ECC does not hold much promise in advancing our understanding of what judges do, and should do, when they apply concepts like dignity as justifications for decisions. They also do not explain why judges arrive at diverging conclusions on employing such concepts. Their limitations provide reasons to be sceptical about the strategy of locating explanations in the special nature of value concepts. This limits its potential as a framework to explain how and why participants in a practice reason with such concepts. In order to aid us in understanding the problems that concepts like dignity pose for adjudication, we need an account of how we might employ them as justifications for decisions. Such an account will enable us to assess whether particular decisions are legitimate or not.

There exist other theoretical accounts of the nature of such concepts, and how they do and should figure in adjudication, which deserve close examination. One such account is Ronald Dworkin's account of interpretive concepts. Interestingly Dworkin's account too pays its debts to Gallie, but moves beyond Gallie's account in explaining what interpretive concepts are, and how they should be reasoned with.¹³⁰ Examining that account is another project, but to the extent that Dworkin's account relies on Gallie's, the arguments advanced in this chapter may partly apply.

Though this chapter has primarily been an exercise in criticism, it does advocate scepticism about the potential of ECC to explain the problems thrown up by concepts like dignity. It also points out that one of the major concerns that

¹³⁰ Ronald Dworkin, 'Thirty Years On', (n 6) at 1686; Ronald Dworkin, *Taking Rights Seriously*, (n 4) at 103.

such concepts throw up for adjudication is that of justification: how can decisions based on such concepts be a justified basis for authoritative decisions? There is a need for synchrony between the justification of judicial decisions based on the reason-giving account of adjudication, and the manner in which we reason with concepts like dignity, given their nature. Tarunabh Khaitan rightly points out that substantive accounts of particular conceptions of dignity are a pressing need.¹³¹ Such accounts will surely contribute towards better understanding how dignity can justify decisions. Simultaneously, there is a need to develop accounts of what is a legitimate way of reasoning with concepts like dignity. What is the kind of knowledge and reasoning involved in applying concepts like dignity, and what generates competence for such reasoning? We can only start meeting the challenges posed by dignity for adjudication, which Professor McCrudden has painstakingly and carefully pointed out, by giving answers to these questions, along with robust substantive accounts of what dignity is.

¹³¹ Tarunabh Khaitan, (n 9) at 14.

Chapter 3: Are There any Interpretive Concepts?

Explaining the nature of values based on their conceptual nature - that they are special kinds of concepts - has received much greater attention in contemporary legal theory than Gallie might have imagined. 20th century legal theory hosts one of the most influential of such accounts in Ronald Dworkin's idea of interpretive concepts. Dworkin's account characterizes the conceptual nature of values as 'interpretive', and explains how that guides us in reasoning with values.¹ The first claim is an account of what interpretive concepts are, while the second claim about reasoning with values is a prescription of how one ought to reason with such concepts. In this chapter and the next, I closely examine the two claims in turn. In this chapter I argue that the idea of interpretive concepts does not amount to a claim about the special *conceptual nature* of values.² By conceptual nature I mean that Dworkin aims to demonstrate that interpretive concepts are unique *kinds* of concepts that capture the nature of moral and political values like dignity, equality, truth, responsibility, and many others. In his own words: 'I suggest that we treat certain concepts as special by designating them as interpretive concepts whose nature cannot be explicated except through normative argument'.³ Note that

¹ I primarily rely on Dworkin's explanation of interpretive concepts in *Laws Empire* (Oxford: Hart Publishing, 1998) hereafter 'LE', and in *Justice for Hedgehogs* (Cambridge MA: Belknap Press, 2011) hereafter 'JFH'. To trace how the idea has developed, I will make references to his *Justice in Robes* (Harvard University Press, 2006) hereafter 'JR' and *Taking Rights Seriously* (London: Duckworth, 1977) hereafter 'TRS'.

² Dworkin clearly reserves the name conceptual for his account. See JFH Ch 8, where the account of interpretive concepts is a part of his account on 'conceptual interpretation'.

³ *Justice for Hedgehogs*, 102. Dworkin pays his debts to Gallie in his first references to contested concepts, which he later takes to be interpretive. TRS 103; Ronald Dworkin, 'Thirty Years On' (2002) 115: 6 Harvard L.R. 1655 at 1686.

the claim here is about explicating the nature of special concepts and not the phenomena they are concepts of. Such concepts are special because they are interpretive- a quality all such concepts possess. The justification for such a claim then lies in explaining what it means to be interpretive, and how that is a property of a class of concepts. Dworkin must have offered an explanation of what concepts are, and how the nature of concepts allowed them to be interpretive. I saddle his theory with this burden as there is in philosophy, psychology, and cognitive science extensive literature on what concepts are. On my argument, the fundamental premises of that literature do not allow interpretive concepts to be a kind of concept based on their conceptual nature. I advance this argument in section 3.2 below.

Distinct from *conceptual nature*, though related in many ways, is a question about *conceptual content*. From Dworkin's view of interpretive concepts, it is evident that he thinks that the nature of interpretive concepts can only be explicated by normative argument. I argue this to be a distinct claim making sense about the content of concepts and the phenomena that the concepts represent. Indeed, this claim does hold valuable insights about how the *content* of concepts is determined, and it is this claim that motivates Dworkin's prescriptions for reasoning with values through his theory of the unity of values. I critically examine the nature of that claim in Chapter 4. The claim about content, however, is not an argument about how we should understand the conceptual nature of interpretive concepts. I argue for this in section 3.1 by pointing out some mistakes about how Dworkin is commonly understood. I then argue that he has a picture of interpretive concepts that is logically prior to his claims about why normative argument is required to understand these values.

My argument in this chapter is that this prior picture is unsustainable if one were to hold a plausible view about what concepts are.

3.1 Understanding Interpretive Concepts

Dworkin offers several values including DIGNITY, TRUTH, LEGALITY, RESPONSIBILITY, EQUALITY, FRIENDSHIP, and COURTESY as examples of interpretive concepts.⁴ Several claims contribute towards explaining why such concepts are interpretive concepts. These include claims about their having a deep structure⁵, that structure being normative⁶, the concepts themselves being integrated⁷, and interpretation of those concepts being a conceptual matter⁸. The background against which he brings up the proposal of interpretive concepts also involves more than one influential theory in law and political philosophy. In particular, he employs interpretive concepts to explain how his theory of law, and his characterization of moral and political philosophy is different from Hart's claims to a descriptive theory of law, and Isaiah Berlin's value pluralism.⁹ Given the several claims that Dworkin makes about interpretive concepts, I will pick out three distinct attempts at conceptualising interpretive concepts which are found in three of his most influential works in legal, political and moral philosophy. The latest and the

⁴ In keeping with the tradition of writing about concepts in cognitive science, I shall refer to concepts in capitals, properties represented by concepts in italics, and words standing for properties in single quotes. For instance DOG (concept), *doghood* (property), and 'dog' (word).

⁵ Ronald Dworkin, *Hart's Postscript and the Point of Political Philosophy* re-published in JR, 154.

⁶ *ibid.* 155.

⁷ *ibid.* 156-159.

⁸ *ibid.* 155.

⁹ JR 140-147.

clearest conceptualisation is found in *Justice for Hedgehogs*, where Dworkin defines what interpretive concepts are. The earlier ones are found in *Law's Empire*, where he explains interpretive concepts through the idea of constructive interpretation, and in *Justice in Robes*, where he lists some constitutive elements of political concepts, which he thinks are interpretive. I will examine these conceptualisations in chronological order.

3.1.1 Interpretive Concepts in Law's Empire: constructive moral reasoning through paradigms

In *Law's Empire* Dworkin employed the idea of interpretive concepts to defend his account of theoretical disagreement in law. His strategy was to extrapolate the question from the realm of law and frame it in terms of disagreement generally. The resulting project was aimed at demonstrating that genuine disagreement about a concept was possible even in the absence of clear criteria defining the concept. He thus set out to explain how people could disagree about what a concept is, and what it required, and still be sure that they were talking about the same concept, i.e., that they had a genuine disagreement.¹⁰ The answer he proposed was a paradigm based one: since participants directed their interpretations at the same paradigm cases, they could be sure that they were speaking about the same concept.¹¹ It is important to note that in *Law's Empire* despite invoking the term 'interpretive concepts'

¹⁰ LE 46, 73.

¹¹ LE 46. See Brian Bix, *Law, Language, and Legal Determinacy* (Oxford: Clarendon Press, 1993) Ch 2 (for a discussion of Dworkin's view as a paradigm based one and its comparison to WB Gallie's reliance on exemplars.)

Dworkin claimed that his theory aimed at explaining interpretive social 'practices' and 'structures'.¹² Perhaps this explains the idea of being interpretive as something that participants in a practice do, rather than being a property of concepts. Allow me to reserve my examination of this issue for a discussion of interpretive concepts in *Justice for Hedgehogs*, where Dworkin develops his thinking more along these lines. I point this out now since Dworkin employs the term interpretive to characterise both concepts and practices and employed these two terms themselves interchangeably.

In *Law's Empire* Dworkin argued that to understand disagreements that arise in interpretive practices like law, one must abandon criterialism: the view that the correct use of a concept depends on the shared criteria that participants hold about the concept.¹³ Genuine disagreement could ensue in the absence of settled criteria about the concept due to the existence of common paradigms, and in offering contesting views of the concept, participants engaged in constructive interpretation mediated by paradigms. Participants postulate a point and purpose to the concept/practice¹⁴, and examine which interpretation of the concept best justified this point and purpose, and its paradigm cases. He sometimes labels this point and purpose 'the concept', and the candidate explanations as 'conceptions'.¹⁵ At other times he articulates it in terms of values that justify the practice: "...why a practice ...is worth pursuing".¹⁶ Despite the varied terminology, in effect, he proposes a two-stage ascent in the

¹² LE 49.

¹³ JR 151.

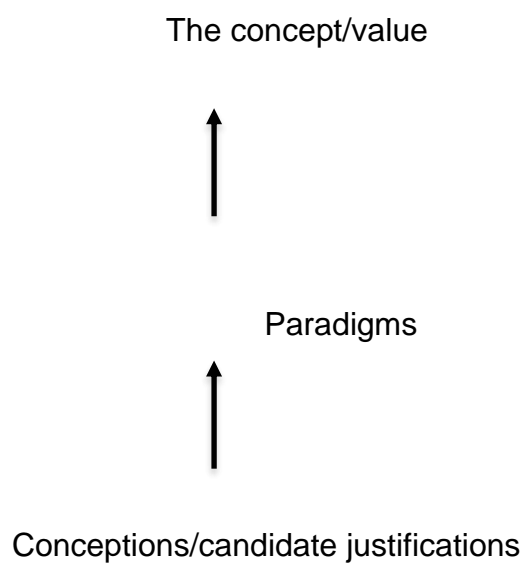
¹⁴ Dworkin uses the word practice as he does not maintain a distinction between concepts and practices.

¹⁵ LE 71.

¹⁶ LE 66.

reasoning of participants when they engage in constructive interpretation. The stages are represented by figure 1 below.

(Fig. 1)



In this scheme, no paradigm is safe from revision since it is the concept that participants seek to develop an understanding of.¹⁷ The paradigm is instrumental. It is an instance that represents the concept/value and provides a common point of access to that value. Perhaps in Platonic terms, the paradigms are cases that represent hypotheses about what the concept is, and participants must ascend to the level of understanding to realise what these

¹⁷ LE 72.

paradigms really are by exercising their power of reason.¹⁸ To use one of Dworkin's examples, the paradigm cases of courtesy are actually about respect, and the various practices of courtesy that we have are therefore about respect.¹⁹ To determine what courtesy requires, we must understand what respect is. The role of paradigms here is that through them, participants try and access the reasons that are a true understanding of the concept of respect. Their own conceptions in turn are their best effort at discovering this truth.

In the process of constructively interpreting our practice, one dimension of proof is that of fit with paradigms. This occurs at a time when the paradigms are not yet proven to be mistakes. Here, accounts of values that fit the paradigm will be more convincing than others. However, evidence of fit is not proof of having arrived at the truth of the matter.²⁰ When we have some view of the values that are in operation in explaining the paradigms, we are in a position to reason with the values themselves and thus transcend the limits of the paradigm. Once we are past the paradigms and in the realm of values, Dworkin thinks that we will discover a moral value that justifies the practice. It is this value that will guide us in thinking about what it requires of us. Such a value might turn out to be a contested concept, and we will have to depend on our own moral convictions and reasoning to determine what it requires.²¹

¹⁸ Here I refer to Plato's metaphor of the line in *The Republic* Book 5. In Plato's line, paradigms can be analogized to hypotheses in the third section of the line. It is in the realm of understanding, but only as starting points for philosophical reflection. G.R.F. Ferrari (ed.) Tom Griffith (Trns.) *Plato: The Republic*, (Cambridge University Press 2000) 217-219.

¹⁹ LE 71.

²⁰ Admittedly Dworkin has abandoned the significant role for the dimension of 'fit' in interpretation, and it is moral justification that is central to his views on interpretation. This departure from his views in LE is clearly demonstrated by his views on conceptual interpretation in JFH. See JFH 131. See generally JFH Ch. 8 (for Dworkin's account of why conceptual interpretation is also moral through and through.)

²¹ *Taking Rights Seriously* Ch. 4 (the thought experiment involving the ideal judge Hercules.)

In this picture of constructive interpretation, note that Dworkin has not made any claims about the nature of interpretive concepts. He provides us an account of how we should, and on his account, do, reason with such concepts.²² That however does not explain why we should reason that way with those concepts. If such concepts do warrant constructive interpretation, something must be said about the nature of these concepts that requires such interpretation. The account of interpretive concepts in *Laws Empire* is silent on this matter. Rather its value lies in describing how genuine disagreement is possible due to paradigms, and in prescribing how one embarks on constructive interpretation. It does not explain how moral reasoning mediated by paradigms is required by the nature of concepts involved. Though it might be true that in many of our practices that Dworkin labels as interpretive, we do engage in constructive interpretation, that does not make a case for certain *concepts* being interpretive in nature. Perhaps Dworkin realises this inadequacy and therefore offers us an account of the nature of interpretive concepts in *Hart's Postscript*, subsequently published in *Justice in Robes*.²³ Here he proposes some constitutive elements of interpretive concepts. This account therefore holds some promise of explaining how the idea of interpretive concepts enables us to understand the nature of moral and political values, and how that warrants reasoning with them in a special manner.

²² I take constructive interpretation based on paradigms to be the beginnings of a sound theory of reasoning with values. However, Dworkin abandons this project for his theory of unity of values that I argue is vitiated by its problematic holist roots. See chapter 4 for how I Dworkin's unity of values is a holist account of reasoning with values that is distinct from constructive interpretation. See pp 262-263 below for a discussion of how paradigms were a promising start, but not enough for a sound theory of reasoning with values. See section 6.5 of this thesis for why paradigms are not enough for a sound theory of reasoning with values.

²³ Dworkin, JR Ch. 6.

3.1.2 Constitutive features of Dworkin's Interpretive Concepts

Dworkin spells out three constitutive features of interpretive concepts. First, that they have a deep structure.²⁴ Second, that at the heart of this structure is a normative core.²⁵ Third, that to share such concepts participants in a practice must take the correct use of the concept to be the best justification of the role that it is supposed to play for them.²⁶ In this section I will examine the first two claims. The third feature turns out to be a definition of what interpretive concepts are, and I examine that closely in the following section. The objective in this section is to examine if the first two claims make out a strong case for some concepts to be understood as interpretive, and whether the notion of being interpretive in this sense furthers our understanding of how participants in a practice reason with interpretive concepts.

That interpretive concepts have a 'deep structure' is a relatively new argument from Dworkin's armoury. It closely connects his interpretivism to Nicos Stavropoulos's work on semantics and substantive disagreement. The argument rests on an analogy with natural kind concepts; the claim being, that interpretive concepts are similar to natural kinds to the limited extent of both having deep structures as their cores. Dworkin offers a skeletal account of the deep structure argument when taken on its own. But situating it in the context of the views he challenges brings out the major philosophical claims that he thinks it supports. So, let me first reconstruct the argument with Dworkin's statements and then situate it in the context of other views that he develops.

²⁴ *ibid.* 154-155.

²⁵ *ibid.*

²⁶ Dworkin, JFH 158.

Dworkin claims that *political* concepts have a deep structure. I read this as being a claim that *interpretive* concepts have a deep structure. This is so because Dworkin does not clearly state what political concepts are. Rather he lists many of the concepts that he thinks are interpretive, to be political concepts. In this he does not distinguish between political, legal, or moral concepts. Perhaps it is a fair reading of his work to say that interpretive concepts, including political ones have a deep structure. The case for this reading becomes stronger with his claim in *Justice for Hedgehogs* that all our concepts of value are interpretive.²⁷ Since most of the political concepts he lists, e.g. justice, freedom, and liberty, are concepts of values, it is more than safe to assume that Dworkin's claim about deep structure applies to all interpretive concepts.

Dworkin claims that political concepts such as justice, freedom, and liberty have a deep structure, similar to the deep structure of natural kind concepts such as water or gold. Their deep structure explains other characteristics of political concepts just as the deep structure of a natural kind explains its other features.²⁸ The deep structure of a concept is therefore fundamental to its nature. However, on Dworkin's view, unlike the deep structure of natural kind concepts, which is physical, the deep structure of political concepts is normative.²⁹ Being normative does not make the deep structure of interpretive concepts any more elusive than that of natural kinds. Dworkin believes that "...just as a scientist can aim, as a distinct kind of project, to reveal the very nature of a tiger or of gold by exposing the basic physical

²⁷ Dworkin, JFH 166.

²⁸ Dworkin, JR, 154

²⁹ Dworkin, JR, 155.

structure of these entities, so a political philosopher can aim to reveal the very nature of freedom by exposing its normative core.”³⁰

Notice that the deep structure argument makes a case for the existence of objectivity in the realm of political values. This fits well with Dworkin’s views on objectivity in law and morals that critiqued an Archimedean view of morality generally by denying the possibility of external scepticism.³¹ The deep structure argument develops a novel dimension of critiquing Archimedianism about political concepts by attacking the criterial semantics on which it rests.³²

In brief, the Archimedean view holds that political values can be described in a neutral manner without engaging in substantive normative arguments about what they are.³³ It holds that even if we disagree about what such concepts require, or even what they are, there is a threshold agreement on what we take them to be before we have disagreements about them.³⁴ Dworkin alleges that holding such a view permits philosophers like Isaiah Berlin to claim that the meaning (content) of a concept, say liberty, can be established by conceptual analysis that does not involve ‘normative judgment, assumptions or reasoning.’³⁵ Archimedeanism believes such analysis to be purely descriptive and therefore neutral among the controversies that are involved in the practice.³⁶ In opposition, Dworkin cites evidence from the practice of applying political concepts as contradicting the Archimedean view. He argues that

³⁰ *ibid.*

³¹ Ronald Dworkin, ‘Objectivity and Truth: You’d Better Believe it’ (1996) 25 *Philosophy and Public Affairs* 87.

³² JR, 148 and 150.

³³ Dworkin, JR 145-150.

³⁴ *ibid* 148

³⁵ JR 146

³⁶ *ibid.* 137. Nicos Stavropoulos launches an attack on a similar view that claims that concepts like cruelty have a non-evaluative component independent of evaluative considerations. Nicos Stavropoulos, *Objectivity in Law* (Clarendon Press: Oxford 1996) at 94.

participants in a practice that involves political concepts do not disagree merely on whether a concept, say democracy, is important or not, but they disagree on what democracy *is*?³⁷ Their arguments about what democracy *is* are normative arguments. They are normative arguments about a value that democracy tries to capture. Participants contest the description of democracy by others with their own; the bone of contention being, which description best captures or realises the value.

I take it that it is this value that is the normative core that Dworkin thinks comprises the deep structure of interpretive concepts.³⁸ Participants hold different descriptive senses of a political practice because they differ in their beliefs about which description best justifies the value. He characterises such disagreement to be theoretical disagreements about what a practice is, where participants dispute each other's descriptions of political concepts like justice, democracy, or dignity. Dworkin thinks that in such disagreement we try and provide an account of the value that lies at the core of the concept. This I think might be true. When we disagree about what justice is, it is not to say that we do not have the concept of justice, rather we have different beliefs about what justice stands for. Traditionally situations of different beliefs about the same concept have been spoken in terms of concepts and conceptions.³⁹ The central question has been about whether the conceptions are about the same concept.

³⁷ JR 148. Dworkin employs the same question in his attack on positivists in *Laws Empire*. There he points out through the hard cases he cites, that lawyers routinely disagree on what the law *is* on an issue.

³⁸ He indicates this by taking the important question about political concepts to be how to identify a 'value's value'. See JR 156. Though the idea of interpretive concepts being normative in nature is taken to be a consistent claim throughout Dworkin's work, explaining it as the 'deep structure' of interpretive concepts is only found in JR.

³⁹ John Rawls, *A Theory of Justice* (OUP, 1999) at 5; Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) at 103; LE at 71-72; WB Gallie, 'Essentially Contested Concepts' (1955) Proceedings of the Aristotelian Society 167

Dworkin has at least three answers to this question. The first is that the pre-interpretive materials in the form of paradigms anchor our conceptions to the same concept.⁴⁰ The second is that there is agreement amongst participants holding different conceptions on the criteria required for sharing an interpretive concept.⁴¹ And third, that the fact of the existence of a deep structure roots our disagreement in common ground, thus making our varying conceptions about the same concept. The third answer is not an answer that Dworkin expressly provides for the question of agreement. It is a possible answer: since there is a deep structure of interpretive concepts that can be elucidated by philosophers, our differing beliefs are those about the deep structure.

I will consider these answers in turn in light of Nicos Stavropoulos' explanation of substantive disagreement based on Saul Kripke and Hilary Putnam's work on meaning (hereafter 'K-P Semantics'), which he thinks is compatible with Dworkin's interpretivism. Stavropoulos' views are significant for Dworkin's claims about the deep structure of interpretive concepts as Stavropoulos employs K-P semantics to explain what the deep structure of concepts is and how it supports an argument for substantive disagreement in law that is inimical to criterialism.

3.1.3 K-P Semantics, deep structure and paradigms

The question of disagreement about what a practice *is*, has been addressed sometimes as the debate on substantive disagreement, or as theoretical

⁴⁰ LE 65-66 and 72-73.

⁴¹ Dworkin, JFH, 158.

disagreement in law, or rational disagreement in philosophy. The central question is about how we understand disagreements where participants argue over what a practice is, without characterizing it as radical disagreement. David Plunkett and Timothy Sundell have argued that Dworkin's characterisation of such disagreement is mistaken.⁴² My intuition is that their criticism is sound. In this chapter however, my focus is not on the mischaracterisation of such disagreements as theoretical disagreement. My attention is directed at how answers to the question of theoretical disagreement can be anchored in a question about concepts, as Stavropoulos does. That answer however, does not make a case for some concepts being interpretive concepts.

Dworkin and Nicos Stavropoulos have argued that positivist theories of law are unable to explain substantive disagreement due to the criterial semantics they adopt.⁴³ Criterialism is the view that the determining factor for the correct use of concepts depends on their conformity to certain shared criteria that users hold.⁴⁴ It holds that the extension of a concept is determined by criteria that is conventionally determined by users, and when there are cases in which the agreement among users that underlies the standard cases break down, then there is indeterminacy over the application of the concept.⁴⁵

⁴² David Plunkett and Tim Sundell, 'Dworkin's Interpretivism and The Pragmatics of Legal Disputes' (2013) 19 *Legal Theory* 242.

⁴³ Dworkin, LE 45-46. Dworkin labels this inability, the semantic sting. For responses to Dworkin see Joseph Raz, 'Two Views of the Nature of the Theory of Law', and Timothy Endicott, 'Herbert Hart and the Semantic Sting' in Jules L. Coleman (ed) *Hart's Postscript: Essays on the Postscript to the Concept of Law* (OUP 2001).

⁴⁴ Dworkin, JR, 151

⁴⁵ Stavropoulos, *Objectivity* (n 36) 3. Many theorists have pointed out that Stavropoulos errs in ascribing criterialism to Hart, even though his account of semantics can be accepted, see James Penner, Book Review: *Objectivity in Law* by Nicos Stavropoulos, (1997) 60 *Modern Law Review* 747.

Dworkin attributes criterialism to Hart and other legal positivists.⁴⁶ He alleges that on a legal positivist view, if participants in a practice disagree over what a concept is, they probably hold different criteria for the meaning of the concept. Their disagreement therefore is not intelligible since they are not disagreeing about the same concept. Whereas on Dworkin's own view, participants in practices like law routinely engage in disagreement about what the law is, or what the grounds of law are. Positivists would have to take all such disagreements to be radical ones.

As an alternative, Dworkin proposes that political concepts, including law, are interpretive. Their correct use does not depend on any agreed criteria that users of the concept hold. This proposal is supported by at least two distinct arguments, one advanced by Nicos Stavropoulos and the other by Dworkin himself. Until the publication of *Justice in Robes* and *Justice for Hedgehogs*, it appeared that Dworkin's criticism of criterialism was identical to Stavropoulos'. Now it appears that Dworkin adheres to criterialism of some sort as he posits a criterion to be shared by participants that generates the agreement required for meaningful disagreement about political concepts, including law. Let me first take up the chronologically prior view that is argued for at length by Stavropoulos.

In his book *Objectivity in Law*, Stavropoulos relied on K-P Semantics to criticize criterialism, and consequently legal positivism. His work made positions in the theory of meaning (semantics) central to debates in legal philosophy, especially the Hart-Dworkin debate. Stavropoulos' semantics also

⁴⁶ Dworkin, JR, Ch. 6.

made concepts the principal unit of semantics, as opposed to words.⁴⁷ He combines K-P semantics, Tyler Burges' non-individualism, and Donald Davidson's principles of charity to advance the following argument:

S1: The meaning (content) of concepts is its reference. Reference is an objective property in the world.

S2: For theoretical concepts that do not refer to physical properties in the world, we construct a coherent theory through paradigms of the property, targeted at the property. Meaning is both object and theory-dependent.

S3: S2 is arrived at by ascribing a Davidson's principle of charity in understanding mental states of individuals.

S2 does not depend on any criteria that the community of users might hold as the meaning of that concept. Rather like natural kinds such as water and gold, the meaning of theoretical (including legal) concepts is also controlled by its referent.

In applying K-P semantics to non-natural kind concepts Stavropoulos wishes to make a cognitivist move that does not require strong realism associated with natural kinds.⁴⁸ He adopts the position that for such properties to be objective they need not be 'queer' mind-independent properties.⁴⁹ He then proposes S2, that drives the rest of his book.⁵⁰ Stavropoulos explains S2 first in the context of mental contents like thoughts, beliefs, and intentions.⁵¹ The claim is that they are not autonomous (world-independent) but are individuated

⁴⁷ Anne De Moor, 'Nothing Else to Think? On Meaning, truth, and Objectivity in Law by Nicos Stavropoulos', (1998) 18 OJLS 345 at 346.

⁴⁸ Iain Law, Review of Nicos Stavropoulos. *Objectivity in Law*, (2000) 109 *Mind* (New Series), 650 at 651.

⁴⁹ Iain Law (n 48) at 651 and Stavropoulos, *Objectivity* (n 36) 40-44.

⁵⁰ Stavropoulos, *Objectivity* (n 36) 36, 43.

⁵¹ I take this to be a significant point since I will argue below, that Stavropoulos' views are sounder as claims about the nature of mental states such as beliefs, but not about the nature of concepts.

by their object. Objects here are not to be construed as physical mind-independent properties. Rather they are to be explained by taking into consideration the 'subject's purposes and actions', along with 'objective factors affecting his relation with the environment'.⁵² 'Hence what thought will be attributed to the subject depends on the most coherent story available concerning the subject.'⁵³

There is however a bootstrapping allegation that Stavropoulos anticipates. To attribute mental contents to a subject, we must rely on some characterization of the subject's actions, and on the meaning of the language used. Such attribution and meaning itself is dependent on relevant propositional attitudes again, and thus the bootstrapping allegation.

To overcome the allegation Stavropoulos introduces S3. The principle of charity acts as a 'constitutive non-optional' constraint: that we assume that the speaker is rational in a substantive way by ascribing natural contents to her, such as that she believes in certain truths, has sensible desires, uses language properly, etc. Without these assumptions we will be unable to view the subject as a subject.⁵⁴ This principle of charity does not imply indubitable truths about the ascriptions we make to the subject. Rather it leaves room for error in two ways. The first is an evaluation of how well-placed and equipped the subject is to observe aspects of her environment. The second is the evaluation of her connections among the beliefs attributed to her with special emphasis on her epistemic beliefs. i.e., belief in sentences whose truth she counts as supporting the truth of others.⁵⁵

⁵² *ibid.* at 42.

⁵³ *ibid.*

⁵⁴ *ibid.* 43

⁵⁵ The two ways of falling into error are taken from Donald Davidson's two interpretive devices

In the case of non-natural kind concepts, the object that is the referent of the concept is to be found in the manner in which a community *in fact* uses a concept, not on what criteria the community thinks to be the correct meaning of the concept. Meaning is thus not conventional.⁵⁶ Properties described in introducing such terms are 'reference-fixing devices liable to be amended as more information is available concerning the physical property they are really meant to capture'.⁵⁷ They are in this way *targeted* on nature and thus supported by S1. Our theories construct the best coherent account we can of the property that collects for us the paradigms of the concept.⁵⁸ Theories are *targeted* at the property which exists in nature.⁵⁹ For Stavropoulos, therefore, the meaning (content) of theoretical concepts is determined both by mental states of concept holders, as well as their relationship to properties in nature.⁶⁰

Can Stavropoulos' account sustain a claim about the deep structure of interpretive concepts? What the account does do is anchor questions about substantive disagreement to questions about conceptual content. If the content of theoretical concepts (read interpretive concepts) is determined partly by properties in nature, then perhaps that is the deep structure that Dworkin might be referring to.

On Stavropoulos' account however, the content of concepts being fixed to referents in the world is a theory of content in general, applicable to all concepts. What is special about interpretive concepts then? If interpretive concepts are theoretical concepts, then arguably, their content is also to be

⁵⁶ *ibid.* 45-46

⁵⁷ *ibid.* 45, 88

⁵⁸ *ibid.* 46, 146.

⁵⁹ *ibid.* 88.

⁶⁰ *ibid.* 146.

determined in part by mental states of concept holders in that they construct theories about the property that collects the paradigms of the concept. This takes us back to the circularity of Dworkin's constructive interpretation. Indeed, Stavropoulos takes this circularity to be inevitable.⁶¹ To repeat, it is unclear as to whether the property collects the paradigms for us, or whether the paradigms are all we have in figuring out the property that the concept represents? If it was the property that collected the paradigms for us, then we already have a concept of that property. Alternatively, if attention to paradigms indicated the common property involved, then what would be the constituents of such a theory apart from the paradigms? If the paradigms themselves are instances of the concept, then a plausible account of why we take the paradigms to be instances of a particular property remains to be provided.

My intention here is to point out that Stavropoulos' view is one about conceptual content and not the special conceptual nature of some concepts. Even if we were to admit that theoretical concepts were special due to the special way their content was determined, it certainly does not amount to saying that they have a deep structure as concepts that can be elucidated.

If the claim is that when we apply such concepts, we offer theoretical accounts of what the paradigms aim at, then that is a claim about how the content of concepts is determined, not a claim about what their content is. It is also not obvious that this manner of content-determination is warranted by a feature of some concepts i.e. that such concepts are interpretive. To take cue from Stavropoulos' S2, the reasons for this manner of content determination lies in the non-natural nature of theoretical properties: that they are not purely

⁶¹ *ibid.*

physical like natural kinds. This implies that the comparatively determinate decision-procedures available for non-natural kinds is unavailable in the case of theoretical properties and thus what necessitates S2 is indeterminacy about the property. If indeterminacy of the property represented were the deep structure that made interpretive concepts special, then all indeterminate concepts would be interpretive concepts.⁶² Dworkin however refrains from admitting this clearly and ends up offering a novel ground for designating some concepts to be interpretive. I discuss this in the following sections. The conclusions from the discussion in this section are threefold. First, that Dworkin does not offer a clear picture of what the deep structure of interpretive concepts is. Second, Stavropoulos' attempt at explaining substantive disagreement through K-P semantics is a theory of conceptual content that does not immediately make out a case for the special conceptual nature of certain concepts. Indeed, his is a view that relies partly on K-P semantics and partly on holism, as theories of conceptual content and the content of mental states.⁶³ I do not take up issues of conceptual content here as pointed out before.⁶⁴ The point I want to drive home is that Stavropoulos' view is not one about the nature of concepts i.e. they do not answer the questions: 'What is a concept'? and 'What are the different kinds of concepts'? Neither do his views support a view that there is a deep structure of interpretive concepts that is normative. Indeed, on his view, the content of theoretical concepts is akin to that of natural kinds

⁶² Dworkin does indicate that this is what he means when he says that concepts migrate. See Dworkin, JFH 164-165.

⁶³ I attribute holism to Stavropoulos since the views of Davidson that he relies on are holist views. I discuss the problems of holism at length in chapter 4.

⁶⁴ Chapters 4,6 and 7 of this thesis engage with questions of conceptual content. My position on conceptual content in those chapters agrees with K-P semantics to the extent that determining the content of concepts involves mind-world relations. I reject holism as a sound theory of conceptual content.

in that mind-world relations figure in both. Both kinds of concepts are linked to referents in nature and are targeted at the world.

The third conclusion drawn from this section is that it is unduly burdensome to establish the special nature of some concepts based on how their content is determined. For that one must propose a theory of content determination of some concepts that is peculiar to them. Theories of conceptual content generally hold that the content of all concepts is determined in a similar manner. For instance, holism holds that the content of concepts is determined by their relationships with other concepts;⁶⁵ theories about inferential role hold that the content of concepts is determined by their inferential relations to other concepts;⁶⁶ while Information-Atomism holds that the content of concepts is determined by law-like relationships that mental particulars have with properties in the world.⁶⁷ If the manner of content determination cannot establish that certain concepts have a special nature, then what else can? Dworkin perhaps needs an account of what concepts are, and how they are individuated, to claim that interpretive concepts are a special kind of concept. In the following section I test that claim by examining if his latest description of interpretive concepts can discharge that burden.

⁶⁵ Peter Pagin, 'Meaning Holism' in Ernest Lepore and Barry C. Smith (ed), *The Oxford Handbook of The Philosophy of Language* (OUP 2006) 213.

⁶⁶ Jerry Fodor and Ernest Lepore, *Holism: A Shopper's Guide* (Basil Blackwell 1992)163.

⁶⁷ Jerry Fodor, *Concepts: Where Cognitive Science Went Wrong* (OUP 1998) Ch. 1.

3.2 Interpretive Concepts?

In *Justice for Hedgehogs* Dworkin defined interpretive concepts on the basis of criteria to be satisfied for sharing them: ‘we share an interpretive concept when our collective behaviour in using that concept is best explained by taking its correct use to depend on the best justification of the role it plays for us.’⁶⁸ In the literature on concepts in cognitive science, there is a debate on whether the question of *having/sharing* a concept, is prior to the question of what a concept is.⁶⁹ That I take it is not Dworkin’s concern, and presumably he thinks that there are some concepts that are interpretive in nature, and being interpretive turns on how we share such concepts.

How we come to *share* concepts however may not be a tenable basis for identifying *kinds* of concepts based on the nature of concepts. If it were, then it would have to be on the premise that the manner of sharing concepts holds the key to the nature of concepts. Such a view would be at great variance with the literature on concepts in psychology, philosophy, and cognitive science where there is considerable agreement on the view that the nature of a concept depends on how it represents phenomena to human minds. Thus, it may not even make sense to talk about kinds of concepts based on their conceptual nature. To start with, and in simple terms, concepts are mental particulars or objects of thought.⁷⁰ They represent or ‘token’ phenomenon to our minds that

⁶⁸ Dworkin, JFH 158. It might be thought that using the term ‘criteria’ to explain interpretive concepts is a mistake, given Dworkin’s arguments against criterial concepts. However the definition that he provides does seem to be criteria for identifying interpretive concepts.

⁶⁹ For a distinction between the two see Jerry Fodor (n 67) 3.

⁷⁰ *ibid*, Eric Margolis & Stephen Laurence, ‘Concepts and Cognitive Science’ in Eric Margolis & Stephen Laurence (ed.) *Concepts: Core Readings* (1999 MIT Press)3-81 at 5-6 (for a discussion of why concepts are mental particulars).

enables us to think about such phenomena.⁷¹ As I will explain below, what concepts *are* neither depends on how we share them, or even on what beliefs we have about them. What concepts are, depends on knowing what enables us to think about things they are concepts of.

There is of course a different sense in which we can speak of *kinds* of concepts. Concepts can be of different kinds perhaps based on the kind of phenomena they represent, or on the basis on how they are acquired or more controversially, on the way they represent phenomenon. The most prevalent basis of concept individuation is the first. On that basis concepts could be concepts *of* natural kind objects, or concepts *of* values, or concepts *of* artifacts.⁷² What distinguishes one concept from the other here is the subject matter that the concept represents and not the nature of concepts themselves.

Claiming that there are different kinds of concepts based on the nature of concepts would mean that there are natural kind concepts, or value concepts, or say artefact concepts on some basis other than the kind of phenomena they represent. Traditions of thinking about the nature of concepts in the three disciplines demonstrate that the nature of concepts depends on *how* they represent phenomena to us and not on *what* phenomenon is being represented. How concepts represent phenomenon to us is closely related to how we acquire concepts.⁷³ A brief detour into the literature of concepts will demonstrate why speaking of kinds of concepts irrespective of the

⁷¹ Fodor (n.63) Ch. 1.

⁷² I am grateful to James Penner for pointing this out. James Penner, Interpretive Concepts: What is the Disagreement About? (unpublished paper on file with author).

⁷³ There are of course theories that take concepts to be non-representational. Those theories however have not gained much currency. See Edouard Machery, *Doing Without Concepts* (OUP: Oxford, 2009) Ch. 1

phenomenon they represent, and irrespective of the manner in which we acquire them, does not generally make sense.

3.2.1 Concepts in psychology: The problem with concepts as ‘bodies of knowledge’ and the concept-belief distinction

The literature on concepts can be broadly divided into the disciplines of psychology on the one hand, and philosophy and cognitive science on the other. There are considerable overlaps between the disciplines and there have been efforts at distinguishing their respective projects, especially between philosophy and psychology.⁷⁴ For most psychologists concepts are bodies of knowledge stored in long term memory that are used by default in processes underlying our higher cognitive processes.⁷⁵ There are theories in psychology that oppose this view, the prominent grounds being that concepts are stored in short-term memory, and that concepts are categorization devices.⁷⁶ Despite this opposition, the fact that concepts store bodies of knowledge is not widely disputed. There is also wide agreement about the central questions that psychologists seek to answer about concepts: (1) the kind of knowledge stored in concepts, (2) the format of concepts: do they store knowledge as definitions, prototypes, exemplars or some other form, (3) their use in cognitive processes, i.e., how they figure in thinking (4) their manner of acquisition and (5) their neural localization.⁷⁷

⁷⁴ For attempts at such distinction see Christopher Peacocke, *A Study of Concepts* (MIT Press 1992) Ch.7, and Machery (n 73) 38-39.

⁷⁵ Machery, (n 73), 12.

⁷⁶ *ibid.* 25-29, for a criticism of such theories.

⁷⁷ *ibid.* 18

Saying that concepts store 'bodies of knowledge' is however problematic for philosophers and cognitive scientists, for many of whom the term would presumably be too broad. 'Bodies of knowledge' would suggest that a concept would not only store information about the thing that it is a concept of, but also beliefs about that thing that can later be retrieved from memory when we are faced with instances where the concept applies. Cognitive scientists would point out that there is a difference between the concept itself and beliefs about it. For example, you and I might both have the concept TIGER, but may have different beliefs about them. Your beliefs might be true, while mine false, yet we could both have the concept. The fact that both of us can entertain beliefs about tigers proves that we have the concept TIGER, about which we form beliefs. The term 'body of knowledge' does not allow maintaining this distinction. Rather it suggests that a concept, say TIGER stores all the knowledge we have about tigers in our memory, including beliefs about them, and when we have an instance of a tiger before us, we retrieve that knowledge including beliefs about tigers in order to think and/or act in that situation.

This view collapses the concept-belief distinction that is dear to cognitive scientists and philosophers.⁷⁸ It is of course possible to overcome this difference between the disciplines if one were to read the term 'bodies of knowledge' narrowly. The term could be restricted to the view that a concept (say TIGER) stores only that information that makes it possible for us to have thoughts, including beliefs, about tigers. This implies that concepts only do enough to enable us to have thoughts, whether correct or incorrect, about

⁷⁸ See for example Fodor (n 63) 9.

things they are concepts of, and taking such a view would allow psychologists to maintain the concept-belief distinction.

Despite this possibility it is improbable that psychologists who take concepts to be bodies of knowledge would favour a narrow interpretation since knowledge includes belief and the narrow interpretation might be stretching it too far. However, it is also true that some psychologists, e.g. Edouard Machery (whose views I examine in section 3.3.1 below), accept that concepts can be of the kind that philosophers and cognitive scientists say they are, without perhaps realizing that this causes tensions with the use of the term 'bodies of knowledge'.

3.2.2 Concepts are mental representations that are constituents of thought

In philosophy and cognitive science there are two central questions that the literature initially seeks to answer: (1) what it means to *have* a concept and (2) what *is* a concept. Answers to (1) have generally been of the form that having a concept of x means the ability to have propositional attitudes towards x. For example, to have the concept TIGER means the ability to have propositional attitudes like beliefs and desires about tigers. To say that this precedes the question of what concepts are is controversial, given the dispute over the priority of (1) and (2) above: Which question comes first, namely, what *is* a concept, or what it means to *have* a concept. The influential cognitive scientist and philosopher, Jerry Fodor, thinks that this is a methodological question that rests on a preference.⁷⁹ For him, those thinking that the question of concept possession is prior, have some kind of pragmatism in mind. Such pragmatism

⁷⁹ Fodor (n 67) 3. See also Jerry Fodor, 'Concepts: A Potboiler', (1994) 50 *Cognition* 95 at 100

however does not dispense with the need to answer the question about what a concept is.⁸⁰ Answers to this dispute about the priority of the two questions do not affect the argument I am advancing here. Contemporary cognitive scientists, psychologists and philosophers of concepts generally agree on what I draw upon from the literature of concepts, and the question I will concern myself with is about what a concept *is*.

Literature on concepts across disciplines identify five major theories about what concepts are: the classical view of concepts or that concepts are definitions, the prototype theory, the theory-theory, the neo-classical theory, and conceptual atomism.⁸¹ I may be excused from elaborating on each of these theories as the point I want to drive home is not dependent on the content of each theory, but on the nature of the question that they seek to answer. To be answering the same question requires that there is some agreement on what these theories consider to be their subject matter. The agreement here seems to be that concepts are mental representations, which are the constituents of thought.⁸² Mental representations, simply put are representations of things (physical or abstract) that our minds store, enabling us to think about those things. Concepts thus are mental representations *of* things that enable us to think of those things. Amongst the many things that concepts enable us to do is to have propositional attitudes towards things, and compose complex concepts using other concepts. For example, if we had the concept DIGNITY,

⁸⁰ *ibid.*

⁸¹ See Margolis & Laurence (n 70) Ch. 1 (for an overview of theories of concepts). Perhaps the only exception is the view that concepts are abilities. The view has lost favour amongst philosophers and cognitive scientists. See Eric Margolis and Stephen Laurence, "Concepts", *The Stanford Encyclopedia of Philosophy* (Spring 2014 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/spr2014/entries/concepts/>. (Last visited 14 July 2016.)

⁸² *ibid.* See also, Fodor (n 67) Ch. 1.

we could have beliefs about dignity, say by combining them with other concepts like ABDOLUTE, SUPREME, LIMITED or VACUOUS. We could then believe that dignity is absolute and supreme, or that it is a vacuous concept. Or we could compose more concepts like ABSOLUTE DIGNITY, or LIMITED DIGNITY.

Given the agreement on concepts as mental representations, most theories of concepts inevitably seek to explain the nature of concepts by explaining the nature of mental representations. The dominant method is to explain the structure of mental representations, except for Conceptual Atomism that argues that they have none.⁸³ There is no disagreement however about concepts being mental representations. The general agreement I point out can also be inferred from the fact that psychologists, philosophers and cognitive scientists converge, even if only to criticize, on what they take to be the dominant theories of concepts. For example, the classical paradigm of thinking about the nature of concepts is that concepts are definitions.⁸⁴ This view holds that concepts are structured mental representations in the form of conditions that need to be satisfied to identify an instance of a concept. These conditions include sensory and perceptual ones. For example, I can identify grass if it looks like a blade, is green in colour, and smells the same as when I first acquired the concept. Concepts are thus definitions.

⁸³ All theories of concepts assume that concepts have a structure except Conceptual Atomism that concepts are like atoms (in the 1990s) that do not have structure.

⁸⁴ Laurence & Margolis (n 70) 8. Machery (n 73) 78; Fodor (n 63), Ch. 3 and 4; Jerry Fodor, 'Concepts: A Potboiler', at 101-105. The view that concepts are definitions is traced back to Aristotle, and sometimes to Plato. However, Plato gave a subsidiary role to definitions, unlike Aristotle. For Plato, the first amongst the necessary conditions for possession of a concept is prior apprehension of a corresponding form of the object that the concept is a concept of. A definition of the essence of the concept comes further down the scale as a condition for possession of the concept. For a discussion of Plato's implicit theory of concepts, see Morris Weitz, *Theories of Concepts*, (Routledge: London, 1988) Ch. 1.

Later views argue that concepts are either prototypes, exemplars, theories, or to take another traditional but not definitional view, that concepts are mental particulars that are constituents of thought.⁸⁵ Holders of one theory generally deny the others. The classical paradigm held that *all* concepts were definitions, prototype theorists hold that *all* concepts are prototypes and so on.

None of these views generally allow that concepts can be of any other kind. There are of course notable exceptions. For example, Jerry Feodor's Conceptual Atomism allows for complex concepts to be definitions.⁸⁶ Fodor however, denies the classical theory generally, and also denies that concepts are either prototypes or theories. For Fodor, concepts are not prototypes because being a prototype denies compositionality, which, on his account, explains how concepts are productive and systematic. In brief, compositionality means that complex concepts inherit their contents from those of their constituent ones. For example, the concept of a BROWN COW is composed of the concepts BROWN and COW. This explains how concepts are productive and systematic: we can produce complex concepts from simpler ones in a systematic manner, just as we produced BROWN COW from the constituent simpler concepts. Fodor rejects the prototype theory as prototypes deny compositionality. Many complex concepts do not have prototypes, and conversely many prototypes cannot be understood in terms of their constituent prototypes. Thus, prototypes do not compose and therefore are not a good explanation of what concepts are.⁸⁷

⁸⁵ It is important to note that there are different versions of each of these paradigms.

⁸⁶ Fodor (n 67) Ch. 3.

⁸⁷ *ibid* 100.

Similarly, Fodor argues that those holding the ‘theory’ theory of concepts do not have a positive account of concept possession/individuation. Briefly for now, but in more detail in 3.3 below, the theory-theory of concepts is the view that concepts are mental representations whose structure consists of their relations to other concepts as specified by a mental theory.⁸⁸ Thus my concept of say DIGNITY depends on what role it plays in some theory in which DIGNITY figures or the inferences that one can draw about DIGNITY from the other constituents of that theory. Fodor thinks that if one were to agree with the ‘theory’ theorists that concepts are embedded in theoretical inferences, it remains to be explained which inferences are to count towards proving that one possesses a concept.⁸⁹

Apart from Fodor’s exception for some concepts also being definitions, it is Edouard Machery’s heterogeneity hypothesis that allows concepts to be definitions, prototypes, exemplars or theories. Even his views, which I discuss in 3.3.1 below, do not deny that concepts are mental representations of phenomena.

3.3 Interpretive Concepts as a *Kind* of Concept

Since concepts are mental representations, it is only within this constraint on the nature of concepts that theorists individuate concepts. Some available options for individuation therefore are to categorize concepts on the basis of what they represent, how they are acquired, and probably how they figure in mental processes. A claim about a particular *kind* of concept is thus a claim of this sort. A claim about there being interpretive concepts, as a special

⁸⁸ Margolis & Laurence (n 70) 47.

⁸⁹ Fodor (n 67)119. Machery (n 73) 100-106, for a description and criticism of the theory theories of concepts.

kind of concept, thus must be a similar claim. Dworkin however seems to suggest that interpretive concepts are a special kind of concept on some other grounds.

First, he thinks that there is something special about the nature of these concepts. Secondly, he thinks that part of the reason why some concepts are interpretive is the way we share them. Third, he thinks that interpretive concepts are special because their nature can only be explicated by normative argument. The first claim is unsustainable since a claim about the nature of concepts is a claim about the nature of mental representations. The claim about interpretive concepts is not a claim of this sort. To be so would require arguing that some interpretive concepts represent phenomenon to us in a special manner. The second and third claims tie up with other claims that Dworkin makes which have wider implication. Let me therefore first dispense with one support base that Dworkin might seem to have in the literature on concepts in psychology. I will then return to the second claim, about sharing concepts, in 3.2.2 and discuss the third claim later in section 3.3 as it ties up with Dworkin's claims about conceptual content.

3.3.1 Interpretive Concepts and the Heterogeneity Hypothesis

In the literature in psychology, there is a view that appears to support interpretive concepts as a kind of concept on grounds other than for individuating concepts. This view is the philosopher Edouard Machery's heterogeneity hypothesis proposed in his book *Doing Without Concepts*. The heterogeneity hypothesis allows that for the same phenomenon we may have different kinds of concepts. Kinds of concepts are identified by the way

phenomenon is represented to us, and stored in our long-term memory e.g., as prototypes, exemplars, or theories.

The hypothesis proposes that information about the world is stored in all these forms in our long-term memory and thus it is better to eliminate the term 'concepts' from the vocabulary of psychology, and refer straightaway to prototypes, exemplars and theories.

Notice that the heterogeneity hypothesis does not negate the argument I am advancing, rather it claims that concepts are about how information about the world is stored in our memory and then employed in cognitive processes. Machery suggests, given that there is evidence of the co-existence of all the different kinds of concepts suggested by existing theories, it is better to speak of the theories themselves and eliminate the vocabulary of concepts. In other words, Machery suggests that definitions, prototypes, exemplars, and theories are *kinds* of concepts, i.e. the way information is stored in our memory. The term 'concept' then seems to refer to an amalgamation of ways in which information is stored, and thus does not contribute independently to understanding our cognitive processes. The vocabulary of concepts is thus dispensable.

The heterogeneity hypothesis does not make a case for interpretive concepts, for to establish such a case it must be argued that being interpretive is a way of how information is stored in our long-term memory and how that functions in the processes underlying our higher cognitive capacities. I do not think that Dworkin seeks to make any claim of this sort. Thus, if interpretive concepts are to be a *kind* of concept then it must be so in some other sense.

3.3.2 Sharing Interpretive Concepts

Dworkin's second claim that being an interpretive concept depends on how we share such concepts is also not about the nature of mental representations. In that sense therefore, it is not a claim about the nature of concepts. Rather, it is a claim about the way we share some concepts. Dworkin states that we share interpretive concepts 'when our collective behaviour in using that concept is best explained by taking its correct use to depend on the best justification of the role it plays for us.'⁹⁰ The claim here is about what we take the correct use of a concept to be. Indeed, Dworkin's statement above presupposes that people already have the concept in question, and his claim is about a further criterion that is to be met in order to identify whether we are employing the concept in the same sense, i.e., as an interpretive one. The further criterion is that we must accept the correct use of the concept to depend on the best justification of the role that it plays for us. Now, this suggests that to share an interpretive concept the following must exist:

- a. Agreement, even though loosely, on the role that it is to play for us.
- b. Sharing the belief that the correct use of the concept is the best justification of that role.

Oddly, it appears, that for both these features to exist we must already have the concept which is in issue. Otherwise we could not identify the role we were agreeing about, and about what we are to offer the best justification possible. Both involve having propositional attitudes towards the concept in

⁹⁰ Dworkin, JFH, 158

issue, and that requires that we already have the concept. If that is the case, then his definition is surely not about what amounts to having an interpretive concept. For example, if DIGNITY is an interpretive concept, then it requires that we believe that the correct use *of* DIGNITY depends on the further belief *about* DIGNITY, that we offer our best justifications for its use. This requires that we already possess the concept DIGNITY in order to know that what is in issue is our use of *that* concept.

One might reply that Dworkin here is talking about the correct *use* of a concept, and evidence of correct use is what determines whether we *have* a concept or not. On this view, if someone were using the concept TIGER, and identified hyenas to be tigers, then we might as well say that she does not have the concept tiger. Thus, when Dworkin says that we must share a belief about the correct use of the concept, he is in effect speaking of what it means to have a concept.

This reply is misplaced. There is a difference between speaking about a *particular* application as the correct application of the concept, and a *belief* about what *sort* of application is a correct one. Let me first explain why the reply is mistaken because it moves too easily from an incorrect use of a word to a conclusion about not having a concept. In our tiger example, we had concluded that employing the word tiger to identify a hyena was at least an incorrect use of the word tiger. We might demand reasons from such an applier as to why she used the word tiger in that manner. Such an enquiry might lead us to at least four conclusions. We might either find out that she made an incorrect use of the *word* tiger even though she has the concept TIGER, or that she held false

beliefs about tigers though she has the concept TIGER, or she does not have the concept TIGER, or she misapplied the concept TIGER.

For incorrect use of the word, we might realise that the applier used the word tiger to refer to hyenas, but when a real tiger appeared before her, she held the correct beliefs about it: she would know that it posed a danger to her, or that tiger cubs that are around might be those of the tiger and not the hyena's, or in case the person possessed updated scientific knowledge, she might identify the right DNA in the lab as belonging to the tiger and not to the hyena. She thus has the concept TIGER as we have, but only a different word for it. She can form beliefs about tigers, and thus is able to apply the concept.

For different beliefs about tigers, we might find out that she not only refers to the hyena as a tiger, but when a real tiger appears, she thinks that it would bark, eat biscuits, and if chased, would fly away. In this case we know that the person has false beliefs about tigers, but the fact that she can identify tigers and form beliefs about them means that she has the concept TIGER. It might appear as if this is a case about not having the concept TIGER. That, however, would amount to collapsing the concept-belief distinction. The person in question can identify tigers, which is enough for her to have the concept TIGER and form beliefs about tigers, whether true or false.

For the third conclusion of not having the concept TIGER, we can be sure about it if she cannot identify TIGERS when they appear before her. It might turn out that she has no beliefs about the thing that we know as a tiger. In such a case we realize that the person not only has a different use for the word tiger (she uses it for hyenas) but also does not have the concept of TIGER that we have. Tigers do not figure in her world.

For the fourth conclusion of misapplying the concept TIGER, a case might arise in the following manner. We know that the concept applier has the concept TIGER and can identify tigers when they appear, even if she has a different word for the concept, say DIGER. Now we witness a case where she uses the word DIGER for a striped Great Dane dog. This means that she thinks that the dog is a tiger, probably because it is brownish-yellow and has stripes. We can enquire whether she attributes the same beliefs that she has for tigers, both true and false, to the dog. If she does, then we know that she has misapplied the concept TIGER. Wrongly applying a concept involves applying the concept to a thing that it is not. In other words, it means applying a mental representation to a thing that it is not a representation of. Evidence of wrong application may be holding wrong beliefs about the thing in question, and on further investigation we might establish that the wrong beliefs are being invoked because the concept applier is applying beliefs about some other concept to the thing in question, which she thinks is represented by the same concept. Misapplying a concept is therefore distinct both from not having a concept, and wrongly using a word according to our linguistic usages.

The four conclusions above are about when a case is an incorrect use of a particular word, or holding wrong beliefs about a particular concept, or not having a particular concept, and cases of misapplication of a particular concept. In contrast to the four conclusions above, stands a claim about what *kind* of application of a concept is a correct one. In my view Dworkin's criterion for sharing interpretive concepts is a claim of this sort. Such a claim is about stipulating the conditions under which a particular use is a correct use. In other words, it is a claim about a *procedure* that yields correct use.

A need for such a procedure perhaps arises when there is disagreement over what the correct use of a concept is. In cases where there are no disagreements, reasons for establishing such a procedure may not arise. An example would be that we share a belief that in the process of determining the correct use of a *class* of concepts, say of animals, contesting users will provide the best imitation they can of the animal to demonstrate their familiarity with it and thus strengthening the probability that their use is correct. Holding such a belief does not demonstrate that we have the concept of a particular animal, but only that we have an agreed procedure to judge whether candidate applications of a concept are correct or not. We might of course say that when we hold such beliefs about some concepts then we call such concepts 'IMITATIVE CONCEPTS'. But this naming does not prove that we have a particular IMITATIVE CONCEPT or not. It only demonstrates that we now have a concept of IMITATIVE CONCEPT, which represents the decision procedure we have devised, and which in turn would apply to any concept that comes under the purview of the procedure. The concept of an IMITATIVE CONCEPT has come into existence by way of definition. To share this concept, we must share the content of the definition.

Notice that whether one has any particular IMITATIVE CONCEPT, i.e., a concept that falls within that category- a particular animal in our example- does not depend on whether we have the concept IMITATIVE CONCEPT. It depends on whether we have had sensory stimulus about that animal whether direct (sight, sound, touch etc of that animal) or indirect (read about it, or heard it being described, for example).

The concept IMITATIVE CONCEPT only kicks in when we have a disagreement about say whether the animal before us is an instance of a particular animal, and where we must decide on which of the candidate claims is correct. Therefore, holding a belief *about* the correct use of a class of concepts of the sort that Dworkin prescribes is not about *having* a concept about which the belief is. In sum, Dworkin's criteria for an interpretive concept is not about having some concept that is interpretive, but about having the concept INTERPRETIVE CONCEPT. This is a concept we have learned by way of Dworkin's *definition*. Thus, if dignity was an interpretive concept, the criteria for having the concept INTERPRETIVE CONCEPT does not help us in understanding what dignity is or what its correct use is. What it does is informs us that if we have disagreeing uses of dignity then the correct one is the best justification for it. For sure, Dworkin did provide an account of how 'best justification' is to be achieved. In *Laws Empire* he prescribed constructive interpretation through paradigms, while in *Justice for Hedgehogs* he prescribes holism, that I discuss in the next chapter. These ways of justification are however not a part of what interpretive concepts are. Rather they are warranted, on Dworkin's claim, because some concepts are interpretive.

Does the concept INTERPERTIVE CONCEPT then shed any light on the nature of dignity, or any other value over which we have persistent disagreement? For starters, we presumably already possess the concept DIGNITY if we are to speak about our beliefs of what is a correct use of DIGNITY. Secondly do we not offer best justifications for any concept we use? Why would we genuinely put forward something as the correct use of a concept unless we thought that our reasons were the best justification for it? If this is

true, then all concepts are interpretive concepts whenever we have to provide justification for their use.

Is it the case then that there are some instances of employing concepts that demand justification while others do not? Surely yes. If a concept is employed unchallenged, there is no demand for justification. Challenges might arise due to disagreement on a particular application of the concept, or a demand for explanation for other reasons, e.g., to develop a better understanding of why the concept is applied in a particular manner. Demands for justification on an application leads to explanations of the best possible justification for that application, albeit that the application is a genuine one, where we choose it on the basis of the best reasons available to us. This is when the concept employed becomes interpretive. In effect, an interpretive concept is any concept that we have disagreements about, or about which justification is warranted for any other reason. Interpretive concepts then presuppose disagreement, or a demand for justification. The idea of an interpretive concept does not provide leads to answers for why we have disagreement, or why there is a demand for justification when such concepts are involved. It describes a situation where people demand justification from each other and hold the belief that others will provide the best justification for their proposed use of the concept. In addition, they hold a further belief that this is how the concept is correctly used.

Indeed, Dworkin himself indicates this when he says that 'concepts migrate'.⁹¹ For him criterial concepts sometimes migrate and become interpretive concepts. The reason for this migration is that the criteria for

⁹¹ Dworkin, JFH 164-165.

determining the correct use of the concept is no longer settled. This view of Dworkin's reduces the idea of interpretive concepts to refer to concepts about which we have disagreements. If this is what the concept of an interpretive concept does, then surely it does not answer questions about why we have disagreement on such concepts, apart from stating the obvious that the criteria for its use are unsettled.

Dworkin also leaves us with another puzzle. If we agree with him that sharing an interpretive concept requires us to hold the belief that the correct use of any interpretive concept is the 'best justification of the role that it plays for us', then at first sight, all the candidate uses will be correct uses. Indeed, any genuine user will think her use to be the best, and therefore the correct use. Dworkin's criteria for interpretive concepts, therefore, are not a decision procedure, unlike in the case of IMITATIVE CONCEPTS. Yet, it is a claim about a sort of use that is a correct use. So how do we characterize what sort of claim it is? At best it appears that it is a description of the attitudes of users when concepts that Dworkin thinks are interpretive concepts are at play.

This view of interpretive concepts found in *Justice for Hedgehogs* is a statement about the kind of belief users of a concept must hold in order for a concept to be interpretive. The belief is strikingly similar to Gallie's criteria V and VII for essentially contested concepts.

To recall, the two criteria set out that opposing users of a concept accept others having intelligible reasons for disagreeing with their use; and all users believe that their disagreements will result in the concepts being used in an optimum fashion. These criteria are latent in Dworkin's account of interpretive concepts. First, without users accepting the intelligibility of other's reasons for

disagreement, it is impossible to recognize that others offer candidate best justifications for the role that the concept plays. To assess what is a best justification, the candidate justifications must be intelligible. Secondly, without believing that their disagreements will result in the development of the exemplar (paradigm cases for Dworkin) in an optimum fashion, it would be impossible to agree that offering of best justifications is the correct manner of applying the concept. A use that cannot make sense of the exemplar cannot be agreed upon as a justified use, since the exemplar generates agreement on what we are having a disagreement about.

What remains, thus, leads to the conclusion that by interpretive concepts Dworkin probably means concepts of interpretive phenomenon. In the rest of the thesis this is what I will take interpretive concepts to mean, and subject it to closer examination. For now, we have reason to believe that interpretive concepts are not a kind of concept in the sense that they say something about the nature of concepts, but only in the sense that they are concepts *of* interpretive phenomenon.⁹²

The argument I have advanced might be thought to be trivial. It might be argued that it does not matter whether we say 'interpretive concepts' or 'interpretive phenomena' or 'interpretive practice'. Similarly, it does not matter if we speak of 'essentially contested concepts' or 'essentially contested practices/phenomena'. The argument might proceed that the nature of

⁹² A similar but not so detailed argument is made by Joseph Raz when he says that concepts stand between the objects in the world they represent and the words we use to refer to them. They capture properties of the world for us. In this sense when Hart speak of *The Concept of Law*, or Gilbert Ryle writes about *The Concept of Mind*, they are speaking of the nature of law, and the nature of the mind. See Joseph Raz, 'Can There Be a Theory of Law?' In Martin P. Golding & William A. Edmundson (eds.), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell 2004) 324.

important questions that these practices/concepts raise for human societies remains the same whether we refer to them as practices or concepts. We would still be concerned about how we ought to reason with them, how we ought to understand disagreements they seem to generate, and what would be a justified way of employing them in justifying authoritative decisions.

This objection is partly true. Even if we abandoned the terminology of concepts, it would not contribute to answering the issues that the terms 'interpretive concepts' or 'essentially contested concepts' are employed to raise. These issues centre around understanding how fierce moral disagreement can be substantive disagreement rooted in a locus of agreement, such as Wittgenstein's forms of life.⁹³ Admitting this truth does not blunt the argument about concepts I made, nor does it reduce its relevance.

It was never the objective of the argument to offer resolutions for the issues that interpretive, or essentially contested practices, raise. Rather the argument serves the interests of clarity. It highlights and maintains the important distinction between a word for a concept, the concept itself, and the phenomenon of what it is a concept of. This traditional distinction is important to maintain and for at least two reasons. First, it brings clarity to the questions that are asked. For example, to say that there is something peculiar about how political concepts are conceptualized, because they are interpretive concepts, would be a claim about a special manner in which political practices are represented to our minds. For psychologists, it would be a claim about the special manner in which knowledge about political practices are stored in long

⁹³ Susan Hurley provides a clear statement of how these issues are primarily about disagreement. See Susan Hurley, *Natural Reasons* (New York: OUP 1999) Ch. 3.

term memory, which in turn will demand explanations of the ways in which they will figure in our cognitive processes. In contrast, a claim about a political practice will focus our attention on the features of the practice without having to think about any special manner of how they are represented to our minds.

Secondly, such focus on phenomena (political practices in our example) as opposed to how they are conceptualised, would bring the question of conceptual content to table that I discuss in Chapter 4. This in turn will help us appreciate relations and distinction between different political practices. It will also provide added opportunity for the literature on concepts to provide fruitful insights into understanding the nature of practices that the concepts capture, as the focus will shift from concepts to content. For example, it might be the case that most of the concepts in our political practices are accessed by way of learning existing theories about them, and for that reason we might want to call them theoretical concepts. Other concepts might be acquired based on paradigms. Some might be complex concepts, with their constituent concepts being acquired in ways more than one.

Investigating how we have acquired a concept of a practice and how that affects our beliefs about the practice might go a long way in shedding more light on questions about the practice. In contrast, if we assumed that our concepts of certain practices, say political ones, belonged to a special kind of concept, clarity of thought will demand that we provide an explanation of how this kind of a concept is different from a prototype, a stereotype, an exemplar, a theory, or some other kind of mental particular. It does not appear that Dworkin's or Gallie's view on concepts discharges such a burden, and thus it might be best

to abandon conceptual exceptionalism and address the question of reasoning with values by focussing on the phenomena values represent.

3.4 Conclusion

I have argued that the literature on concepts in other disciplines do not allow interpretive concepts to be a special kind of concept. Dworkin's argument for interpretive concepts requiring constructive interpretation does not establish that it is their interpretive nature that requires constructive interpretation. If the fact of constructive interpretation itself designates concepts subjected to it as interpretive concepts, then interpretive concepts do not denote a special kind of concept, but a manner of reasoning. If it is the case that some concepts require such reasoning, then such a case has not yet been made out apart from the claim that all indeterminate concepts are interpretive concepts.

Dworkin's claim about the deep structure of interpretive concepts is also under-described. Neither is it clearly supported by Nicos Stavropoulos' account which is perhaps suited to describing the content of mental states rather than conceptual content. Holist theorists of conceptual content might build bridges between interpretive concepts and Stavropoulos' account. Such a claim would however be about how conceptual content is determined in general rather than about special kinds of concepts.

The claim about interpretive concepts that they depend on how we share such concepts also turns out to be implausible, given the literature on cognitive science, philosophy and psychology. What remains is that Dworkin's claim is not about how some concepts have a special nature, but about how we should

reason with moral and political values in an interpretive manner. That would be a claim about determining the content of such values. Not because such concepts are special kinds of concepts that warrant such reasoning, but because of the independent merits of such reasoning in determining content. I think that such a picture exists in philosophy as a holist account of conceptual content. Such accounts do not restrict themselves to special kinds of concepts but purportedly apply to all concepts. Dworkin does not explicitly embrace it, but I suspect that it might sustain a plausible view of interpretive reasoning. That is the claim that I now turn to in chapter 4.

Chapter 4. Interpretive Concepts: Holism about Values

In Chapter 3 I argued that Dworkin's account of interpretive concepts lacked argument to characterise them as special kinds of concepts, given the literature on concepts in cognitive science, psychology and the philosophy of mind. This chapter examines a distinct aspect of interpretive concepts that forms the basis for Dworkin's prescription that moral and political values, being interpretive concepts, warrant a specific form of reasoning.

Dworkin claims that values are interdependent and are woven into a web with other values. Reasoning with them requires placing each in the web of all other values. This chapter first argues that Dworkin's prescription is based on the following content-holist premise: conceptual content of values is determined by mutual relationships between values. The key element in Dworkin's content holism is the idea of interpretive concepts, which is in fact a normative claim about how their content ought to be determined. His holism, however, is under-described. Reconstructing it in terms of holist theories that his account resembles fails to present it as persuasive, given the limitations of content-holism.

Dworkin's views are also understood to be coherentist about justification i.e. as being confirmation-holist. My arguments in this chapter do not examine his confirmation holism. I examine the relationship between his content-holism and confirmation-holism in chapter 5. The concerns in the chapter are therefore distinct from previous examinations of Dworkin's holism about law that focused on the limits of coherentism, and the relevance of coherence in judicial

reasoning.¹ The subject matter here is investigating the precise nature of Dworkin's holist claims about how the content of values is determined.

The enquiry begins with a description of Dworkin's holist claims and subsequently evaluates how they compare with influential holist traditions in the philosophy of mind and language.² I do so to argue that unlike holist theories such as Quine's meaning holism, Dworkin's does not discharge the initial burden of explaining how its holist *explanandum* is constituted. That is a burden any holist theory must discharge to get off the ground. Dworkin's account of interpretive concepts is silent on how values are united and systematic; and how they are distinct from the realm of science, as he claims.

A comparison with Quine's holism is also instructive as it reveals assumptions and arguments that must be in place to sustain a holist argument for intra-systemic content-determination such as Dworkin's claims about value concepts. A clear view of such sustaining claims and assumptions brings into focus objections that any intra-systemic holist view must anticipate. Prominently, they bring into focus the question of how the initial content of holist systems is gathered. Unlike Quine's holism that painstakingly accounts for initial content, Dworkin's holism lacks such an account. I consider and reject the objection that Dworkin has a picture of initial content-determination in the pre-interpretive stage. Without accounting for initial content, an intra-systemic theory of content-determination stands on weak foundations.

¹ Andrei Marmor, 'Coherence, Holism and Interpretation: The Epistemic Foundations of Dworkin's Legal Theory' (1991) 10 *Law and Philosophy* 383; Joseph Raz, 'The Relevance of Coherence' in *Ethics in the Public Domain* (Clarendon Press 1994) 277.

² Holism also has a strong tradition in Quantum Physics. That picture is beyond the purview of this chapter. For a discussion of how holism in science is related to holism in the philosophy of mind see Michael Esfeld, *Holism in Philosophy of Mind and Philosophy of Physics* (Kluwer Academic Publishers 2001).

Apart from Quine's holism, insular holist theories that invoke ideas of 'conceptual role' and variants of 'inferential role' can be employed to reconstruct Dworkin's holism. However, such theories are intractable as theories of conceptual content and are unhelpful in reconstructing Dworkin's content-holism as a persuasive account of reasoning with values.

Though the chapter is critical in nature, I build upon it in later chapters to construct a non-holist, bottom up account of how decision-makers should employ values as justifications for decisions.³

4.1 Dworkin's holism

For Dworkin, being interpretive is a fundamental feature of moral and political values.⁴ Understanding values as interpretive concepts explains why we have

³ There are arguments leading to a similar conclusion about Dworkin's theory of law. One from the Critical Legal Studies School accuses Dworkin's theory of not allowing space for radical reform of the law. The other comes from liberal critics who point out that Dworkin's legal holism, especially its emphasis on coherence, is unwarrantedly conservative of past practice. See Douglas Litowitz, 'Dworkin and Critical Legal Studies on Right Answers and Conceptual Holism' (1994) 18 *Legal Studies* 135 (Discussing the argument from Critical Legal Studies.); Raz (n 1) and Marmor (n. 1) (for a critique of Dworkin's coherentism). Many interpreters of Dworkin deny these criticisms by arguing that past practice was never a real constraint for evaluation in Dworkin's theory of law - that the dimension of 'fit' never played a determinative role in his legal theory. The charge of undue conservativeness therefore does not stick. For them, moral evaluation goes all the way down in determining the content of the law in Dworkin's theory: past practice was made relevant by value and not the fact of the practice itself. See Stephen Guest, 'How to Criticize Ronald Dworkin's Theory of Law' (2009) 69 *Analysis* 1. For a fleshing out of the argument without ascribing it clearly to Dworkin, see Mark Greenberg, 'How Facts Make Law' (2004) 10 *Legal Theory* 157. In contrast to the debates in law, in Dworkin's holist prescriptions about *values*, the problems of holism do not arise from any view on past practice or the dimension of 'fit'. The criticisms I will highlight pertain to problems with the idea of holism itself that leads us to an inescapable circularity about conceptual content.

⁴ In his project is like Raz's who too claims that the nature of an object is something that occurs as fundamental in its every instance. Joseph Raz, 'Can There Be a Theory of Law' in *Between Authority and Interpretation: On The Theory of Law and Practical Reason* (OUP 2009) 24-25. Dworkin however criticizes accounts akin to Raz's as criterial accounts of concepts that are different from interpretive concepts, since criteria is not fundamental to understanding interpretive concepts. See *Justice For Hedgehogs* (Belknap Press 2011) 159-160; 'Hart's Postscript and the Point of Political Philosophy' in *Justice in Robes* (Harvard University Press 2006) 154 (arguing for the fundamental nature of political concepts like freedom and justice).

genuine, and not radical, disagreement about values. It also guides us in understanding values and employing them in decision-making.⁵ Dworkin explains what interpretive concepts are on at least two grounds. The first is about how interpretive concepts are shared.⁶ This distinguishes them from criterial concepts. The second, and I think the more significant, is about what it means to be interpretive:

‘... [T]he epistemology of a morally responsible person is interpretive....We form (moral opinions) through interpretation of our abstract concepts that is mainly unreflective. We unreflectively interpret each in the light of the other. That is, interpretation knits values together. We are morally responsible to the degree that our various concrete interpretations achieve an overall integrity so that each supports the others in a network of value that we embrace authentically’.⁷

The core claim in this passage is epistemological: that we form moral opinions (read beliefs) by interpreting abstract moral concepts unreflectively in terms of each other. Our moral beliefs are justified because we interpret moral concepts in a manner that gives them integrity by knitting them together, thus making us morally responsible. Since interpretation is about giving meaning (determining content), Dworkin’s enterprise is about how we determine the content of moral concepts that would in turn justify our moral beliefs.

It is my intention in this chapter to demonstrate that both the epistemological claim, and the conclusion about moral responsibility are undermined by the problems of content-holism.

To begin this critical exercise, note how Dworkin moves fluidly between moral concepts and moral opinions/beliefs/judgments. Ordinarily, in

⁵ Dworkin, *Justice For Hedgehogs* (n 4) at 158.

⁶ *ibid* at 160-163. I criticized this view in section 3.2 of chapter 3 of this thesis.

⁷ Dworkin, *Justice For Hedgehogs* (n 4) at 101.

philosophy, a concept-belief distinction is maintained, where concepts are constituents of thoughts that figure as constituents of our beliefs (propositional attitudes).⁸ Dworkin himself maintained that distinction in *Laws Empire*, where he distinguished between concepts and conceptions. His distinction implied that conceptions were beliefs about the same concept, and therefore disagreements about moral concepts were substantive and not radical.⁹ In this picture, concepts anchored beliefs. If we accept this distinction, then surely there is a question that begs attention. What explains our unreflectively interpreting moral concepts in an interdependent way to arrive at moral beliefs? Why is this knitting-together, or interweaving interpretation, warranted?

Dworkin's answer can be inferred from his ontological claims on the one hand, and a prescriptive assertion on the other. The ontological claims are:

- (i) O1: Values are in a realm independent of the 'scientific realm'.¹⁰
- (ii) O2: Values are interwoven in a network forming an interrelated system.

The prescriptive dimension relies on O1 and O2 to prescribe:

P1: Values must be interpreted mutually.

O1 and O2 are key to his account of interpretive concepts. O1 sustains the claim about values being abstract and insulated from the 'scientific realm'. Concepts in the scientific realm are more concrete in Dworkin's view, in that they are part of the physical world. To take cue from his views on criterial

⁸ See Jerry Fodor, *Concepts: Where Cognitive Science Went Wrong* (OUP 1998) at 7-9 (for a statement of the distinction).

⁹ Ronald Dworkin, *Laws Empire* (Hart Publishing 1998) at 71.

¹⁰Dworkin, *Justice For Hedgehogs* (n 4) at 14, 24.

concepts and scientific concepts, both are more concrete than interpretive concepts.¹¹ But concrete in what sense? A probable answer is heightened agreement in a community of users on the content of concepts, as is the case in criterial concepts. Surely, that could not be the only sense in which 'concrete' is employed by Dworkin, as then any determinate criterial concept would be a scientific concept.

A more justifiable view is to anchor concreteness to reasons that figure in the case of natural kinds concepts. The realm of science interacts with the physical/natural world capable of sense experience, that is a more reliable basis for agreement and thus more concrete.¹² In contrast, the realm of values has no claim to concreteness in this physical/natural sense as it consists solely of values. Such a reading coheres with O2. If only values are available in this realm, then to understand one, we must invoke others. Metaphysical insulation from the physical world makes abstractness a fundamental feature of values. Dworkin therefore excludes a naturalist epistemology for content determination of value concepts.

O1 also sustains the claim about unreflectively interpreting value concepts. In fact, Dworkin's scarce observations on acquisition of value concepts indicates their insularity: 'we inherit these concepts from parents and culture and, possibly, to some degree through genetic species disposition'¹³. Inheritance and genetic species disposition epistemologically insulate value concepts from the physical world. Inheritance includes the mental world, being

¹¹ Ronald Dworkin, 'Hart's Postscript and the Point of Political Philosophy' in *Justice in Robes* (Harvard University Press 2006)

¹² *Justice in Robes* 155 (Where Dworkin takes the deep structure of natural kinds to be physical and therefore in the realm of science).

¹³ *Ibid* at 101.

accessed through communication, while species disposition perhaps recognises evolutionary genetic

coding bestowing a relative innateness to values. What they exclude is inputs from the natural world as contributing to the content of value concepts.¹⁴

Metaphysical and epistemological insularity explain the axiomatic status of 'unreflectively' interrelating value concepts. Arguably Dworkin's reference to value concepts as figuring in 'practices' belies this insulation. However, that thread lies dormant and even abandoned, as he prizes the interconnected nature of values claimed through O2 over explaining how we generate agreement on paradigms in constructive interpretation.¹⁵ In constructive interpretation, Dworkin prescribed that conceptions of values were justified by paradigms, which in turn led us to interpretive/moral concepts that tied our institutional history together.¹⁶ The content of interpretive concepts however were to be determined by placing them in the web of values.

This web of values claimed through O2 sustains the claim about integrity. It brings the prescriptive dimension of being *interpretive* into focus and breathes life into P1. For Dworkin, not only do values exist as a network, they are in fact woven into one by interpretations, and indeed they ought to be interwoven by interpretations.¹⁷

¹⁴ Communication and species disposition are surely classifiable as part of the natural world, and in this sense, Dworkin excludes the crucial feature of value acquisition from content-determination of values.

¹⁵ Dworkin's takes concepts to figure in practices and sometimes even equates them. For example, while speaking of the concept of courtesy in *Laws Empire*, he speaks of 'the practice of courtesy' and how our existing understanding of courtesy is reflected by that practice. Dworkin, *Laws Empire* 68-72. Similarly, he speaks about the concept of 'justice' as figuring in practices. Dworkin, *Justice for Hedgehogs*, 162-163. I take this claim to be a sound one, but unattended to by Dworkin in moving towards holism about values. In fact, as will be apparent in my criticism of Dworkin's holism, pursuing this claim will significantly water down holism of any sort.

¹⁶ Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) Ch. 4.

¹⁷ Dworkin, *Justice for Hedgehogs* (n 4) at 154.

But what precisely warrants P1? O2 suggests an ontological answer: that value concepts exist as an integrated system, so we interpret within the system. But what has it going for the view that they are integrated? O1 suggests that non-moral, external accounts of what moral judgments require are unavailable due to metaphysical insularity. This response would at best be a *non-sequitur* without a thick description of the realm of values. Without reasons for why the realm is insulated from all non-value considerations, the response lacks argument for why value concepts are to be understood as interrelated. Metaphysical insularity neither implies ontological conclusions about interconnectivity or epistemological insularity about content.

One might object that Dworkin need not provide an account of how the web is constituted as he is a non-natural realist about moral values.¹⁸ For him, values objectively exist, but not in the sense that scientific facts do.¹⁹ As much as Dworkin distances himself from meta-ethical claims about values, his non-naturalist claims are surely meta-ethical. To be sure, non-naturalism about values is questionable on any naturalist and/or physicalist account of morality, and to be candid, my own meta-ethical commitments are realist, physicalist, and naturalist even about value concepts. However, my arguments in this section do not rest on meta-ethical arguments, even if some later epistemological implications of my argument do assume meta-ethical positions. I state them expressly when they do so. For now, the argument I seek to advance is that even if we were to grant metaphysical insularity about values,

¹⁸ Ronald Dworkin, 'The Original Position' in Norman Daniel ed., *Reading Rawls* (Basil Blackwell 1975); David Brink, *Moral Realism and the Foundations of Ethics* (Cambridge University Press 1989) 17-18: for a discussion of Dworkin's constructivist realism.

¹⁹ Ronald Dworkin, 'Objectivity and Truth: You'd Better Believe it' (1996) 25 *Philosophy and Public Affairs* 87.

and therefore not question Dworkin's meta-ethical commitments, it does not count towards an argument for the interwoven web. Nothing prohibits individual values from being related only to some values or even be freestanding. Indeed, non-naturalism leaves open various possibilities of how values exist and how their content is determined.²⁰

Dworkin is sensitive to this and therefore offers explanation for what interweaves values, independent of O1. This view stems from his distinction between moral, as opposed to scientific, reasoning, through which he attempts an internal account of the realm of values.²¹ The distinction arises from 'intrinsic goals' and 'justifying goals.'²² For Dworkin, the intrinsic goal of scientific enquiries is to arrive at scientific truth, whereas its justifying goals are the 'goals and purposes that we believe justify trying to find the truth'.²³ For example, we believe that medical research is justified because it prevents and cures diseases.²⁴ In moral reasoning however, intrinsic and justifying goals merge: 'Our standards for success in an interpretive genre do depend...on what we take to be the best understanding of the point of interpreting in that genre.'²⁵ Arguably, in generating the best understanding, our interpretations are the only available material.

Note the shift in focus from moral values to moral reasoning. The claim now is that reasoning weaves value concepts together, and not that they are already interwoven. Accepting this claim would lead us to another circularity.

²⁰ Non-naturalism can support realisms of several kinds: intuitionism, particularism, foundationalism, and Dworkin's own interpretivism. See Brink (n 18) 17-19 and 107-113. See section 5.2 in Chapter 5 of this thesis for a discussion on the nature of Dworkin's realism. See also David Enoch, *Taking Morality Seriously* (OUP 2011) 122-133.

²¹Dworkin, *Justice for Hedgehogs*, 156.

²²Ibid at 152.

²³ Ibid

²⁴Ibid

²⁵Ibid at 153.

Do we mutually interpret value concepts because they are interwoven, or does our reasoning integrate them? Dworkin hints that this circularity is inescapable in the realm of value.²⁶ At other times he claims that it is necessary to rely on other value concepts to avoid further circularity: "...A defense of ...equality or liberty must draw on values beyond itself: it would be flaccidly circular to appeal to liberty to defend a conception of liberty. So political concepts *must* be integrated with one another."²⁷

Here reliance on other value concepts is warranted by avoidance of a sort of circularity that is not immediately apparent. Arguably, we must rely on instances of liberty and agreed content of liberty to defend our view of liberty against others. It is not obvious that we must rely on other vague value concepts to defend a conception of liberty. No circularity need be involved in appeals to the content of liberty itself. What remains of Dworkin's assertions about value concepts is that being interrelated is an ontological feature of values, over and above values being metaphysically insulated. They are not freestanding but hang together in a web. Their interrelated nature warrants interwoven interpretations.

Another argument against interpretations uniting values is that on such a view interpretation must necessarily be a unifying exercise. This militates against instances of interpretation, where to understand phenomena, we

²⁶ Dworkin, *Justice for Hedgehogs*, 163. This circularity resembles Dworkin's 'double hermeneutic claim' that I discussed in chapter 3. To briefly recall, the claim was that participants in a practice are not only aware that their views, and those of others, are interpretations of the practice, but they are also aware that the very nature of the practice is interpretive. They are in a state of double awareness about the practice where they know that it is in the very nature of the practice that rival interpretations ('best justifications') is all there is to settle disagreements about the practice. The practice is purely interpretive.

²⁷ Dworkin, *Justice for Hedgehogs*, 7. (emphasis in the original). What Dworkin does not investigate is what it means to appeal to liberty on its own. He assumes that there is no non-circular method of investigating into liberty without falling back upon other values.

distinguish them from similar phenomenon. For example, interpreting a piece of art or a theory often brings out their distinctive features- something that distinguishes them from other pieces of art and theories. For sure, in interpreting something we invoke other phenomena to lend meaning to our object of interpretation. In fact, Dworkin claims that 'Interpretation is pervasively holistic.'²⁸ This however does not justify our selection of which phenomena to invoke in interpretation. P1 is a claim precisely about that: values must exclusively be invoked to interpret values. P1 can only be justified by independent reasons for why values are interrelated. I therefore proceed with the understanding that for Dworkin, values as phenomena exist as an interconnected web, and they mutually determine the content of our value concepts. This is a quintessential holist claim about the meaning, or content, of value concepts.

The claim for interpretation about value concepts being holistic is then dependent on accepting O2. But does Dworkin argue for O2 in a way that leads to P1? My analysis in this section demonstrates that Dworkin has not accounted for how values constitute a web, nor has he explained how value concepts lend content mutually. His views however derive succour from holist traditions in philosophy.

Though it is generally believed that Dworkin's interpretivism is holist, both about law and about values,²⁹ a close examination of the nature of

²⁸Dworkin, *Justice for Hedgehogs*, 154.

²⁹Douglas Litowitz, 'Dworkin and Critical Legal Studies on Right Answers and Conceptual Holism' (1994) 18 *Legal Studies* 135; Linda C. McClain, 'Justice and Elegance for Hedgehogs: In Life, Law and Literature' (2010) 90 *Boston University Law Review* 863.

Dworkin's holism about values is lacking. Such an exercise is useful as it lays bare the epistemological foundations of Dworkin's views on values.³⁰

I do recognise that Dworkin has provided us with substantive accounts of different values without relying on holism.³¹ This might indicate that he applied, perhaps unknowingly, non-holist views of content-determination. My concern in this chapter is not to examine such substantive accounts, but to examine his theoretical prescription on how we ought to reason with values.

In what follows I compare Dworkin's holism to other exemplars of holism in twentieth century analytic philosophy to demonstrate that a holist theory cannot get off the ground without an account of how its *explananda* is a closely-knit system. I specifically focus on Quine's meaning holism as it is a paradigm of contemporary content-holism that illustrates this common strand of holism. My objective is to show that sound holist theories flesh out a constitutive argument of its *explananda*, and do not necessarily insulate themselves from external epistemological resources. Dworkin's holism, in contrast is silent on the constitutive argument, and resembles strong, insular holist claims that are intractable as a theory of conceptual content.

4.2. Holist theories and Dworkin's value holism

4.2.1 The origins of holism and its common strand

³⁰ Some criticism on Dworkin's epistemology of values is provided by David Brink, but his criticisms are in the context Dworkin's constructivism and intuitionist views. See Brink (n 18).

³¹ For example, an account of equality in *Sovereign Virtue*, of democracy in *Is Democracy Possible Here*; of integrity in *Law's Empire*, or of dignity in *Justice For Hedgehogs*.

The term 'Holism' is attributed to JC Smuts, who in his book *Holism and Evolution*, argued for a holistic understanding of evolution.³² Its contemporary roots in analytic philosophy are perhaps best developed in Ludwig Wittgenstein's and WVO Quine's work.³³ Quine's holist views extended holism to explaining scientific theories, the meaning of sentences, and conceptual content.³⁴ It is holism in these fields that has striking similarities with Dworkin's holism about values and thus will be the focus of my enquiry.

These paradigms of holism share the ontological commitment that the phenomena they set out to explain form an interconnected system, just as Dworkin's O2 does. Holist theories usually provide argument and/or evidence for how their *explananda* are closely connected *systems* that, in the words of Duhem, and later endorsed by Quine, 'face the tribunal of experience not individually but only as a corporate body.'³⁵ I will call this commitment the common strand of holism shared by all holist theories, whether they are understood as confirmation-holism or content-holism.³⁶

For example, Wittgenstein's belief-holism is a form of confirmation-holism where our beliefs are justified if they cohere with other beliefs. To justify this claim, Wittgenstein relies on the common strand of holism: 'All testing, all confirmation and disconfirmation of hypotheses takes place within a

³² JC Smuts, *Holism and Evolution* (Greenwood Press 1973).

³³ Clear statements of Wittgenstein's holism are found in Wittgenstein, *On Certainty* (G.E.M. Anscombe and G.H. von Wright ed., Basil Blackwell 1969). Hereafter 'On Certainty'.

³⁴ W.V.O. Quine, 'Two Dogmas of Empiricism' in *From a Logical Point of View* (Harvard University Press 1961) 20. Hereafter 'Two Dogmas'.

³⁵ Two Dogmas 41.

³⁶ Michael Esfield in his proposal for a general conception of holism takes holism to be a thesis about the way in which certain systems are organised. I examine the manner of how holist systems are organized in the sections on Meaning Holism and on Quine's holist arguments. For now it is enough to point out that Esfield too takes holism to be dependent on an ontological picture where the explanandum of holist theories are interconnected systems. See Michael Esfield (n 2) 2-3.

system...The system is the element in which arguments have their life.'³⁷
Again, 'When we first begin to *believe* anything, what we believe is not a single proposition, it is a whole system of propositions. (Light dawns gradually upon the whole).'³⁸ Despite many differences between Wittgenstein's belief holism on the one hand, and Quine's meaning holism on the other, they do share the common feature of providing an account of how the system is constituted and the manner in which its constituents relate. For example, Wittgenstein states:

'A child learns to believe a host of things. I.e. it learns to act according to these beliefs. Bit by bit there forms a system of what is believed, and in that system some things stand unshakably fast and some are more or less liable to shift. What stands fast does so, not because it is intrinsically obvious or convincing; it is rather held fast by what lies around it.'³⁹

In a similar vein, but in much greater detail, while criticizing the analytic-synthetic discussion, Quine provides a detailed account of how statements within a theory or a language relate to each other, and to experience. In later work, he accounts for how content is acquired in the first place by the system.⁴⁰ Quine is considered to be both a confirmation and meaning-holist. To make his holist claims however, he first explains the manner in which a holist system is constituted. This acts as evidence for the claim that there exists a system, rather than individual elements.

My claim about Dworkin's value holism was that despite making the necessary ontological commitment through O2, it does not provide argument

³⁷ *On Certainty* 105

³⁸ *On Certainty* 141.

³⁹ *On Certainty* 144.

⁴⁰ W.V.O Quine, 'Breaking Into Language' in *Roots of Reference* (Open Court 1973) 33; W.V.O Quine, *Word and Object* (MIT Press 1960) Chapter II.

for values forming an interdependent system. To justify this claim let me first introduce the arguments from meaning/semantic holism that I think influence Dworkin's interpretivism. As will be evident, all of Dworkin's holism does not neatly map onto any single holist theory but draws upon arguments that are available across different theories.

4.2.2. The core holist claim

In its barest sense, holism is the idea that understanding something requires understanding it in relation to other things. Take for example, meaning holism. Meaning holism is the view that the meaning of a linguistic utterance depends on its relations to the meaning of other linguistic utterances.⁴¹ Similarly, in the case of conceptual content, a weak holist claim would prescribe that the content of concepts is determined by its relation to the content of other concepts. A strong one would claim that content is determined by relations to all other concepts.

Both meaning holism and holism about conceptual content have several variants.⁴² My objective here is not to map these distinctions, but to highlight the logic that drives the holist claim generally. A good starting point of grasping that logic is Fodor and Lepore's metaphysical distinction between the ideas of a property being *atomic*, *anatomic*, and *holistic*. The distinction they draw often serves as a basis for a formal definition of holism.⁴³ The distinction, does not

⁴¹ Peter Pagin, 'Meaning Holism' in Ernest Lepore and Barry C. Smith (ed), *The Oxford Handbook of The Philosophy of Language* (OUP: 2006) 213.

⁴² For a discussion of the several variants of meaning see Peter Pagin (n 41), and for those of conceptual content see Jerry Fodor and Ernest Lepore, *Holism: A Shopper's Guide* (Basil Blackwell 1992).

⁴³ Pagin (n 41) 216.

comprehensively capture all elements of diverse holist theories, but it at least begins to clarify the core holist commitment.

‘A property is *anatomic* just in case if anything has it, then at least one other thing does.’⁴⁴ For example, the property of being a sibling is anatomic since being a sibling only makes sense in terms of at least another sibling.⁴⁵ In contrast, a property is *atomic* if it can be instantiated by only one thing, e.g., properties expressed by predicates like “discovered the only...”, or “ate the only...”, and being properties such as being a rock, which can be instantiated by reference to a single rock without reference to other rocks.⁴⁶ The existence of these properties does not rely on their being severally instantiated. Closely related to a property being atomic, is the idea of being *molecular*. Being molecular means that there might be some dependence of the content of the property on other things, but those other things themselves are atomist.⁴⁷ In contrast to the atomist and the molecular, a property is holistic if it is ‘very anatomic’, such that if anything has it then lots of other things have it.⁴⁸ For example the property of being a natural number is holistic since natural numbers are defined by reference to the successor relation: ‘nothing is a natural number unless there is a natural number that is its successor.’⁴⁹

Fodor and Lepore’s explication of a holistic property captures the central claims of holist theories: that their *explananda* not only exist when severally realized but are also related in a systemic manner. My focus here is on whether the *explananda* of holist theories form a *system* within which a constituent of

⁴⁴ Fodor and Lepore (n 42)1; Esfield (n. 2) 7.

⁴⁵ Fodor and Lepore (n 42) 1.

⁴⁶ *ibid.* 1-2

⁴⁷ *ibid.* 6. Fodor and Lepore advance the same argument about language.

⁴⁸ *ibid.*

⁴⁹ *ibid.* 2-3

the system only makes sense in terms of the *whole* system. This claim, if true, can justify Dworkin's claim that the meaning of a value *V* is determined by its relation to *all* other statements in the system of values. However, this view does not immediately count towards the system being insular, that would require further argument.

If the holist claim was that *V* only made sense in terms of *some* other values, then it remains open to values being molecular on Fodor and Lepore's logic. Whether it is, would depend on the nature of values *V* is related to. If they are atomistic, then *V* is surely molecular. If the related values are themselves atomic or molecular, then values would be holistic on Fodor and Lepore's logic, but yet again it may not commit one to an insular system of values. Such holism however would be a significantly weak one.

The form of holism operating in Dworkin's holism about values, Wittgenstein's belief-holism, and Quine's initial claims about meaning holism, is much stronger. For them, a property is holistic if it is understood in terms of *all* other like properties constituting a system. This is warranted by the ontological claim that values or languages form a unified system. In the case of Dworkin's value holism, this is additionally warranted by Dworkin's prescription that reasoning with values requires placing a value in the web of values; the web being constituted by *all* other values that we have.

That holism entails a systemic nature of its *explananda* is uncontroversial. Semantically, the term holism refers to the idea of a 'whole'. In philosophical usage, including in Quine's, Smuts', and Wittgenstein's holism, holist theories typically start with a strong idea of a 'whole', even though some like Quine substantially weaken their holism, as I point out later.

It is therefore fair to demand of holist theories that they explain how their *explananda* constitute a system, and how the constituents determine content mutually. Such explanations are especially important, since a significant criticism of holism is that it cannot take off the ground without relying on atomism and/or molecularism about the very same properties that it claims are holistic.⁵⁰ In what follows, I demonstrate through Quine's holism the nature of a holist theory, and the sort of burden it must discharge. Quine's holism accepts the common strand of holism and explains why and how the components of his explanandum are interconnected. Controversially, later he allows for atomistic elements in explaining what determines the content of largely holistic systems. Dworkin's value holism lacks these essentials of a holist theory for value holism to hold.

4.2.3. Quine's meaning holism

Quine's meaning holism is perhaps best brought out by his critical essay 'The Two Dogma's of Empiricism' ('Two Dogmas'). Though, given his later work, the extent of his holist claims has become controversial; in Two Dogmas Quine's appeal is staunchly holist. Quine here proposes a holist approach to understanding both language and scientific theories. His central holist claims are:

⁵⁰ Fodor and Lepore (n 42): For a detailed critical appraisal of the different versions of holism in offer. For a further development of these criticisms, see Jerry Fodor, *Concepts: Where Cognitive Science Went Wrong* (OUP 1998).

(i) The meaning of statements depends both on language and experience. The traditional distinction between analytic and synthetic sentences was therefore mistaken, and so was reductionism.

(ii) The vehicle of meaning is not the sentence, but the language as a whole. The unit of empirical significance in science is not individual scientific statements, but science as a whole.⁵¹

Both claims are arrived at by arguing against two influential ideas prevalent in analytic philosophy. The first is the 'analytic-synthetic distinction' ('the A-S distinction') introduced by Immanuel Kant, and the second is 'reductionism'. The A-S distinction holds that certain truths are *analytic*; in that they can be 'grounded in meanings independently of matters of fact'⁵². Others were *synthetic*, which were truths grounded in facts.⁵³ For example, the truth of the sentence 'A bachelor is an unmarried man' is analytic, its truth being solely dependent on the *meaning* of the words within the statement. Conversely, the truth of the statement 'The Syrian army used chemical weapons' is dependent on the *fact* of whether the army did use chemical weapons.

The A-S distinction was widely accepted by linguistic philosophers including many logical positivists of the Vienna Circle, prominently, by Rudolf Carnap.⁵⁴ It was Carnap's view of the distinction that Quine specifically took up.

⁵¹ Two Dogmas 42.

⁵² Two Dogmas 20.

⁵³ *ibid.*

⁵⁴ See Roger F. Gibson Jr., 'Williard Van Orman Quine' in RF. Gibson (ed). *The Cambridge Companion to Quine* (CUP 2004) 1, 11.

At the outset it would be wise to keep in mind that Quine held a controversial truth functional view of meaning. It did not leave open the possibility of maintaining an intelligible distinction between the truth of empirical statements, the *meaning* of analytic statements, and the inapplicability of the notion of truth to certain kinds of statements. In other words, Quine thought that questions of meaning/content, and truth, were inextricably intertwined. This entailed that his holism did not distinguish between content and confirmation holism, even if some critics of his holism choose to maintain a distinction between his content-holism and confirmation holism.⁵⁵ Indeed, on some views about his account, many of his criticisms of the A-S distinction can be insightful without having to recommend a complete rejection of it; nor is it necessary for him to claim that those who believed in the distinction commit themselves to a complete non-revisability of analytic sentences.⁵⁶

Quine's notion of truth was uniform. In contrast, Carnap's admitted at least two different senses, while Wittgenstein usage was well-defined, and limited to only certain kinds of statements. For Carnap, analytic truths within a constructed language were distinct from empirical truths and therefore there were two intelligible notions of truth at play. Analytic truths were about meaning, whereas empirical truths were about the state of affairs in the world.⁵⁷ Such a distinction is intelligible if we understood a statement that expressed an analytic truth as being dependent on the accepted meaning of its component terms within a language, and in this limited sense their *meaning* was true by virtue of

⁵⁵ See Fodor & Lepore (n 42) Ch 2.

⁵⁶ HP Grice and PF Strawson, 'In Defense of a Dogma', (1956) 65 *Philosophical Review* 141.

⁵⁷ P.M.S. Hacker, 'Post-Positivism in the United States and Quine's Apostasy' in P.M.S. Hacker, *Wittgenstein's Place in Twentieth Century Analytic Philosophy* (Blackwell Publishers: 1996) 183

the accepted meanings of certain components. If the accepted meaning of terms remained unchanged, analytic truths could not be falsified by experience. However, analytic truths are surely mutable on such a view, but that would involve changing the meaning of the terms on which the analytic truth depended.⁵⁸

Quine's criticism recognises this feature of Carnap's argument, but concludes that since the sentences that licensed analytic statements themselves could not be derived analytically, the notion of analyticity did not make sense.⁵⁹ In contrast, on Carnap's view outlined above, analytic truths could be spoken of in a limited sense without denying that they could be revised, and this usage seems to point out an intelligible, though limited, A-S distinction. This view also resembles some of Wittgenstein's observations on truth, which maintained a strict separation between the truth of sentences and their meaning.

For Wittgenstein, the correct meaning of sentences is about using them correctly in accordance with the correct rules of usage *in a language* agreed upon in a community. The truth of what a sentence expresses, on the other hand, had nothing to do with the language. Indeed, for Wittgenstein, it was nonsense to speak about the truth of some sentences. For example, sentences such as 'Red is a colour', or 'Either it is hot or it is not', are not made true by anything.⁶⁰ However, the sentence 'The sun is hot' is made true by the sun's being hot. Its truth has nothing to do with any language.⁶¹

⁵⁸ *ibid* 213.

⁵⁹ Cf my discussion of Quine's arguments against analyticity below.

⁶⁰ Hacker (n 57) 183 at 214.

⁶¹ *ibid*.

Analytic 'truths' so to say, for Wittgenstein, as Hacker points out, were 'rules in the guise of descriptions'.⁶² 'Bachelors are unmarried men' is an explanation of the meaning of the word bachelor that licenses further inferences like 'A is unmarried' to 'A is a bachelor'.⁶³ Being rules, analytic 'truths' are normative. They license further inferences. They are on this view not falsifiable within the language, but surely mutable by a change in the meaning of the component terms. Their meaning could be changed by agreement on some other usage that could then serve as a rule. These possibilities of maintaining an intelligible difference between meaning and truth, is important for purposes of terminological clarity in this chapter. When I use 'truth' in explaining Quine's holism, I do so only because Quine employs the term, even though in a highly aggregated sense. My discussion does not require me to accept his controversial truth functional semantics.

To return to Quine's argument against the A-S distinction, he argued in 'Two Dogmas' that there is no strict separation between analytic and synthetic truths. He took issue with the idea that analytic truths were true by virtue of meaning, and that they were non-revisable.

Analytic statements were taken to be true by virtue of meaning and they were true under any reinterpretation. Quine argued that an analytic statement such as 'No bachelor is married' could be converted into the logically true sentence- 'No unmarried man is married'- first by way of definition, where bachelor is defined as an unmarried man. That however was problematic according to Quine, as reducing it to a definition relies on a prior notion of

⁶² *ibid.*

⁶³ *ibid.*

synonymy within the language, which itself is unexplained, just as the idea of analyticity is.⁶⁴

Quine points out that to rely on definitions requires relying on prior observable synonymous *usage*, not meaning. For example, there must be prior usage of bachelor as referring to unmarried men in order for the two to be synonymous, and therefore making it possible for them to yield an analytic sentence. The notion of analyticity therefore remains unexplained. Quine however admits one class of definitions that does not fall prey to his criticism: novel notations introduced for purposes of 'sheer abbreviation'.⁶⁵ Admitting this truth does create problems for Quine's account, for reasons that are not relevant for the purposes of this chapter.⁶⁶

Quine subsequently proceeds to examine, and discard, three other candidates that might support analyticity: interchangeability due to cognitive synonymy, extensional interchangeability, and semantic rules.

Through his arguments against the idea of analyticity Quine purported to demonstrate that the meaning of a sentence in a language could not be understood purely by reference to the language alone, or what he called, the 'linguistic component'. He then proceeds to the second dogma to demonstrate why the meaning of a statement could not be understood only in terms of the external world, or what he called the 'factual component'.

Quine thought that the second dogma- reductionism- was closely related to the A-S distinction. Reductionism was the 'belief that each meaningful statement is equivalent to some logical construct upon terms which refer to

⁶⁴ Two Dogmas 24.

⁶⁵ *ibid.* This admission creates some hurdles for Quine's criticism of definitions. See Strawson and Grice (n. 56) at 152-53.

⁶⁶ Hacker (n 57) (for a discussion of the implications).

immediate experience.⁶⁷ For reductionism, all truths were synthetic. The truth of statements was ultimately reducible, even though through logical constructs, to some sense experience that is factual, to which the individual terms within the statement referred to. Quine termed this sort of reductionism 'radical reductionism' and linked it to a verification theory of meaning. Roughly, the verification theory held that the meaning of any statement was that which could be empirically infirmed or confirmed.⁶⁸ Given his empiricist commitments, this verificationist view might seem acceptable to Quine. However, Quine rejected it and thought that there were statements in a language that were deeply embedded within it, e.g., logical truths, that could not be explained in relation to the external world alone.⁶⁹ Broadly, Quine argued against both dogmas by rejecting the binary distinction between language (in analytic sentences) and experience (in synthetic sentences and in reductionism) as the key to understanding the meaning of sentences. In contrast, he proposed holism, which was the view that the truth of statements depends both on language and experience.⁷⁰ Indeed, Quine thought that 'It is nonsense, and the root of much nonsense, to speak of a linguistic component and a factual component in the truth of any *individual* statement.'⁷¹

Quine explains how both components together constituted a larger unit, or 'corporate body', or system, and how they interact with each other and the external world. In Quine's picture, the system comprises peripheral and internal statements. Peripheral statements impinged upon the external world but had

⁶⁷ *ibid.*

⁶⁸ *ibid* 37.

⁶⁹ Hacker (n 57) 202.

⁷⁰ *ibid* 42.

⁷¹ *ibid* (emphasis supplied).

an impact on statements that were internal to the corporate body. Indeed, his criticism of the idea of analyticity was explaining the reverse of this process: he explained how the most embedded internal statements were closely related to peripheral ones and that a change in the peripheral ones ultimately affected the internal statements. There were thus no truths that solely derived from the internal statements alone. Internal statements were logically connected to other internal and peripheral statements, and both the logical connections, and the relationship with peripheral statements, added up towards the truth of any statement within the corporate body. The same reasons also demonstrated why radical reductionism could not explain the truth of individual statements. Quine thus reserves a role for both language and experience in his view of language and scientific statements. In doing so, his holism holds that this duality cannot be traced to each individual statement. It applies to, and can be noticed in, some larger unit of which the statement forms a part.⁷² Thus we arrive at his second holist claim, that linguistic meaning and scientific truth are only instantiated within a systematic whole..

Notice that Quine's meaning holism supports its twin claims by explaining the nature of the constituents of the holist system and how they are related. That is a burden that any holist theory must discharge to be convincing. However, it is also immediately apparent that the holist systems he spoke about were strongly related to the external world, given the role of peripheral statements. Indeed, it becomes incomprehensible as to how his claim is holist in the sense of statements only making sense within a system of sentences.

⁷² Quine makes the same claim for science. See Fodor and Lepore (n 42) 40-41.

Clearly, the external world has a determinative role to play in the content of the peripheral statements.

Of course, Quine's claims in *Two Dogmas*, could be molecular given that the peripheral statements relied partly on internal statements and partly on the external world, without any compelling reasons to assume that the internal statements they were related to were in turn related to all statements within the system. The later Quine of *Roots of Reference* and *Word and Object* removed any doubts about his position. He was now of the opinion that some peripheral statements did not rely on other statements within the system. They could be atomist. This considerably watered down his holism.

4.2.4 Quine's weak holism and the role of Observation Sentences

In *Roots of Reference* and *Word and Object*, Quine clarifies that some statements in a language only had 'stimulus meaning': meaning which was constituted by the class of non-verbal stimuli to which a speaker would assent or dissent when the sentence was uttered.⁷³ Some statements therefore were learnt, and could be understood, solely by reference to the external, non-verbal world. These sentences, which he called 'observation sentences', were for him the 'gateway to language'.⁷⁴ We learn these sentences first because, 'we have only to key them to current episodes; there is no need for deduction or conjecture, no searching of memory'.⁷⁵

⁷³ Quine, *Word and Object* (n 40) 32.

⁷⁴ Quine, *Roots of reference* (n 40).

⁷⁵ *ibid* 41-42.

In effect what Quine implies, is, that there are some sentences that can be factual, without involving relationships to other internal statements in a language. This was possible in Quine's view since 'we learn the language only partly by associating terms or sentences directly with observation, and partly by linking them to one another'.⁷⁶ Thus, on his view, language had a place for both observation sentences and sentences learnt only by their relationship with other sentences in the language.

Though some have argued that in his reference to observation sentences Quine was not referring to the *meaning* of those sentences,⁷⁷ Quine unequivocally states that he does take observation sentences to have purely stimulus meaning.⁷⁸ They are the channels through which empirical content is imbibed into a language or scientific theory.⁷⁹

Quine was aware that a channel for imbibing initial content into the system was necessary. He reserved this role for observation sentences. Even though Quine thought that we learn a language by 'learning to relate strings of words to strings of words', he was also of the opinion that 'somewhere there had to be non-verbal reference points, non-verbal circumstances that can be intersubjectively appreciated and associated with the appropriate utterances at the spot'.⁸⁰ The truth value of observation sentences thus depended on whether

⁷⁶ Quine, *Roots of Reference* (n 40) 38.

⁷⁷ See Hilary Putnam, 'Quine's Meaning Holism', in LE Hahn and PA Schilpp, *The Philosophy of W. V. Quine* (Open Court: 1986) 405 at 406

⁷⁸ WV Quine, 'Reply to Hilary Putnam' in Hahn and Schilpp (n 77) 427-428: 'I did intend the stimulus meaning to capture the notion of meaning-for the linguistic community in the case of an observation sentence, and for the individual speaker in the case of many other occasion sentences.'

⁷⁹ *ibid.* 426.

⁸⁰ *ibid.*

just about any member of a particular speech community agreed to it by *witnessing the occasion*.⁸¹

There are two insights from discussions over Quine's later holism that significantly bear upon Dworkin's holism. The first is Quine's commitment to the common strand of holism in *Two Dogmas* and the evidence and argument he presents for it. Not only does he claim that language and scientific theories are a highly built up area of human activity, but he also provides an argument for how individual statements within those areas are mutually related.

Simultaneously, Quine remained heavily committed to his naturalism through the idea of observation sentences.⁸² This wrenched him free from circularity of a kind that Dworkin's holism suffers due to O1. Quine's is a theory about linguistic utterances and statements in a scientific theory, which involves a reference to the concerned holistic system and the external world (world of experience or non-verbal stimuli). Applying it to imagine a holist system of values, might yield the following picture.

The content of constituent values of a system of values are not determined solely by other values. Some values, akin to Quine's observation sentences, derive their content externally. Call these values 'atomistic values'. Analogous to Quine's observation sentences, atomistic values would be the channels to imbibe initial content to the system. Without them the system would be contentless. Given that Dworkin's theory does not provide for such atomistic values, it significantly differs from Quine's weak holism and is akin to a strong holist claim. As I point out in my discussion of 'the problem of initial content' in

⁸¹ *ibid.* 39.

⁸² For a discussion of Quine's naturalist and verificationist commitments see Raffaella De Ros and Ernest Lepore, 'Quine's Meaning Holism' in *The Cambridge Companion to Quine* (CUP 2004) 65.

section IV below, Quines' weak holism does not support Dworkin's metaphysical insularity. His idea of observation sentences undermines O1.

The second insight from Quine is that he richly accounted for the nature of internal and external statements, generating a constitutive account of his holist system. Dworkin does not offer such an account. He does not argue for O2: how within their realm, values mutually interact. Dworkin's premium on O2 is thus unaccounted for in his own work.

Are there then other holist arguments that might sustain O1 and O2? In what follows I discuss variants of an idea in semantic holism that support Dworkin's strong holism to argue that such variants of holism are unsustainable accounts of conceptual content.

4.2.5 Conceptual Role and Inferential Role.

Holist arguments that employ the idea of 'conceptual role' to arrive at holism lend support to Dworkin's holism about values. The idea of conceptual role has several variants, the most prominent being Conceptual Role Semantics (CRS).⁸³ I will initially refer to CRS but later use the terms 'conceptual role' and 'inferential role' instead, since my interest lies in demonstrating how these ideas rather than any particular theory employing these ideas, resonates through holism about values.⁸⁴ Some versions of CRS adopt a very broad view of what

⁸³ Mark Greenberg & Gilbert Harman, 'Conceptual Role Semantics' in Ernest Lepore and Barry C. Smith (ed), *The Oxford Handbook of the Philosophy of Language* (OUP: 2006) 295 (for a discussion of Conceptual Role Semantics). See Mark Greenberg, 'Troubles for Content I' in Alexis Burgess and Brett Sherman, *Metasemantics: New Essays on the Foundations of Meaning* (OUP 2014) 147at 150: for the view that some CRS theories can be non-holist.

⁸⁴ Fodor and Lepore (n 42) chapter 6 (for a discussion and criticism of the relationship between Conceptual Role Semantics and holism).

conceptual role is.⁸⁵ My focus is not on the wide claims of such versions, but to examine the idea of ‘conceptual role’, often related to the idea of ‘inferential role’, within a particular system.

CRS is the view that the meaning of words, and the content of mental states, is the *role* that they play in a language and in thinking respectively.⁸⁶ In its broadest sense, the term ‘role’ has been argued to mean ‘use’.⁸⁷ For example, the content of the concept DOG is determined by uses of the concept i.e. by its applications. CRS is opposed to the view that thought has some intrinsic content prior to use. For CRS, content is use.⁸⁸

CRS faces some obvious initial hurdles. To use the concept DOG, I must already have the concept DOG. If I have the concept, then it necessarily has some content. There remains much to be clarified in what the import of ‘use’ is, for this version of CRS to be convincing. Some versions of CRS even hold that not all conceptual content is determined by use, but only the simple ones.⁸⁹ The simple contents then add up to constitute complex ones. My concern here is only with those theories that employ ‘role’ more specifically than just ‘use’. Such theories take role to be ‘inferential role’ and it is variants of these theories leading to holism that resonate through Dworkin’s holism.

Inferential role theories hold that the content of concepts is determined by their ‘inferential relations’ to other concepts.⁹⁰ But why does inferential role

⁸⁵ Greenberg and Harman (n 83). Indeed, several CRS views have similarities with what Greenberg calls covariational views, including Fodor’s view. Some CRS theories also allow for inferential relations not only with mental contents but also the external world. See Greenberg ‘Troubles for Content I’ (n 83) 149-151.

⁸⁶ Greenberg and Harman (n 83) at 295.

⁸⁷ *ibid.*

⁸⁸ *ibid.*

⁸⁹ *ibid* 298.

⁹⁰ The idea of inferential role is most clearly explained in the context of ‘Inferential Role Semantics’ as a theory of meaning. For example: “Its idea is that the meaning facts are facts about inferential role: an expression means what it does by virtue of participating in one set of

determine content? A plausible answer is, that content *is* inferential role.⁹¹ For example the content of the concept COW is determined by how it figures in relations with other concepts such as ANIMAL, QUADRUPED etc.⁹² The view seems plausible at first instance because we do identify cows as animals, and quadrupeds. However, it is also true that to possess the concept COW and to entertain thoughts about cows we do not need the concepts ANIMAL and QUADRUPED.

Indeed, most children acquire the concept COW before they acquire ANIMAL or QUADRUPED. The two other concepts would thus appear not to be *constitutive* of the concept COW, because one can possess the former without possessing either of the two.⁹³ This is not to deny that the properties in the world that the concepts ANIMAL and QUADRUPED represent to our minds are related. They in all probability are. However, the mental representation that is tokened in our minds when we acquire the concept COW is not *caused* by its relation to the other mental representations like ANIMALS and QUADRUPED.

To recall Jerry Fodor's view of concepts that I invoked in chapter 3, concepts are mental particulars that represent properties in the world to our minds. They are tokenings of properties that enable us to think about those properties. This view can explain how there can be constitutive relations between concepts on the basis of compositionality where simple concepts add up to compose complex ones. It can also explain how we acquire concepts in

inferences rather than another..." See Paul Boghossain, 'Inferential Role Semantics and the Analytic/Synthetic Distinction' (1994) 73 *Philosophical Studies* 109-122 at 110.

⁹¹ Fodor and Lepore (n 42) 163.

⁹² To distinguish between concepts, the properties that concepts stand for, and words that express them, I will employ upper-case letters for the concept, lower-case for the property, and lower case within quotation marks if speaking about the word. For example, COW, cow, and 'cow' respectively.

⁹³ Jerry Fodor, *Concepts: Where Cognitive Science Went Wrong* (OUP 1998).

diverse ways involving our perceptual mechanisms. In effect, like Quine's observation sentences, Fodor's informational view of concepts provides a channel for concept acquisition that is not circular. In contrast, those inferential role theories that propose holism hold that content is intra-systemic i.e. it is only determined within a system of concepts. This entails that we must have many concepts forming a system in order for us to start drawing inferences from them.

There are inferential role theories that are not holist in this intra-systemic sense. Inferential role by itself, therefore, does not necessarily lead to holism, rather it can, and on some constructions does. It is open for some inferential role theories to hold that content is determined by a concept's relation to some other concepts. As a theory of conceptual content however, even this view is problematic considering the example discussed above. Such theories must explain how the concepts that figure in the inferences acquire content to make inferences meaningful.

The hurdles are steeper for intra-systemic inferential relation theories that leads to holism. For content to be holistic on such views, inferential role must be holistic. The important question that demands attention is: holism in relation to what and how? Arguments that lead from inferential role to holism are those where the inferential role played by concepts is within a holistic system. Within such a system, the content of any constituent will be determined by their inferential relations to *all* other elements in the system.

Dworkin's holism about values appears to advance an argument of this sort. Indeed, it might be possible that the content of a constituent is determined by its relation to some other constituents in the system, but that would not lead to holism. Those who think that it might, must advance arguments for how a

system can be holist if some of its constituents were unrelated to others. Dworkin's holism resembles the idea of inferential role since it holds that *all* concepts of values are interwoven in a network, and to determine the content of one we must place it in the web constituted by the others. The content of value concepts is thus intra-systemic. His holism is therefore exposed to the criticisms that apply to all such intra-systemic views. Three such criticisms that I discuss below are particularly potent.

4.3 The problems of intra-systemic holism in Dworkin's interpretivism

4.3.1 The problem of initial content

Recall that in section 4.1 above I pointed out that Dworkin could claim holism about values without relying on O1. The alternative claim was that values were interwoven by interpretations. I argued this claim to be leading us to the absurd conclusion that interpretation always united its object. The discussion on Quine's holism brings out that absurdity clearly: without an account of how the initial content of individual values is determined, it is impossible to sustain a claim about the interwoven nature of values. If values had no initial content, there would be nothing for interpreters to interweave. They would be concepts without content, or words without meaning.

The question also assumes importance as values are admittedly vague, and the question that decision-makers such as constitutional courts face in employing them as justifications are precisely about their content. If in meeting that challenge, we are redirected to other vague values then that would

be begging the question. Inferences can only be drawn from a web of value if the values involved have some content.

To assume the interconnected nature of values also appears counter-intuitive, given the methods that are ordinarily applied in thinking about concepts. We often distinguish between concepts, draw distinctions, and contrast them to sharpen our understanding. Such methods point towards the distinctive individual content of concepts. For sure, the content of some concepts is interconnected, e.g. in the case of complex concepts. But there appears no reason to assume that the content of concepts is necessarily determined by other concepts. Any theory of content determination therefore must account for the initial content of concepts to make a claim about their interconnected nature. Does Dworkin have an account of initial content?

Dworkin's defenders might argue that he provides one in the pre-interpretive stage. The stage consists of assumptions that make existence of a practice possible, and of initial agreement on the main elements of the practice. These act as constraints on interpretations of the practice itself, or of its fundamental concepts. Analogously, for holism about values, the stage identifies the basic elements that constitute our web of values.

In *Taking Rights Seriously*, though Dworkin does not expressly invoke the pre-interpretive stage, the idea takes shape in his discussion of hard cases. In 'Hard Cases', Dworkin explains how judges should decide cases when the rules of law seem to run out.⁹⁴ Though Dworkin here is speaking of practices/institutions, and not about concepts and values, his discussion on practices paves the way for his claims about values as interpretive concepts.

⁹⁴ Dworkin, *Taking Rights Seriously* Ch. 4.

Dworkin explains the nature of decision-making in hard cases through the example of chess. He argues that in practices including games like chess, the decisions of officials are 'understood to be governed by institutional constraints even when the force of these constraints is not clear.'⁹⁵ An official must opt for those rules that preserve the *character* of the game, and indeed, participants have a right to such a decision.⁹⁶

In determining institutional character, we start with 'What everyone knows. Every institution is placed by its participants in some very rough category of institution; it (chess) is taken to be a game rather than a religious ceremony...These conventions, exhibited in attitudes and manners and in history, are decisive.'⁹⁷ The role of these conventions is fundamental to determining answers to what the character of the institution is and what decisions it requires.

The pre-interpretive stage thus provides the materials within which institutional character is determined. These materials, however, are not final. In fact, for Dworkin, they too run out in an abstract manner, 'so that their full force can be captured in a concept that admits of different conceptions'.⁹⁸ Thus, the pre-interpretive stage provides materials for understanding the abstract concept that captures institutional character, but it does not determine the operative force of the conceptions of that concept.

In *Law's Empire*, the pre-interpretive stage receives greater explication. Strictly speaking, it signifies a consensus on the 'rules and standards taken to

⁹⁵ Dworkin, *Taking Rights Seriously* 102.

⁹⁶ *ibid.*

⁹⁷ *Ibid.*

⁹⁸ Dworkin, *Taking Rights Seriously* 103.

provide the tentative content of the practice.⁹⁹ In other words, here we identify the concepts and ‘conventions’ (to adopt the language in *Taking Rights Seriously*) that constitute the practice. However, the stage either includes or presupposes a prior consensus akin to a Wittgenstein’s form of life: agreement of a kind that assures that participants are talking about the same practice, and do not talk past each other.¹⁰⁰ For Dworkin, such agreement is an agreement in interests and convictions that is ‘sufficiently dense to permit genuine disagreement but not so dense as that disagreement cannot break out.’¹⁰¹

The pre-interpretive stage thus provides a consensus that makes it possible for people to share a practice. In addition, it also identifies the ‘main elements of the practice’ within which disagreement ensues.¹⁰² This dual role resembles the one in *Hard Cases*. The ‘main elements of the practice’, and the ‘agreement in interests and convictions’, place structural constraints on interpretations of the practice, and of individual concepts within it. In a more controversial, and now abandoned role, they are also the materials that our interpretations should fit. In *Law’s Empire*, therefore, the pre-interpretive stage is wide and includes not only agreement in ‘forms of life’, but also the main elements of the practice.

Despite its significant role in Dworkin’s account, the pre-interpretive stage does not save Dworkin’s insular holism. The agreement in ‘forms of life’ makes disagreement possible by sustaining a common language. Identifying

⁹⁹ Dworkin, *Law’s Empire* 65-66.

¹⁰⁰ Dworkin, *Law’s Empire* 63-64. We could perhaps also understand this practice in terms of Davidson’s principles of charity: that it includes principles that are necessary to be presupposed in order for the interpretive stage (where inferences are drawn) to function.

¹⁰¹ *ibid.* 64

¹⁰² Dworkin, *Law’s Empire* 66. In identifying the main elements of the practice Dworkin states that some interpretation may still be required at this stage.

the 'main elements' of the practice similarly identifies bases of agreement which make disagreement substantive and not radical. The pre-interpretive stage therefore identifies concepts for us rather than explaining how they gain content. The claim is that we '*inherit*' certain practices and the concepts embedded in them;¹⁰³ not *how* the content of the concepts in the practice are determined.

Elements of the pre-interpretive stage are silent about how the content of the 'main elements' or say main concepts of the practice are acquired. It could possibly be suggested that since Dworkin's holist claims about values are a theory of how the content of value concepts is determined, it applies to the pre-interpretive stage as well. Dworkin himself mentions in passing that some interpretation may be required at the pre-interpretive stage.¹⁰⁴ This response however merely begs the question, since the problem of initial content would then recur at that stage. The problem attaches to inferential roles and thus travels with it. If holism is recursive, then so is the problem.

A possible way out of the problem of initial content is to suggest that Dworkin is open to the content of concepts being atomist or molecular in the pre-interpretive stage. If so, his holism is a weak one similar to Quine's. Adopting this view however results in abandoning holism about the content of values since their content is no longer determined by their role in inferences. Strictly speaking, weak holism is hardly holistic about conceptual content. Weak holism, such as Quine's, might be thought to be holistic since it claims that systems of symbols such as language are *largely* holistic, i.e., *most* of their

¹⁰³ Dworkin, *Justice For Hedgehogs* 101.

¹⁰⁴ Dworkin, *Laws Empire* 66.

constituents are to be understood in relation to others. To make a similar case for values, a theory must provide reasons for why values form a system without claiming that they do so because their content is derived holistically. Such an argument is not on the horizon in existing interpretations of Dworkin's views on interpretive concepts.

4.3.3 The problems of publicity and total change

The problem of publicity has it that that if concepts were holistic then individuals could not share the same concepts i.e. concepts cannot be public.¹⁰⁵ This follows from the holist claim that concepts are intra-systemic, and their content is determined by inferential relations within the system. It follows that for two individuals to share a concept, they must have an identical gamut of concepts within which they would draw identical inferences about any concept. This presents an unlikely picture where no two individuals can possess different sets of concepts and yet have agreed content on some concepts.

Holism could overcome the problem were it to claim local holism of some sort where clusters of concepts pertaining to particular domains were interrelated, and not others. Local holism would therefore allow individuals to share some concepts, provided they shared the necessary clusters.

Plausible as this picture might appear, it is unsound. Let's assume Jurisprudence to be a domain, or a cluster of concepts. On local holism, jurisprudes can share concepts in Jurisprudence if they share the concepts that

¹⁰⁵ For the varied ways in which holism can affect the possibility of sharing concepts, and the possibility of undermining the fact that different theories can have the same things as their subject matter, see Fodor and Lepore (n 42) 11-16

constitute Jurisprudence; say LAW, AUTHORITY, LEGITIMACY, ACCOUNTABILITY, INTEGRITY, EXCLUSIONARY REASONS, MORALITY etc. For the local holist, these concepts form a cluster because their content is determined by mutual inferential relations. This implies that any concept in the cluster, say AUTHORITY, derives its content from its relationships with all others. Intuitively this sounds plausible. These concepts do appear related. They are always in each other's vicinity, to say the least. However, closer examination belies this intuition.

Mutually determined content may not be the reason why we think concepts in the cluster are related. Rather, several of them appear related because we *believe* that they do. A belief is a propositional attitude that we have towards properties in the world. Beliefs can be true or false depending on their content. The content of our beliefs depends on the concepts that constitute our beliefs. This implies that those constitutive concepts must already have content. Concepts therefore have content prior to belief.

For example, to believe that authority is related to legitimacy requires that the concepts AUTHORITY and LEGITIMACY already have content. Their content is not determined by their relations, rather, their relations are governed by their content. AUTHORITY may not derive its content from LEGITIMACY, but some might believe that the two are related because authority claims legitimacy. Here the content of AUTHORITY, CLAIM and LEGITIMACY are involved in constituting our belief.¹⁰⁶ Similarly for the belief that legitimacy justifies authority, JUSTIFY too must have independent content. Such content

¹⁰⁶ The possibility of distinctions between de fact and de jure authority, and legitimacy as a justification for authority show that various combinations of beliefs involving authority and legitimacy are possible.

allows us to draw relations between concepts. The relationship between concepts in a cluster, therefore, are not necessarily determined by content-fixing inferential relations between concepts, but by beliefs held about the properties that concepts represent.

The problem of publicity is especially challenging for Dworkin's holism as he argues for values being objective, which necessarily requires that they be public.¹⁰⁷ His commitment to disagreement about values being substantive as opposed to radical, also implies that values are public.

Closely related to the problem of publicity is the problem of 'total change'. The charge now is that if all our concepts were interrelated, then a change in one will induce a change in all others.¹⁰⁸ If this were true then, it would result in an absurd situation where the content of all our concepts would be liable to change on acquisition of a new concept. On a holist picture, acquiring a concept or abandoning one would impact the content of all others due to the inferential relations they share. Conceptual content would therefore be perpetually unstable.

The problem can perhaps be contained if the argument from holism was local or molecular, where instability would be restricted to a cluster. However, Dworkin's holism about values is neither. Rather by invoking the metaphor of a network, he makes clear that all values are related. This makes his holism susceptible to the total change problem.

An objector might point out here that Dworkin also held the view that the basis of the rights that we have are founded in the right to equal concern and

¹⁰⁷ Ronald Dworkin, 'Objectivity and Truth: You'd Better Believe it' (1996) 25 *Philosophy and Public Affairs* 87.

¹⁰⁸ Pagin (n 41) 227; Fodor and Lepore (n 42) 11-16.

respect,¹⁰⁹ or that the basis of our moral values is the concept of human dignity.¹¹⁰ Stability in the content of these foundational concepts would lend stability to other moral and political values, and minor changes in others would not affect the content of all other values. This response paints Dworkin's view as foundationalist, and not a holist one.¹¹¹

If that indeed is the correct understanding of Dworkin's interpretivism about values, then at least two views would need further fleshing out. First, would Dworkin have proposed holism about foundational values too? If yes, then how? Secondly, what is the relationship between the foundational value and the others? Do other values play a role in determining the content of foundational values, or do foundational values rely on external sources of content?

I will refrain from travelling down this line of enquiry since my objective is to query whether holism about conceptual content and thus about values is plausible, and whether it is a good basis for guiding us in reasoning with values. If we accepted Dworkin's view to be holist, as I do, then the criticisms I have identified apply to him. If his views are some sort of foundationalist-holism, then that too is unsustainable as I argue in Chapter 5 later.

¹⁰⁹ Dworkin, *Taking Rights Seriously* 272-274 (for equal concern and respect as the ground for rights in liberal democracies); Ronald Dworkin, *Sovereign Virtue* (Harvard University Press 2000) 1-3 (for the claim that equality is the sovereign virtue of political communities, and in that sense is again the ground for rights that we have in liberal political communities). This view of Dworkin's can be read as considering equal concern and respect as the value that grounds values that other rights like the right to liberty capture. See also Ronald Dworkin, 'What is Equality Part I: Equality of Welfare, Part II: Equality of Resources' (1981) 10 *Philosophy and Public Affairs* 185, 283; Ronald Dworkin, 'Keynote Address: Rawls and the Law' (2004) 72 *Fordham L. Rev.* 1387: for a view supporting comprehensive moral arguments against Rawls' ideas of public reason and overlapping consensus.

¹¹⁰ Dworkin, *Justice for Hedgehogs*, Ch. 9.

¹¹¹ For a similar argument about Dworkin's views on coherence, see Marmor (n 1) at 393.

4.4 Conclusion

My arguments in this chapter provide reasons to be sceptical of Dworkin's holist prescriptions for reasoning with values. Holism has usually been deployed to demonstrate *that* certain phenomena exist as systems: that claims such as O2 are true about some identified system. Belief-holism and meaning holism claim that beliefs and language respectively, form systems and function as such.

In contrast, the claim of Dworkin's holism is primarily prescriptive. It urges us to determine the content of values exclusively in terms of other values. This is then markedly different from Quine's, or Wittgenstein's holism, which account for the acquisition of content in non-holistic ways. Holism figured both in questions of content and confirmation based on constitutive arguments for a holist system, coupled with non-holist arguments for initial content determination.

Without a non-holist method of initial content-acquisition, holist prescriptions about reasoning with value concepts can be frustrating for decision-makers, especially when they are faced with determining the content of vague values. They also burden decision-makers with making sense of all values before arriving at a decision based on one.

As an alternative, a theory of reasoning with values would benefit from a robust account of initial content determination that is able to account for how content can be pursued individually, and yet explain how value concepts can be related. In chapters 6 and 7 of this thesis I argue that such an alternative view finds support within existing theories of concepts and conceptual content without discarding inferential role theories.. In constitutive practices like games,

where there are constitutive rules that define concepts, and the game itself, it is obvious that our understanding of the properties of the practice depends on understanding the relations between its various properties. But as Quine demonstrated, the statements internal to the practice relate to the ones that are in the periphery, and the peripheral statements are the ones that bring in initial content. Even in constitutive games therefore, holism does not fully explain content determination and therefore focussing on non-holist options might be instructive.

Chapter 5. Two objections: value-holism as monism and coherentism

This chapter defends my attribution of content-holism to Ronald Dworkin's views on reasoning with values. It might be thought that my attribution is mistaken as Dworkin's work is best understood as elucidating the nature of morality as a monist enterprise as opposed to a pluralist one, and highlighting the requirement of coherence in our moral beliefs and concepts. Holism, thus, was not central to his project. I argue here that even if Dworkin is a monist about morality, his holism is independent of his monism. It is holism that sustains his view about the integrated nature of interpretive/value concepts. Coherentism, or confirmation-holism, is not a theory of content, and therefore Dworkin's prescription of reasoning with values would not serve as a normative guide for content-determination in cases where indeterminate value concepts are applied. If his prescriptions are understood as an account of content determination, then they must face up to the criticisms that apply to content-holism.

A possible objection that I do not address alleges that Dworkin's account is not about determination of conceptual content, but a meta-ethical one, elucidating the holistic nature of morality. The account is meta-ethical since it does not concern specific moral values but aims at generally explaining the nature of moral values. I do think that there is merit in the view that Dworkin's

account is meta-ethical at times, despite his express rejection of meta-ethics.¹ I choose not to take up this objection for two reasons. First, Dworkin distances himself from meta-ethics to deny the very possibility of having second-order, descriptive statements about morality. Though he might have been mistaken about the nature of his own account, I will refrain from taking up a claim that he expressly denies. Secondly, my engagement with his views is through the lens of conceptual exceptionalism on the one hand, and conceptual content on the other, qua value concepts. It is not based on what meta-ethical assumptions we hold about values as properties. Meta-ethical considerations figure as implications of the alternative account of reasoning with values that I propose in chapters 6 and 7, but again, they are mediated in significant ways by a theory of concepts and content that is squarely epistemological in nature.

5.1 The independence of Dworkin's holism from monism

Recall Dworkin's holist prescription that any value concept must be interpreted/defended/understood in terms of other value concept. This prescription was articulated in different forms, including the claim that any conception of a value must be placed in a network of other values. There is possible ambiguity though in understanding why we place a conception in a network of other values on Dworkin's account. Dworkin sometimes states that we must do so to *defend* any conception of a value.² This might imply that on

¹ Ronald Dworkin, *Justice for Hedgehogs* (Cambridge MA: Belknap Press, 2011) 10-11, 24-26, 37 (Hereafter JFH). For a criticism of Dworkin's view see David Enoch, *Taking Morality Seriously* (OUP 2011) 122-133.

² JFH 162.

his account, we place a value in the network only having determined its content, since any conception worth defending must have content. Its relationship with other values in the network is about confirming that the determined content is correct. This presupposes that there is a method of content determination independent of other values, and there are reasons why we must now relate it to other values for purposes of confirmation. What is that method and what are those reasons?

Dworkin claims that we *develop* our conception of a value, *interpret* it, and develop an *understanding* of it, by placing them in a network of values.³ In these senses it does not appear that he distances himself from how the content of values is determined holistically. My claim therefore might not be off the mark that to prescribe placing a value in a network of other values must presuppose that the content of values is determined by other values. If this was not so, then what prevents us from defending our conception of a value by drawing attention to instances of the value in the world.

For example, and perhaps controversially, given that Dworkin adopts a Kantian approach in much of his work,⁴ Kant provides an account of human dignity by drawing attention to the capacity of human beings to reason.⁵ This is a capacity to reason autonomously of our inclinations and desires, and to imagine a world by universalizing our conclusions on what ought to be done. This articulation of dignity refers to a capacity in human beings. To understand dignity in Kant's terms does not require us to possess the concepts of equality,

³ Ronald Dworkin, *Laws Empire* (Hart Publishing, 1998) Ch. 3 especially, 46-49.

⁴ JFH 14, 19 (claiming that his project is largely Kantian). Kant's influence is also apparent in Dworkin's reliance on constructivism that I discuss in section 5.2 below.

⁵ Immanuel Kant, *Groundwork of the Metaphysics of Morals*, translated by Mary Gregor (Cambridge University Press, 1998), 4:423, 4: 435-436.

democracy, or liberty; and the reverse might also be true: we might possess the concepts of democracy or liberty without possessing the Kantian concept of dignity. It is undoubtedly possible that our inability to relate them might be a function of our ignorance, and as we understand our values better, we appreciate their relationships with other values, and indeed, contra Dworkin, also their differences. Notice however that my objection to Dworkin's holism is directed primarily at its prescription as a mode of reasoning with values. I need not deny that we might realise that our values are related as we come to know more about them, and indeed by exercising our creative faculties, we might mutually relate values in novel ways. Dworkin's prescription is precisely about *how* we determine the content of values. We come to do so in light of other values, and that is the claim that I argue to be implausible.

Accepting his view leads to the conclusion that we cannot understand dignity by following Kant's method, i.e., to provide an account of dignity without referring to all other moral concepts. The overall Kantian account is surely monist about morality since his account of moral duties is an account of morality stemming from an idea of freedom. Notice however, that in explaining what dignity is, he did not rely on all, or even several, other moral concepts, but on his own account of the capacity of human beings to reason and give a law onto themselves. The content of the concept DIGNITY refers to a status arising out of that capacity.⁶

Dworkin's account on the other hand prescribes a manner of reasoning with values that mandates a reliance on other values. To have the concept of DIGNITY then (or a *conception*, as Dworkin might call it), it would not be enough

⁶ *ibid* 4:435-436.

to know Kant's view, since we must necessarily read dignity in terms of other values that we have. Similarly, to have the concept EQUALITY it would not suffice if I understood Dworkin's view of equality alone.⁷

Interestingly, Dworkin's own account of equality or dignity does not follow this advice. For example, he articulates dignity in terms of two further 'principles' (or perhaps concepts): self-respect, and authenticity.⁸ He does state that the two are interchangeable to a great extent, but simultaneously he states that the two raise 'different philosophical issues'. This implies that they are distinct but related concepts. In articulating these principles Dworkin does not place them in a web of other concepts though he indicates how the *two* might be mutually related. He proceeds to articulate substantive views on what they mean, which, one can safely assume, is their content. Self-respect on this account means the responsibility to take one's life seriously, and authenticity meaning that 'each person has special, personal responsibility for identifying what counts as success in his own life.'⁹ The two are surely mutually related yet distinct, and in determining their content Dworkin does not rely on all the other moral concepts he possesses. My criticism of holism as a prescription for reasoning with values seeks to draw attention to precisely this feature of thinking about values: that we think of their content atomistically, where we understand the independent contribution of each value rather than being burdened with thinking about them in terms of all other values.

Perhaps my characterisation of Dworkin's holism is a caricature at best. It is perhaps absurd to suggest that he denies that values have their individual

⁷ Thomas Hurka makes a similar point in his review of *Justice for Hedgehogs*. See Thomas Hurka, Book Review: *Justice for Hedgehogs*, (2011) 122 *Ethics* 188 at 190.

⁸ JFH 203-204.

⁹ *ibid.*

content. Perhaps his commitment to holism is aimed at generally pointing out the interconnected nature of values.¹⁰ What he really intends to argue for are perhaps the following two claims.

- (1) Value-Monism: The individual content of values cannot contradict other values if that content is true.

Monism reflects his commitment to the unity of value, and his rejection of value pluralism.

- (2) Coherentism: The best understanding of a value is one that makes better sense in terms of all other values.

Coherence is at least a part of the test for the truth of our moral concepts.¹¹ In what follows I examine if Dworkin's prescriptions for reasoning with values in an integrated manner can be sustained by these two claims alone, without relying on a holist picture of content-determination.

5.1.1 Value-Monism, Value Pluralism and Holism

In defending his view of the unity of value Dworkin has been a strong critic of value pluralism. His criticism is particularly focussed on the idea of values being in conflict. Value conflict is a possibility when one accepts value pluralism associated with Isaiah Berlin's view that values like equality and liberty can be conflicting in nature. Value pluralism however has several other dimensions, which the idea of value-conflict does not immediately convey. Let me make

¹⁰ Matthew Kramer for one denies this claim too. He views Dworkin's holism as a denial of pluralism rather than as a 'milder thesis' about the interconnectedness of values. See M Kramer, 'Reading Dworkin from the inside', (2013) 73 Analysis 118, 122-123.

¹¹ By 'truth of our moral concepts' I am neutral between moral beliefs and the content of moral concepts.

precise the kind of pluralism that poses a challenge to Dworkin's defence of the unity of value.

In its barest form pluralism is an assertion of the existence of more than one instantiation of any property (value in our case). For example, if values are concepts that people employ in determining what they ought to do, then there are several such concepts that determine what people ought to do. Value pluralism includes within its fold many distinct claims emanating from the commitment that there are several distinct values. In its broadest sense, and perhaps one that also captures its essence, is Berlin's articulation of it in *Pursuit of an Ideal* where he defines it as:

“the conception that there are many different ends that men may seek and still be fully rational, fully men, capable of understanding each other and sympathizing and deriving light from each other, as we derive it from reading Plato or the novels of medieval Japan – worlds, outlooks, very remote from our own.”¹²

In this broad sense pluralism is arguably a moral theory: a theory about what a good life is.¹³ The theory holds that a good life requires the realisation of plural values that might sometimes conflict.¹⁴ Yet, the anatomy that supports this view of a good life is the ontological commitment that there are plural values to be realised. Given this commitment, pluralism allows for incommensurable and incomparable values, and can explain with greater ease cases of regret and a sense of loss when choosing between values.¹⁵ Justifying the anatomy of

¹² Isaiah Berlin, 'The Pursuit of the Ideal', in Isaiah Berlin et al (Eds), *The Proper Study of Mankind: An Anthology of Essays* (Farrar, Straus and Giroux 1997) 1, 9.

¹³ John Kekes, *The Morality of Pluralism* (Princeton University Press 1993) 11.

¹⁴ *ibid.*

¹⁵ Traditionally, monism is charged of being unable to explain the sense of regret people feel when they choose one value over another. There are of course those who argue that monism too can explain regret. For such a defense see Thomas Hurka, 'Monism, Pluralism and Regret', (1996) 106 *Ethics* 555.

pluralism as a plausible view about moral values is the task of 'moral pluralism' which is distinct from 'political pluralism'.

Political pluralism is the view that there are plural political values or value systems in different communities that ought to be respected or tolerated for political and pragmatic reasons.¹⁶ It originates from the premise that plural value systems exist. Debates about political pluralism typically revolve around how such systems ought to be treated. Moral pluralism on the other hand is the view that there exist plural moral values.

Value Monism, in contrast, denies that there are plural values and claim that all values are either reducible to one value, or are unified as a single system where they cannot be understood. Moral philosophers with varied commitments can find themselves on either side of the debate between Monism and Pluralism. Dworkin has at times been thought to be a deontological monist in that he thinks that all our values are reducible to a single master value, say, equal respect and concern, or perhaps justice, or integrity. However, his expansive work on values seems more complex than that. He surely speaks of a master value and of many other values in one breath since he does state that there is a network of values. How does he then reconcile the existence of many different values forming a network or web, with a monist commitment that there is a master value?

One view could be that the content of every other value is determined by the master value, entailing, that in thinking about any value we investigate its relationship with the master value. In Dworkin's work however, the

¹⁶ John Rawls, *Political Liberalism* (Columbia University Press 2005) xvi, and 10-15: for the view that reasonable pluralism is a fact and is respected by his political conception of justice.

relationship between values, including relationships between the master value and other values, mostly surfaces in situations of conflict- where we are defending a conception against others. Even in situations of conflict, it is not always clear that we defend a conception of a value by appealing directly to the master value. His advice, in theory, is that we place it in a web of *other* values. At other times while explaining the role of constructive interpretation as the method of resolving seeming value-conflicts, he speaks of the disagreeing *conceptions* that we interpret in terms of a 'point and purpose' that illuminates the *concept* that the holders of conceptions are attempting to grasp.¹⁷ Is the *concept* in every case the master value? If yes, then the picture would be roughly the following. That there is a master value and other values such as liberty, dignity, justice, autonomy, freedom *et al* are conceptions of that value.

On this picture, Dworkin is surely a value-monist, and if he is a holist too, then he is a monist-holist. A more plausible possibility is that the conceptions in each case of conflict is a clear understanding of a particular value concept, with conceptions being attempts at grasping the true understanding of the concept. On this view, Dworkin's account leans towards pluralism since he must commit to the existence of different values. That presumably stands in tension with any monistic interpretation of Dworkin's view of values. Possible tensions between his monism and holism now become clearer. His monism insists that there is one master value¹⁸ while his holism indicates that there are

¹⁷ LE Chapter 3.

¹⁸ Stephen Guest suggests that Dworkin has at least two master values: freedom and equality that justify the institutions of law and democracy. On such a view Dworkin's view would not be monist but at best anatomist. See, Stephen Guest, 'How to Criticize Ronald Dworkin's Theory of Law' (2009) 69 Analysis 1. If we were also to include integrity and justice as other master values, then Dworkin's view would lean towards being pluralist. Guest however indicates that even integrity is rooted in equality. My claim here is not to argue whether Dworkin is a monist or not, but to demonstrate that if he were monist, then the kind of holism his views reflect would stand at odds with it.

possibly many different values that are interconnected in a mutually supporting manner. What then needs explanation is how he squares his monism with his holism.

The logic of holism that I pointed out in the previous chapter requires that a property is holist when it is instantiated by reference to many others. The claim to holism therefore requires that there exist many constituents of a system that we think obtain by virtue of their relationship with others. The first requirement for a holist picture of values then is to recognise the existence of many different values. Given the arguments in chapter 4, at least many of these values must have independent content initially, for them to figure in the understanding of other values. If holism requires the existence of many values, then how can it possibly support a monist picture of values?

A monist-holist may reply that if one viewed a particular domain, say the domain of values, holistically, then it would reveal that there is only one master value that explains the domain, and that the other values are manifestations of the master value. If we were to only view the values individually, then this truth would be beyond our grasp. Monism therefore requires viewing values holistically. We might then put it to the monist-holist that why is it not the case that a proper understanding of each value individually also leads us to the master value, or why is it not possible to grasp the master value directly? Is it necessary that the path to the master-value lies through other values? Moreover, how many values should we know before-hand, along with the relationships between them, to access the master value? Indeed, is it not the case that monism usually relies on reductionism: the view that every value can be explained in terms of the master value by reduction? These doubts indicate

that a necessary relationship between holism and monism is not evident. To hold so would require argument on the lines that the master value cannot be articulated without possessing the concepts for all other values first, and then relating them mutually to yield the master value. Accepting such a picture poses difficult problems especially as it requires us to accept that all other values can be known independently of the master value, but in a deficient manner. Once we know all values, and relate them mutually, we grasp the master value.

Such a view is problematic because it suggests that understanding the relationship between deficient values yields an understanding of the master value, which itself is not deficient. But is this feasible? How can many deficient values yield a master value that explains away their deficiency? Perhaps the view can be defended by explaining how the master value is more than the sum of the deficient values. This argument is similar to the one that a collective is more than its parts. But even such a defence would involve accepting the independent content of other values. The defence could possibly proceed by arguing that each independent value introduces new content to the system of values, and on mutually relating them, the novel content of each value contributes to a better understanding of other values. The content of each value is therefore mutually supporting and illuminates our understanding of other values. Notice first that in this picture the initial content of values is not determined holistically but individually. Secondly, an understanding of the master value is dependent on the content of other values. Third, an account is required as to how the content of the master value is more than the sum of the content of the other values, and last but not the least, questions remain as to

how the content of one value relates to those of others. Indeed, why should we presume that they must necessarily be non-conflicting?

Though it is not my project here to provide a fleshed-out critique of methodologies that monism might rely on, my limited point here is to indicate that any holism-compatible method must accept, perhaps provisionally, but surely initially, that there are plural values that can be accessed independently of other values including the master value. Monism about values therefore might not find a methodological ally in holism as a theory of content. Indeed, it is reductionism that has mostly been its chosen methodological partner. Reductionism about values roughly being the idea that all other values can be *reduced* to a master value. Reductionism however is a non-holist methodology and has been viewed by holists as their traditional opponent.¹⁹

For monism to be reductionist, it only need be claimed that all values are reducible to the master value. Once we grasp the master value, we can see how other values, which we might have accessed independently, are ultimately dependent on the master value. The master value can in turn be accessed independently. Reductionism in this methodological sense, however, need not be committed to monism. Since it can support the view that some values can be reduced to other values, plural-foundationalists (those who hold that there are many foundational values to which other values can perhaps be reduced) can lay as good a claim to reductionist methodology as monists can.²⁰

¹⁹ W.V.O. Quine, 'Two Dogmas of Empiricism' in *From a Logical Point of View* (Harvard University Press 1961).

²⁰ John Tasioulas, 'Taking Rights out of Human Rights' (2010)120 *Ethics* 647 (for a plural foundationalist approach). For Foundationalism see Richard Fumerton, 'Theories of Justification', in Paul K Moser (ed.) *The Oxford Handbook of Epistemology* (OUP 2002) 204.

It is holists who cannot be reductionist for they take values to be hanging together in a web rather being explained by some foundational value/s to which all other values could be reduced. It is thus characteristic of holism to deny reductionism as Quine did in the case of language and beliefs.²¹ If value-holists were to deny reductionism about values then they certainly cannot support monism through reductionism. Alternatively, if they were to accept reductionism then they face the difficult task of reconciling it with the claim that there are many values constituting the web of values that are mutually content determining.

Is there any other way of reconciling reductionism with holism? It appears that such reconciliation is surely difficult if not impossible. For example, if each of the values in the web were products of some earlier reduction, then one cannot but be a pluralist about values since there now is a web of many irreducible values. Holism necessarily requires an ontological picture where there are *many interconnected* constituents of a system, and a claim about the content of the constituents as arising from their mutual connections is fundamental. Plural constituents are indispensable for holism, and thus the tension between its necessary ontological commitments and monism.²² Reductionism on the other hand is a methodology that can support both

²¹ W.V.O. Quine, 'Two Dogmas of Empiricism' in *From a Logical Point of View* (Harvard University Press 1961).

²² There is of course a metaphysical claim where monism and holism might go together. A metaphysical monist claim about the universe that there is only one basic object, might justify a prescription that things that appears as different objects be understood as a whole. As I indicated in the beginning of chapter 4, my enquiry into holism is not at this metaphysical level, but into holist claims about specific properties. However, notice that in the metaphysical claim about the universe, it is a monist commitment that supports a holist method to understand the world. Arguing the opposite- that a holist method proves a monist reality- might still have much explaining to do.

pluralists and monists depending on whether the product of reductive analysis is claimed to be a single irreducible property or many irreducible properties.

To sum up, it is a difficult task to arrive at monism through holism. To drive this point home, I need not adjudicate between monism and pluralism. Rather the claim has been that if Dworkin is a monist about moral values then his holist method certainly does not come to his aid. It is reductionism that might be a more likely ally. Even if his view were that there are several foundational values that explain other values, holism still would not come to his aid. Rather, it is a reductionist analysis that would support such a view. Therefore, his monism or plural-foundationalism must be independent from his holism to be sustainable, given the incompatibility of holism with monism. The objection from monism then does not seriously threaten my characterisation of Dworkin's holism, indeed it would be wise to not read Dworkin's value holism as being in service of monism.

5.2 Value-holism and Coherence Theories

A second line of objection might allege that Dworkin's holism does not concern content determination of value concepts but is intended to demonstrate the relevance of coherence in thinking about the nature of values i.e. that he was a confirmation-holism rather than a content-holist. Coherence might be relevant to thinking about values in at least two ways. Broadly, coherence theories in morality track coherence theories of epistemic justification and coherence theories of truth. As theories of justification, coherence theories argue that our

beliefs are justified when they cohere with other beliefs. True moral beliefs are those which cohere with other moral beliefs.

Some coherence theories of justification however do not restrict coherence to moral beliefs alone but extend the requirement of coherence to non-moral beliefs and observations as well. Coherence theories of justification generally leave open the possibility that our beliefs might be justified but false.²³ As a theory of truth, on the other hand, coherence is a test of the truth of moral beliefs. Such theories mostly oppose a correspondence theory of truth and hold that the truth of moral beliefs is dependent on other moral beliefs, and coherence with other moral beliefs is therefore the test for truth.²⁴ On Dworkin's view of coherence, those moral beliefs are true that cohere with other moral beliefs. Coherence therefore is an integral part of a test for their truth.²⁵ On some other influential views, a coherence theory of justification leads to a coherence theory of truth.²⁶

Coherence can also be thought of in another sense, where coherence does not refer to whether some property coheres with other properties, but to whether a particular *theory* is coherent. Coherence here is a feature of a theory, and not of any property. On such views, a theory that can explain the features

²³ For a discussion of the difference between Coherence Theories of truth and those of justification see, David Brink, *Moral Realism and the Foundations of Ethics* (Cambridge University Press 1989) Ch 5; Robert Audi, 'Coherentist Epistemology and Moral Theory' in Walter Sinnott-Armstrong and Mark Timmons ed., *Moral Knowledge: New Readings in Moral Epistemology* (OUP 1996) 137, 148; Richard Fumerton, 'Theories of Justification', in Paul K Moser (ed.) *The Oxford Handbook of Epistemology* (OUP 2002).

²⁴ An exception is Davidson's coherence theory. Though his theory is not strictly one about moral beliefs, but about knowledge and truth generally, he argues that his coherence theory presupposes a correspondence theory of truth. See Donald Davidson, 'A Coherence Theory of Truth and Knowledge', in Ernest Lepore (ed.), *Truth and Interpretation: Perspectives on the Philosophy of Donald Davidson* (Basil Blackwell 1986) 307.

²⁵ JFH 120.

²⁶ For example, Donald Davidson proposes a coherence theory of truth routed through a coherence theory of knowledge. Davidson (n 23).

of a practice coherently is to be preferred over other theories.²⁷ Coherence here is a criteria counting towards the success of a theory, alongside other criteria like simplicity, productivity, and epistemological consilience. A theory that explains features previously classed as exceptions, as a coherent part of a practice, is surely more desirable than other candidate theories. Parts of Dworkin's views on moral disagreement reflect such a view of coherence: in cases of disagreement we are to prefer a theory that coherently explains the practice, as a guide for what we ought to do.²⁸ This aspect of Dworkin's theory is not my concern in this chapter. The problem I examine is one about how decision-makers proceed when faced with justifying any decision based on a value concept. My concern is with the role of coherence in explaining why any value should be placed in a network of other values at all. In this respect coherence relations refer to each value cohering with other values, and not some theory that makes some or all values coherent.²⁹

Let me now bring to the table the nature of coherence-based objections that I might be charged with. A possible way of characterising the objection from coherence is to say that Dworkin's coherentist claims are about *beliefs* involving value concepts and not value *concepts* per se. This objection is trivial since beliefs involving values are directed at the values that the concepts represent. Coherence between those beliefs must therefore presuppose coherence between the concepts that the beliefs involve. Recall that beliefs are composed

²⁷ For a discussion of such a view of coherence see Susan Hurley, *Natural Reasons: Personality and Polity* (OUP 1989) Ch 12.

²⁸ As is now widely accepted, this view of 'fit' is found in Dworkin's early work. See for example, Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) Ch. 4; *Laws Empire* Ch. 3

²⁹ This resembles a 'pure' coherence theory of justification in epistemology, which takes the justification of every belief to be a matter of coherence with other beliefs. Similarly, a pure coherence theory of truth would hold that for any belief to be true it must cohere with other beliefs that we have. See Fumerton, (n 20) 204, 226.

of concepts, and concepts have representational content. Beliefs are therefore closely connected to the content of concepts. Holism is a view that does not restrict itself to beliefs alone but also to the content of concepts. Indeed, in speaking about value concepts as interpretive concepts, Dworkin lays emphasis on the nature of these *concepts* and not merely beliefs in which these concepts figure. The challenge from coherence therefore must be more substantial if it seeks to defend Dworkin's view of interpretive concepts and how we ought to reason with them.

A closer look at the objection from coherence reveals that it perhaps leaves open the question of how the content of values is determined. The coherence claim seems to presuppose that values that ought to cohere, have content, and content is the basis of testing whether a value coheres with others. The objection proceeds, that Dworkin's holism is the claim that the test for whether our beliefs about a value are true or not must be a holistic one, where each value must be understood in light of other values. In this, a relationship of coherence must obtain between them. The question however remains as to why any value must be understood in light of others, and why a coherence relation must obtain. Indeed, if the holist claim is only a coherentist claim, then the picture is glaringly incomplete without answers to these questions.

Recall that the question that we started with was why we should reason with values by placing them in a network of other values. My claim was that a possible answer was a holist theory of *conceptual content*. If coherence does not make any claims on conceptual content, then it is distinct from the holist claim I took up in chapter 4. It follows, that since coherence does not provide an answer to the question of content, it does not independently provide a

justification for why values ought to cohere with each other. Coherence theories must rely on some view of content-determination. If it is the case that coherence is a good test for the truth of values because of the commitment that the content of values is related in a holistic manner, then my criticism of holism will apply to a coherence theory presupposing value holism. If a coherence theory, however, does not presuppose holism, as I will go on to argue, it must deny value-holism, the view that a value must only cohere with other values. Let me justify these conclusions in the backdrop of the kind of coherentism associated with Dworkin's moral theory.

Dworkin's moral theory is *constructivist*, and though he thinks that there are true moral principles, it is difficult to label him a moral realist in a strong sense. Strong versions of realism hold that there are moral facts, and that the truth of such facts is not constituted by any function of the evidence that we have for their existence.³⁰ Dworkin's account, in contrast, is constructivist, because he thinks that the truth of moral facts is constituted by a function (construction in his case) of the evidence that we have for them.³¹ More precisely, their truth is constituted by the best moral arguments we can construct for them.³² There is nothing more available than our constructions of what the truth about any moral issue is, and there is no Archimedean point of view from which to assess the objectivity of moral truths.³³

³⁰ Brink (n 23) 17-18.

³¹ *ibid* 21. Brink takes Dworkin to be a non-relativist constructivist who believes that moral truths are a single set of moral principles that hold true in some idealized epistemic conditions.

³² JFH 37.

³³ Ronald Dworkin, 'Objectivity and Truth: You'd Better Believe it' (1996) 25 *Philosophy and Public Affairs* 87; 'On Interpretation and Objectivity' in *A Matter of Principle* at 172. For a criticism of this view, now labeled as 'Quietism' see David Enoch, *Taking Morality Seriously* (OUP 2011) 122-133.

It is in relation to his constructivism that coherence becomes relevant to Dworkin's moral theory. For him, constructivism is one of the models of a coherence theory of morality.³⁴ A clear initial statement of his constructivism is found in his interpretation of Rawls' reflective equilibrium as a constructivist account of moral reasoning.³⁵ In interpreting the equilibrium Dworkin distinguishes between two kinds of coherence theories of morality. The first he calls the natural model, which holds that there is an objective moral reality that is not created by humans but discovered by them through a moral faculty possessed by at least some of them.³⁶ This faculty produces concrete intuitions of morality in particular situations, which serve as clues to the discovery of more abstract and fundamental moral principles. This position is that of 'intuitionism'. In Dworkin's view, for intuitionists "Moral reasoning or philosophy is reconstructing the fundamental principles by assembling concrete judgments in the right order, as a natural historian reconstructs the shape of the whole animal from the fragments of its bones that he has found."³⁷

In contrast, the second model, which he calls a constructivist one, does the following:

"...[It] treats intuitions of justice not as clues to the existence of independent principles, but rather as stipulated features of a general theory to be constructed."³⁸ ...This 'constructive' model does not assume, ...that principles of justice have some fixed, objective existence, so that descriptions of these principles must be true or false in some standard way...It makes the different assumption that men and women have a responsibility to fit the particular judgements on which they act

³⁴ R Dworkin, 'The Original Position' in Norman Daniel ed., *Reading Rawls* (Basil Blackwell 1975) 16-53 at 27.

³⁵ *ibid*

³⁶ *ibid* 27-28. The natural model in this sense can be held to be an intuitionist one which holds that there are some foundational moral intuitions.

³⁷ *ibid* 28.

³⁸ *ibid*.

into a coherent programme of action, or at least, that officials who exercise power over other men have that sort of responsibility.”³⁹

In saying so, Dworkin seems to be making two distinct points. First is the claim that the truth of a moral belief does not have a fixed objective existence but is dependent on our construction of the best moral argument. Second, that individuals, or at least officials, have a responsibility to act in a manner which results in a coherent programme.

The first claim (the ‘objectivity claim’) is a denial of Archimedean objectivity, while the second claim (the ‘responsibility claim’) is a statement about what officials ought to do. None of these claims justify why acting coherently takes us closer to the truth. The objectivity claim has no direct bearing on coherence since it is a negative claim about the absence of an Archimedean point of view. The responsibility claim urges officials to be coherent and consistent but is silent on the reason for why coherence and consistency bring us closer to moral truth. Indeed, unlike coherence theories of truth that oppose correspondence theories of truth, Dworkin does not tell us why he thinks coherence is a test for truth. Neither does he restrict his claim to coherence as only a theory of justification. Rather his claim is that in morality we only have our best arguments to rely on.

His argument however is not one that spells out why our moral arguments are best and responsible if they are coherent with others. There might of course be an independent argument for why *officials* should act in a coherent manner, and Dworkin reasserts this idea through his arguments about

³⁹ *ibid.*

the distinction between principle and policy, and the argument from fit.⁴⁰ Both of these however have been either abandoned by him or watered down to a considerable extent in later work.⁴¹ What seems to remain is a duty of officials to provide a morally justified decision of what ought to be done. If that is the case, then the burden of a coherence theory would be to explain what role coherence plays in providing a morally justified decision. More precisely, how does coherence take us closer to moral truth?

Dworkin's answer to this question, if there is one, seems to be predominantly negative: one that rises from attempts to overcome the challenges faced by other moral theories, particularly strong moral realism based on a justificatory theory of foundationalism. Dworkin thinks that a theory of moral reasoning that builds on a realist ontology has to be foundationalist where some moral beliefs, call them intuitions or convictions, are foundational in that they do not rely on inferences from other beliefs to be true.⁴²

⁴⁰ Both arguments also articulate a concern for fairness, in terms of treating like cases alike. That argument however is one of 'consistency' that may not easily translate into coherence. Even if officials applied rules consistently, and it was certain that the same rules were to be applied to subsequent cases, a test of coherence is not satisfied. Coherence is a test for yielding justification, or truth, or both, for an official's actions. It therefore claims to explain the reasons for why the official must act coherently and why the actions must cohere with other actions. Fairness as consistency on the other hand concerns the application of the same rules repeatedly. It does not justify the application of the particular rule, given the content of that rule, nor does it explain the relationship that the rule has with other rules or principles. In fact, the justification for applying the rule consistently is fairness itself, where fairness means treating like cases alike. The justification then stems from the very definition of fairness, and not from why such a view of fairness is a coherent one. For a further discussion, though along a different line, of how Dworkin's views on coherence are more than that of bare consistency, see Stephen Guest, *Ronald Dworkin*, 2nd Ed (Edinburgh University Press 1997) 35. Guest refers to the role of coherence in Dworkin's work as the idea of having a single coherent view of justice. This I take to be the view of coherence as being a property of a theory that I discussed above. See footnote 30 above.

⁴¹ See JFH at 37 (for a statement of the view that coherence is a necessary but not sufficient condition of truth for moral judgements; rather a moral argument is made true by another adequate moral argument for its truth). See also See Stephen Guest, 'How to Criticize Ronald Dworkin's Theory of Law' (2009) 69 *Analysis* 1. This abandoned position has also been criticized by Joseph Raz, see Joseph Raz 'The Relevance of Coherence' in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1994) 277.

⁴² David Brink characterises Dworkin's objection to the natural model as one that charges it of intuitionism: the view that there are objective moral intuitions that explain moral beliefs. For a

Foundational beliefs must be capable of being justified non-inferentially, i.e. they have to be self-justifying, as their existence does not depend on other moral beliefs.⁴³ Self-justifying beliefs seems to be an inescapable conclusion for foundationalists since otherwise they will be charged with the problem of infinite regress: if there are some foundational moral truths, then where do we stop looking for foundations and why?⁴⁴

For Dworkin, a moral realist who is foundationalist must therefore be an intuitionist who argues that some moral intuitions are taken to be accurate observations of moral facts through a special moral faculty we must possess, and these intuitions are therefore foundational.⁴⁵ Finding this to be improbable, Dworkin falls back on a coherentist model that is constructive and that escapes the problems of foundationalism by anchoring the claim about truth on a *responsibility* to be coherent and consistent about our moral beliefs. Truth now is dependent on our responsible *constructions* of what we morally ought to do. In proposing this Dworkin has a dual objective. First, he aims to deny scepticism and relativism by arguing that the existence of moral truths cannot be denied from an Archimedean point of view. Second, he also aims to deny foundationalism, including intuitionism, by arguing that there is neither any special moral faculty that will establish moral truths for us, nor can the two account for moral disagreement by hoping to find some yet unknown foundational moral principles akin to indubitable perceptual observations.⁴⁶

defense of intuitionism against standards objections from moral disagreement, see Brink (n 23) 107-113.

⁴³ *ibid.*

⁴⁴ The problem of infinite regress is also applicable to theories of inferential justification. I relied on a version of the regress problem in chapter 4 while discussing the problem of initial content in holism. For a discussion of the regress problem in justification see Richard Fumerton (n. 20) 211-213.

⁴⁵ Dworkin, 'The Original Position' (n 34) 29-30.

⁴⁶ *ibid* 29.

Dworkin therefore concludes that given the weaknesses of foundationalism and intuitionism, a moral realist picture (in a weak sense) can only be supported by a constructivist account that is coherentist. This is the view that moral truths are a function of the best moral arguments that we have, and the product of such construction must cohere with other moral beliefs that we have. Moral truth therefore is in part determined by coherence, and in part by our construction of what the right moral position is. This is what he implies by this rhetorical flourish: “Everything depends at the end on what you actually and responsibly think. Not because your thinking makes it right, but because in thinking it right, you think it *right*.”⁴⁷

Notice that in all of this however, an argument for why the right way of thinking is to think about moral values as being coherent with other moral values, is still absent. Indeed if we were wrong about the content of our moral values, it is possible that we are coherently wrong.⁴⁸ Though it is not my objective here to defend any theory of truth, or establish a comprehensive case against coherence theories of truth and justification, I do intend to point out that Dworkin’s holism cannot be defended by arguing that it is in service of his coherentism.

Dworkin’s holism prescribes that we reason with values by placing them in a web of other values and interpreting them in terms of other values in the network. His coherentism on the other hand urges us to construct moral arguments responsibly i.e. to ensure that they cohere with other moral beliefs/values that we have. There is a *prima facie* similarity between the two

⁴⁷ JFH 156.

⁴⁸ Raz, ‘The Relevance of Coherence’ (n 41).

views in that both speak of relationships between values. However, coherentism is a narrower claim than holism in one sense, and wider in another.

It is narrower in that coherentism presupposes content determination, while holism includes a claim about content determination. Coherentism can test whether some content coheres with others or not, but it does not immediately provide an account of why such coherence is a test for truth. Coherentism at best is a reason for a presumption that we are probably right about some value if it coheres with our views on other values.⁴⁹ Holism on the other hand goes further to claim that values are mutually connected, and perhaps that is why holism can support coherentism: since the content of values is intrinsically connected, they must be coherent as a whole. Additionally, the content of values is intrinsically connected because the way their content is determined is holistic: values only makes sense in terms of other values given that their content is determined by their relationship with other values. Holism therefore is the basis on which coherentism in this narrow sense rests.

In another sense coherentism can be wider than holism. Holism about values claims that values form an interconnected holistic system, and that values can only be understood in terms of other values. Coherentism however need not restrict itself to values alone. As I pointed out earlier, some coherence theories require evidence of truth to be based on coherence between moral values/beliefs as well as non-moral properties/beliefs. Such coherentism indicates that coherence is evidence of truth if a belief coheres with other

⁴⁹ Donald Davidson's coherence theory makes a similar claim where coherence serves as a basis for a '*presumption* in favor of the truth of a belief that coheres with a significant mass of belief'. Donald Davidson, 'A Coherence Theory of Truth and Knowledge', in Ernest Lepore (ed.), *Truth and Interpretation: Perspectives on the Philosophy of Donald Davidson* (Basil Blackwell 1986) 307, 308.

related beliefs. There is no presupposition that moral beliefs are only related to other moral beliefs and not non-moral ones.⁵⁰ Notice that even in this wider sense, coherentism by itself does not provide a reason for why coherence is a test for truth or justification. That job was left for holism to do in the narrower sense of coherentism. However, in the wider sense it must rely on some other metaphysical argument to make coherence a test for truth.

Notice also, that in both the narrow and wider senses, coherentism is mostly a procedure of confirmation of beliefs since it presupposes that our beliefs have content. Even as a confirmation procedure, it need not be presupposed that coherentism is necessarily true. Apart from its dependency on a metaphysical picture, it also faces the related 'specification problem': On what basis do we identify the relata amongst which coherence relations must be drawn.⁵¹ For example, if I want a confirmation of my understanding of human dignity, how do I identify the other values or properties with which it ought to cohere? To take that a bit further, why should I presume at all that it must cohere with all or some other values that I have? A plausible answer perhaps is that similarity in conceptual content determines which relata are to cohere: beliefs about value concepts representing related values to our minds must cohere. But what establishes that some values are related to others and therefore a coherence relation must obtain between them? A plausible answer is, that the relations between the values themselves, are to be explained on the basis of

⁵⁰ Robert Audi, 'Coherentist Epistemology and Moral Theory' in Walter Sinnott-Armstrong and Mark Timmons ed., *Moral Knowledge: New Readings in Moral Epistemology* (OUP 1996) 137, 139-140.

⁵¹ James O Young, 'The Coherence Theory of truth' Stanford Encyclopedia of Philosophy available at <https://plato.stanford.edu/search/search?query=%22specification+problem%22> (last visited 22/11/2016). (For a description of the specification problem).

the content of those values i.e. the properties that the values represent.⁵² Coherence as a procedure to confirm the truth of our beliefs about some values requires a substrata of similarity between the content of those values. Since coherence does not determine the content of values, something else must explain the truth about those values. Given the dependence of coherence on truth about the content of values, many coherence theories characterise coherence as being *evidence* of truth, and not the best test for truth itself.⁵³

It might be pointed out here that perhaps my view only applies to natural phenomenon. Moral concepts and beliefs being non-natural, are a different case, where coherence is all we have to work with. To begin answering this objection, there do exist coherence theories of morality on which moral beliefs are to cohere not only with other moral beliefs, but also to second-order beliefs about the nature of morality and more importantly, to non-moral beliefs.⁵⁴ I want to take cue from such theories to first make a negative epistemological claim and then a limited claim based on conceptual atomism (the ‘limited atomist claim’). The negative epistemological claim is that the content of moral and political values is not determined by other such values, and nor is it independent of the natural world.⁵⁵ Most such values capture states of affairs in the world, e.g. equality as a comparative relation, liberty as the absence of restraints and the freedom to act, or autonomy as the availability of choice amongst valuable options. They might also point towards capacities that we have, e.g., in dignity

⁵² On the picture of conceptual content that I rely on in chapter 6, the content of a concept is determined by the property that it represents. Indeed, I go on to claim that values are properties in the world.

⁵³ Brink (n 23) 139.

⁵⁴ Brink (23) 134. James Griffin, *Value Judgments: Improving our Ethical Beliefs* (OUP 1996) Ch 1.

⁵⁵ I draw out the implications of this view in my discussion of thick evaluative concepts in chapter 6 section 6.3.2.

as having the capacity to reason and give laws onto ourselves. The negative claim commits to cognitivism about the content of moral and ethical concepts and is rooted in a naturalistic epistemology. This entails that thinking about such concepts is not restricted to a domain of other values alone.

The limited atomist claim is about what is involved in reasoning with value concepts. The claim is, that such reasoning necessarily must begin by paying attention to the instantiations of the value in the world or representations of such instantiations, e.g. in available literature about those values. This entails that in reasoning with such values we do not restrict ourselves to other values alone. Thinking about values does not commit us to placing them in a network of other values unless we can establish the substrata of similarity in content between the instantiations of that value and other values. It follows that coherence is only relevant when such a similarity in the substrata of content warrants it.

I further ground the negative epistemological claim and flesh out the limited atomist claim in the following chapter. For now, my aim is to first point out that questioning the relevance of coherence opens up space to think about value concepts independent of holist claims, especially when coherence includes non-value considerations. Secondly, when coherence rests on a holistic account of the substrata of content, the criticisms of holism in chapter 4 creep in and would undermine coherence as a test for justification or truth. It is however evident that coherence theories can rely on a non-holist account of content, and in such cases, they need not restrict themselves to coherence between the content of moral values alone. Coherence here extends to non-

moral considerations and performs the limited role of raising a presumption of truth.

The coherence-based objection that I started with in the beginning of this section has perhaps then been met in two steps. First, that the coherence claim cannot be a test for truth without relying on a picture of the substrata of the content of value concepts. If the claim is one that relies on a non-holist account of conceptual content then coherence must be extended to non-value considerations, which would contradict the view that values must be thought of by placing them in a network of other values. Secondly, if the coherence claim is based on a holist picture of conceptual content, then it must face up to the criticism of holism levelled in chapter 4.

A concern might however linger. It might be pointed out that Dworkin has at times mentioned that a coherence function is also performed by fit with facts. This might imply that in appealing for coherence between value concepts he includes fit with factual considerations that provide the primitive content to our value concepts. His coherence theory is thus of the wider kind where fit with values includes fit with factual matters that are relevant to such values. Such a reconstruction of Dworkin's views is indeed possible. That project however faces the difficult task of being reconciled with other views Dworkin has strongly advocated: that values form a realm of their own independent of the world of science and that understanding any particular value requires thinking in terms of other values alone.⁵⁶ The problems I point out for reconstructing Dworkin's view are similar to the ones that I pointed out in Chapter 4 when comparing Dworkin's holism to Quine's: there seems no way

⁵⁶ I addressed this feature of his theory in section 4.1 of chapter 4.

in Dworkin's theory to break out of the realm of value to a world of facts when reasoning with values.⁵⁷ But to repeat, I do not claim that such a reconstruction of Dworkin's views is impossible. Perhaps one could only focus on how he articulated the content of individual moral values to determine his 'real' intuitions about values. That would of course require ignoring the centrality he accorded to his arguments about interpretive concepts and the unity of value.

Be that as it may, my concern in this thesis is with Dworkin's characterisation of value concepts as interpretive concepts, and not his overall views about law and morality, lessons from which this thesis has benefitted from. The objective of this chapter was to defend my criticism of interpretive concepts as a holist prescription on how to reason with values. What I intend to do in the following two chapters is to advance an alternative view on reasoning with values that has implications on both how such reasoning ought to be done, and who would be qualified in employing such methods. My view may not be at odds with all of Dworkin's views on reasoning with values, but it certainly stands in opposition to his prescription that values must only be thought about in terms of other values.

⁵⁷ This is not to deny that facts do have a role in legal interpretation. My concern here has been with whether they can figure in his views about determining the content of values as interpretive concepts. As pointed out in chapter 4, he does not leave that option open due to his insular, non-naturalist holism about moral values.

Chapter 6. Reasoning with Values: An Informational-Atomist Account

6.1 Primacy of content in reasoning with values

This chapter presents a non-holist account of reasoning with values. It draws upon insights from Informational Atomism (IA) as a theory of conceptual content, chiefly argued for by Jerry A. Fodor that in turn draws upon the work of Fred I Dretske.¹ Within theories of concepts, IA is understood as Conceptual Atomism. I choose the term IA instead, as I rely on Informational aspects of the theory that relates specifically to conceptual content. Given the wide range of issues that Conceptual Atomism throws up, I proceed with the following caveat.

In the literature on concepts, Conceptual Atomism makes controversial, yet defensible claims about the nature of concepts.² They include claims about the unstructured nature of primitive/lexical concepts lack, concept learning, deference to experts, the innate nature of our ability to have concepts that are

¹ Jerry Fodor, *Concepts: Where Cognitive Science Went Wrong* (OUP 1998). This is an excellent one stop reference point for his views on concepts. The portions that my account here relies on are found in Chapters 2, 5 and 6 of the book. For Dretske's views see Fred I Dretske, *Knowledge and the Flow of Information* (CSLI Publications 1999 originally published by Cambridge: MIT Press 1981)

² See Eric Margolis & Stephen Laurence (ed.) *Concepts: Core Readings* (1999 MIT Press) Ch. 1: For an overview of the several issues that invite debates between theories of concepts. See also Christopher Peacocke, 'Fodor on Concepts: Philosophical Aspects' (2000) 15 *Mind and Language* 327.

endogenous to our physiology,³ and the modularity of minds.⁴ My reliance on IA is restricted to how the content of concepts is determined. Rarely, and only when necessary to defend a claim about how the content of concepts ought to be determined, do I engage with select issues in those wider debates.

IA is theory that is transparent about what concepts and conceptual content are. It is also transparent about the background theory of mind that sustains its view of concepts and content.⁵ Concepts on IA are mental particulars, and conceptual content stems from information.⁶ How human minds acquire information is therefore an integral part of an account of conceptual content.⁷ In arguing for its claims IA relies on a naturalist epistemology, and cognitive view of properties we can have concepts of. My argument in this chapter shares those commitments. Defending them independently and comprehensively, however, is beyond the remit of this thesis. I do relate IA to prevailing intellectual positions in moral and legal philosophy to demonstrate that it resonates important positions in existing literature. I also defend it from criticisms that apply to its central claims about concepts and conceptual content. Though the chapter takes this detour in

³ This is Fodor's and Chomsky's claim that has come to be known as Mad Dog Nativism. See Jerry Fodor, 'On The Present State of the Innateness Controversy' in Jerry Fodor, *RePresentations* (MIT Press 1981).

⁴ Jerry Fodor, *Modularity of the mind* (MIT Press 1983); *The mind doesn't work that way: The scope and limits of computational psychology* (MIT Press 2000).

⁵ IA is a theory of semantics based on a Representational Theory of Mind. It builds upon the representational theory to propose a theory of concepts and conceptual content. See Fodor (n 1) Ch. 1: for a statement of what the Representational Theory of Mind is. It is not my project to defend those deeper commitments independently, though I make them explicit to convince readers that these are respectable views in the philosophy of mind, and epistemology.

⁶ Fred I Dretske, *Knowledge and the Flow of Information* (n 1). Fodor's views on concepts borrows heavily from Dretske's Informational Atomism despite disagreement on finer points. See Jerry Fodor, 'Semantics, Wisconsin Style' in Jerry Fodor, *A Theory of Content and Other Essays* (MIT Press 1990) 31-50.

⁷ In cognitive science IA argues against inferentialism as a theory of conceptual content. Inferentialism supports some holist theories of conceptual content, including Dworkin's value holism. See chapter 4 of this thesis for my criticism of inferentialism that supports Dworkin's value holism. See Fodor (n 1) pp. 35-39 (for a summary of his objections to inferentialism).

arguing for IA, its objective remains to offer a non-holist account of how we ought to reason with values.

There are four specific virtues of IA that I argue for in this chapter. First, IA eschews conceptual exceptionalism and employs a consistent theory of concepts and content. Consistency is a virtue here, since theories of concepts do not discriminate between types of concepts, even though one may categorise concepts on differences between the properties they represent. Concepts of values do not warrant a tailored theory of concepts.

Second, IA has a sound picture of individual content. It proposes an initially atomist, and inductive process: it is necessary that we generalise *from* knowing a good number of value concepts, which implies that we begin by focussing on the content of each value concept atomistically. To know even a single value is to know what its content is, and therefore, an account of individual content is fundamental to any theory of reasoning with values, including those that claim that values are interrelated.

Third IA sheds light on what is necessarily required of decision-makers to legitimately employ values in justification qua content-determination, and is thus normatively fertile. The better decision-makers get at determining the content of values, the more meaningful and legitimate is their claim to justified decisions based on values. Chapter 7 prescribes non-holist methods that decision-makers including courts and legislatures should apply. In this chapter I lay out the constituents of that account.

Fourth, IA is accommodative as a theory of concepts as it allows for other theories of concepts to figure in explanations, specifically the classical theory of concepts as definitions, when it comes to complex concepts.

The IA-based account I develop here is novel in that Fodor's and Dretske's Informational Atomism that I draw upon does not explore questions of reasoning with value concepts. I also address objections that might arise against IA about value concepts that literature on IA in cognitive science does not engage with. Specifically, I address objections from irrealist and non-cognitivist views on values that feature in debates involving 'thick' and 'thin' concepts; and the view that the content of values arise from theories. The conclusions from my addressing such objections are not available in IA literature. Moreover, the account of reasoning with values applicable to decision-makers that I construct in Chapter 7 proposes a novel account of instances relevant for employing concepts as justifications, that is unavailable in existing literature on IA.

6.2. Concepts and Content

6.2.1 Concepts and properties

IA 1: *Concepts are mental particulars representing properties in the world.*

Concepts are 'mental' because they are in our minds as opposed to being in the world. 'Particular', on IA means that concepts are representations of properties in the world that figure as symbols in our cognitive processes. Concepts enable us to think about properties in the world. This presumes a mind-world distinction, where minds are in the world and can hold representations of it, just as computers are in the world and can hold

information *about* the world. Minds do this through representations.⁸ The form in which they hold these representations are concepts.

For a representation to occur, our minds must have access to the property that is represented to it. On IA, access to properties is mediated by perception. IA therefore relies on an empiricist epistemology about concepts. Mental representations occur via mind-world relations mediated by perception. Having a concept on IA means *that* our minds are locked to the property the concept represents, not *how* our minds are locked to it. The ‘how’ question is about access and deserves clarification before turning to the question of ‘being locked’ to a property.

Minds might access the same property in multiple ways, perceptual abilities permitting. For example, X might acquire the concept DOG by seeing a Border Collie on the shores of a lake in Cumbria while Y might have got it through her teacher showing a picture of a dog and playing a tape on how barking sounds (Incidentally, now you also have the concept BARKING). Both X and Y have the concept DOG, despite acquiring the concept in different ways. What they have got access to (perhaps partially) through their experiences, however, is a property of *doghood*: a property that all dogs share.

The Border Collie through which X acquired the concept DOG was an individual instance of the property of *doghood*, the property being universal.⁹

⁸ ‘Representations’ is similar to the notion of ‘Ideas’ held by empiricists. Fodor’s picture of concepts I draw upon accepts the similarity but chooses not to employ the notion of ‘ideas’ since on the empiricist picture ‘ideas’ are restricted to only one form of representation: images. In the IA picture I draw upon, ‘representations’ are more than images. Images being only one of the many forms in which properties are represented to our minds.

⁹ The view of properties being universals finds support both in Platonic and Aristotelean views on universals despite Aristotle’s criticism of Plato’s theory of forms. See Aristotle, *The Nichomachean Ethics*, Translated by David Ross (OUP 2009) 1096b 15-35 (for a criticism of the theory of forms that takes forms to be universals). In philosophy there is an accepted reading of how Plato’s and Aristotle’s views could be read together: Plato explaining how particulars are instantiations of universals, and Aristotle explaining how human minds acquire

The concept DOG in X's mind has information about *doghood*. Other dog breeds would be instantiations of *doghood*, and dogs in pictorial and audio-visual media are representations of instantiations of the property. Our minds access the property of *doghood* by experiencing instantiations of it. So, if after having seen the Border Collie, X consistently fails to identify other breeds as dogs, then X most likely does not have the concept DOG as he fails to apply the concept to other instances of the property. X probably took the word 'dog' to be a name for the Border Collie. X's mind was not locked to the property of *doghood*.

To be sure, not every failure in applying a concept is evidence of not having a concept. Minds might be locked to a property and yet fail to correctly classify an instance as an instantiation of the property.¹⁰ On IA, the claim about minds being locked to properties is a *satisfaction condition*, and not a *confirmation condition*.¹¹ A satisfaction condition, for Fodor is an essential property of a concept: to have a concept it is essential to satisfy the condition that our minds are locked to a property in a law-like manner.¹² The claim is an

universal concepts through experiences of particular instantiations. For a brief description of this view see Klima, Gyula, 'The Medieval Problem of Universals', *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/win2016/entries/universals-medieval/> Last visited 17/04/2017.

¹⁰ In cognitive science a version of this problem is called the 'disjunction problem'. I discuss the IA reply to this problem in pp 237-238 below. For a statement of the problem see DW Stampe, 'Towards a Causal Theory of Linguistic Representation' (1977) 2 *Midwest Studies in Philosophy* 42.

¹¹ Fodor (n 1) at 25.

¹² Fodor's stringent essentialist claim has invited criticism from several quarters. See Mark Greenberg, 'Troubles for Content I' in Alexis Burgess and Brett Sherman, *Metasemantics: New Essays on the Foundations of Meaning* (OUP 2014) 147 text to footnote 32: for the view that if this is considered to be a 'canonical condition' for concept possession then it invites a problem of circularity as it is also an implementing mechanism. See also Jason Bridges, 'Does Information Semantics Commit Euthyphro's Fallacy' (2006) 40 *NOUS* 522: for the allegation that if the satisfaction condition is also an implementing mechanism then it commits Euthyphro's fallacy. I do not think this objection applies to my claims here as Bridges' target is those informational theorist who hold that to be locked to a property there must be an intentional disposition towards that property i.e. we must know something about the property. I do not make that claim here, and it is debatable, by Bridges' own admission, whether Fodor's claims

atomic one as our minds might be locked to a single property to have a concept of that property. However, one must not extend this claim to be one for concept mastery. As will be evident from my examples below, the claim can leave open the possibility that despite being locked to a property in a law-like manner, minds might fail to recognise other instances of the property and can also acquire more information about the property.

A confirmation condition on the other hand is not an essential property of a concept. We may not be able to confirm whether a specific instance is an instantiation of a property even if we had the concept of that property. Instances of a concept might be indeterminate due to vague manifestations e.g. when our perceptive abilities fail to identify them either due to their intrinsic limitations or due to limitations imposed by contexts. For example, it would be difficult to distinguish between a cow and a buffalo in the dark if they pass by suddenly. Due to our visual limitations in the dark, and inadequacy of time, we might identify a cow to be a buffalo. That does not prove that we do not have the concept COW or BUFFALO. It just means that confirming whether it was a cow or buffalo requires taking our specific contexts into account.

IA 2: *Properties are universal across instances*

Properties on IA exist in the world and are severally instantiated. A concept of a property is a mental representation acquired through experiencing instances of the property.

can be read so. See Bridges' text to note 18. I do claim that for grasping some concepts we require attitudinal predispositions, but about other concepts. See section 6.4.4 below.

On what I have said, the only characteristic of a property is universality - that it is common across instances. Indeed, there are controversies over the nature of properties, including the possibility of universals.¹³ For my account here, the extent to which I need to rely on this view is limited. It would suffice to stick to the bare claim that universals are common across instances. They are unvarying. What this implies is that to have a concept, my mind must be locked in a law like manner to the universal and not merely the instances.

One might ask if it is not information about the instances that leads us to commonalities between them? In such a case, is it not information about instances that forms our concepts? My response is that we might access the property through different instances, but what we access is information about the property. Since every instance instantiates the property, information about the property is accessible through any of them. To say that to have a concept is to be locked to a property is therefore not a denial of the fact that such locking happens through instances.¹⁴ Concept acquisition might happen variously, but the property that our minds are locked to is unvarying.¹⁵

Acquiring a concept through such mind-world interaction, enables us to hold information about the property it represents, and form beliefs about it. In a

¹³ See Orilia, Francesco and Swoyer, Chris, "Properties", *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/win2016/entries/properties/> (For an overview of the objections and defences of properties being understood as universals).

¹⁴ An analogous argument is found in Joseph Raz's 'social dependence thesis' of values: that the same values can be accessed through various instances of it. See Joseph Raz, *The Practice of Value* (OUP 2005) pp. 16-20.

¹⁵ Accepting the unvarying nature of a property does not necessitate the conclusion that properties are static states. Rather they might be an identifiable set of events. Each instance of a property instantiates the same set of events. The point being, that reliance on the idea of properties does not pit IA against the emerging consensus in quantum physics that all matter is in a 'state of becoming' rather than in a 'state of being', to borrow Carlo Rovelli's words. Such states become determinate when they come into contact with other states. For my purposes here, the relevant other state is our minds mediated by perception. Properties become determinate for us when our minds interact with them. See Carlo Rovelli, *The Order of Time* (Allen Lane 2018) 86-87.

sense, having a concept is like opening a folder under which information and beliefs are stored as files.¹⁶ It might be the case that the information someone has say under their concept DOG is more reliable in identifying dogs than information possessed by others. This might be explained by better access to the property given the nature of their perceptual experiences, compared to others. Awareness of this might induce deference to the opinion of such a person in cases of disagreement about whether some animal, say a fox, was a dog. Similarly, we might defer to a biologist's opinion, when aware that biologists possess more reliable methods of understanding living organisms. Perhaps we know that biologists can examine something such as DNA and tell us whether two things are of the same kind, or in many cases, at least the degree of similarity between them.

The biologist has the concept DOG because her concept holds information that is related in a law like manner to a property that is common to all instances of dogs that we know of.¹⁷ Our concepts, in contrast, are perhaps best described by our method of acquisition, say as 'ordinary appearance concepts': mental particulars locked to *doghood* through audio-visual perception. The biologist accesses information about the molecular structure of dog cells that are unavailable to ordinary visual perception unaided by technology. But notice that ours and the scientist's information about dogs were about the same property of *doghood*.¹⁸ It just turns out that the unvarying

¹⁶ I owe this analogy to an unpublished paper by James Penner, 'Concepts: What is the Disagreement About?' (unpublished paper on file with author.)

¹⁷ Bird, Alexander and Tobin, Emma, "Natural Kinds", *The Stanford Encyclopedia of Philosophy* (Winter 2012 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/win2012/entries/natural-kinds/>>. Last visited on 20/11/2016.

¹⁸ See Jerry Fodor, *The Elm and the Expert* (MIT Press 1994): for an argument where deference can be accommodated in an informational atomist theory of content. See Mark Greenberg, 'Troubles for Content (n 12): for the view that space for deference in a theory of content poses problems both for conceptual role as covariational theories. Since the dispute

nature of *doghood*, and indeed the property underlying our different instances of dogs, is the presence of similar DNA. And this knowledge about its essence does not come easy on the view of concepts I am presenting. It is the product of dedicated intellectual effort in scientific research. In the case of concepts of living creatures such as dogs, we generally defer to scientific experts since the information they have of properties, through the experiences they have using scientific methods, offers better proof of the unvarying property that underlies instantiations.

IA 3: *Concepts are nomically locked to properties.*

Having a concept is to have a mental particular related to a property in the world. The relation between the concept and the property is perhaps best captured by the metaphor of being 'locked' to it. To be locked to a property means, that the representation is related to the property in a *law-like* manner.¹⁹ It only resonates to that property and not some other. In Fodor's words, to have a concept is to be 'nominally locked' to a property. Evidence of being nominally locked is that instances of the property *cause* a tokening of the concept in our minds in a law like manner. The concept, in this sense is a token of the property in the form of a mental representation.

For example, instances of dogs in the world cause the tokening of the mental representation dog in our minds. Therefore, the belief that if I think DOG

over deference is primarily about how we address incomplete understanding, it does not centrally bear upon the arguments in this thesis. I mention deference here only to demonstrate that for IA such an option may be available. In any event, my example here speaks of deference to expertise over the nature of the property that a concerned represents and not just a method of content determination.

¹⁹ Fodor (n 1) 12-15, 76.

when retrievers, spaniels, sheep dogs, hounds, and other breeds or their representations appear before me, then I have the concept DOG. I might not think DOG when a groomed Poodle or Chihuahua appears, and I might be confused when I learn that the Basenji does not bark, but that only means that some of what constitutes *doghood* has eluded me and I might be convinced by DNA samples of whether they are dogs.²⁰ However, it is more than likely that when I see these borderline breeds, the concept DOG will be tokened, but I would have reasons to doubt them as being dogs given some feature that I *believed* to be necessary for *doghood* from the instantiations that I experienced.

Notice that the concept DOG still figures as a constituent of that belief. It might of course be the case that some unusual dog breeds do not cause me to think DOG, but that can be explained as a case where I have incomplete information under my concept DOG. If I only had an *appearance-based* concept of dogs, then such cases demonstrate that I have the concept DOG, but incomplete information about the property *doghood*. However, if I were aware that dogs have a natural essence that can be discovered, then I would suspend my judgment and defer to experts.

What I have said above does not suggest that a concept figures in our thinking only when the property is in our vicinity. Of course, we apply concepts even when the property is not around. I might be lying in bed at 3.30am *thinking* about dogs, or human dignity, without any dog being around, or any instance of (un)dignified action occurring before me. The point being, that concepts are representations that minds employ to think about properties even when

²⁰ Having a concept does not require concept mastery. See Mark Greenberg, 'Troubles for Content I' (n 12) at 149.

instances of the properties are not in the vicinity. However, to acquire the concept, our minds must get locked to the property through some perceptual mechanism. Evidence of such locking is the tokening of the concept being caused by instantiations of the property.

An objection may immediately arise about how IA explains cases of misrepresentation of properties? We can call this the objection arising from falsehoods. This objection deserves attention at two levels. First, it can stem from the possibility of holding false concepts e.g. FLYING TIGER. A ready answer lies in the concept-belief distinction that was discussed in Chapter 3. One might argue that we can have concepts based on falsehoods i.e. on assumed rather than known facts. The concept-belief distinction demystifies such instances by pointing out that falsehoods are beliefs which are composed of other concepts. You may think of the concept FLYING TIGER by assuming that tigers fly. That is your belief composed of the concepts TIGER and FLYING. It does not mean that your mind is locked to a property of a *flying tiger*. It is locked to *flying* and *tigerhood*.

At another level however, falsehoods present the 'disjunction problem' or the 'misrepresentation problem'.²¹ The problem points out counterfactuals where concepts can be tokened by properties other than ones that our minds are nomically locked to. For example, buffaloes on a dark night causing COW tokens. This implies that concepts are tokened not only by properties that they

²¹ The problem was a criticism of conceptual role theories on the basis of cases involving incomplete understanding. See DW Stampe, 'Show and Tell' in B. Freed, A Marras, and P Maynard (eds), *Forms of Representation* (American Elsevier Publishing Company 1975); DW Stampe, 'Towards a Causal Theory of Linguistic Representation' (n 10). See also Greenberg, 'Troubles for Content I' (n 12).

represent, but by other properties, thus casting doubts on the idea that concepts are linked nomically through mind-world relations to universal properties.²²

The problem is answered by Jerry Fodor through his 'Asymmetric Dependence Thesis'.²³ To take our example, the objection is that not only do we have *cowhood*-caused COW tokenings, but also buffalo-caused COW tokenings. This implies that COW is not nomically tokened by *cowhood* but also buffaloes as buffaloes cause us to think COW. The Asymmetric Dependence Thesis-based response is that buffalo-caused COW tokens are dependent on *cowhood*-caused COW tokens. There would be no buffalo-caused COW tokens without *cowhood*-caused COW tokens. Therefore, any non-*cowhood* property cannot token COW unless we had a *cowhood*-caused COW concept in place. The meaning of cow, and the content of the concept COW, therefore, is the *cowhood*-caused token and the information stored under the concept COW through mind-world relations, respectively.²⁴

6.2.2 Conceptual content

IA 4: *Conceptual Content is information about a property generated by mind-world relations.*

²² See Jerry Fodor, 'Semantics Wisconsin Style' in *A Theory of Content and Other Essays* (Cambridge: MIT Press, 1992) 31 at 35-48: for how this view poses a problem for Dretske's informational views.

²³ Jerry Fodor, 'A Theory of Content, II: The Theory' in *A Theory of Content* (n 6) 91.

²⁴ Some versions of the disjunction problem aim to strike deeper. For example, under abnormal lighting conditions orange objects might always cause RED in my mind. Such representation happens given the very nature of our perceptual mechanisms- visual mechanisms in this case. Under abnormal lighting conditions, it is argued, orange will always cause RED even if we had knowledge that orange in such conditions cause RED. The red-RED connection here is therefore unable to break the orange-RED connection. See MJ McCain, 'Fodor's Attempt to Naturalize Content' (1999) *Philosophical Quarterly* 520. It would be beyond the remit of this thesis to defend the Asymmetric Dependence Thesis in the context of perceptual mechanisms. What might however be pointed out that such situations would not cast doubt on the idea that the content of RED is a certain frequency of light energy reacting with light receptors in a particular state.

The content of a concept is determined by the property that it represents. Perception of instances of the property causes a mental representation in our minds that holds information generated by instances of a property. As Fred Dretske puts it: 'We need information to manufacture meaning (the concept) because information is required to crystallize a type of structure with the appropriate semantic content'.²⁵

Information is something capable of yielding knowledge.²⁶ To have information about X is to *know* something about X. Information makes us *learn* something about X. For example, Kant's *Groundwork* holds information about dignity and autonomy, because reading it makes me know something about dignity and autonomy- learn something about them. This example might be controversial given that there are competing accounts of dignity, and influential thinkers have argued that there is no such thing as dignity. Such disagreement is understandable as we routinely do contest the existence of a property given the evidence we have, especially when the evidence we have is inconclusive.

Notwithstanding that, to avoid controversy on the example I choose, here are some other examples illustrating what information is. A teacher asking a student to read a book on a topic suggests that the book carries information about the topic. The student can know about the topic by reading the book.

The scraping sound from the tyres of my cycle when I apply the brakes carries the information that my brake pads are worn out. The flowering of bamboo plants in the state of Mizoram in India informs you that a rodent

²⁵ This is how Fred Dretske explains what a concept is in terms of information. See Dretske (n 2) 193-94.

²⁶Dretske (n 2) 45.

infestation is to follow.²⁷ An information desk at the museum is called so because you can know more about the museum by talking to the staff or reading the pamphlets available.²⁸ They do so because of a law-like relationship between the symbols and the properties that constitute the information conveyed to us.²⁹

Transposing this view of information to concepts would entail the following: concepts hold information about properties since they have a law-like relation with the property. I have the concept DOG if I think DOG in a law-like manner i.e. whenever I come across dogs or their representations through various media. I do so since my interaction with an instantiation of the property, perhaps mediated by some other media, causes a mental representation that now holds information generated by the interaction. That mental representation is the concept. The content of the concept is the information generated by the interaction between my mind and the instantiations of the property

An objection that arises to this view is that of how it accounts for concepts of constructs such as UNICORN or GRUFFALO. They do not seem to be properties that exist in the world. In fact, the objector may point out that these are purely constructs of the mind.

The objection is met by IA without having to wade the waters of the metaphysics of fictional entities. Constructs like unicorn are not purely constructs of imagination. They are semi-imaginary, being dependent on

²⁷ In about every four decades the state of Mizoram in India, and the adjoining hilly regions of Burma and Bangladesh face a rodent infestation. This occurs when the bamboo forests in the regions flower simultaneously. For a an overview of this event see 'Rodent Infestation in Bangladesh and India , February 2008' http://pdf.usaid.gov/pdf_docs/PA00J7XS.pdf . Last visited 19/05/2017.

²⁸ Dretske (n 2) 44-45.

²⁹ See Dretske (n 2) Ch. 2 (for a detailed analysis and defence of this view of information).

constituent simpler concepts, which in turn are explained by IA. UNICORN is composed of constituent simpler concepts including HORSE, HORN, HAS, WINGS, TAIL, FLY etc. For GRUFFALO, the constituent concepts include GORILLA, BUFFALO, CLAWS, JAWS, PRICKLES, WART, ANIMAL etc.³⁰ In both concepts, simpler concepts are brought together to create a complex one. What makes these concepts constructs is the belief that they exist as a combination that does not exist as animals in the world. If one believed that unicorns and gruffaloes exist as *animals*, then that is easily explained as a false belief. UNICORN and GRUFFALO are not concepts of real animals. Instead, they are concepts of mythical and fictional animals, respectively. One might say that this response only partially meets the objection as it explains the constituents of constructs on IA, but not the construct itself.

That objection is also met by IA as it can explain how we can have a concept of the construct after it comes to life. The epistemological picture of information conveyed by mind-world relations can consistently explain this feature of concepts of constructs. To have concepts of these two constructs means that we have concepts of ideas where several concepts are combined to produce imaginary animals. It is perfectly comprehensible on IA that the mental representations of these concepts are related in a law like manner to the properties of *unicornhood* or *gruffalohood*. These properties existing in the world as much as any abstract idea exists.³¹ To be sure, they are necessarily, but not sufficiently, explained as creations of some minds. Without an authorial mind/minds, e.g. Julia Donaldson's in the case of GRUFFALO, the concept

³⁰ Julia Donaldson and Alex Scheffler, *The Gruffalo* (Macmillan Children's Books 1999).

³¹ Properties being abstract is accepted explicitly by Fodor's version of IA as for him all properties are abstract. See Fodor, *A Theory of Content* (n 6) 111.

would not exist. But without her mind having the simpler concepts through mind-world relations, the concept would not come to life. Once she has formulated the concept by combining the simpler concepts, either as a picture or as a description, we have a new property in the world: a fictional animal. Once we see its picture or read/hear its description, we have the concept. The word for that property and concept is Gruffalo. The content of the concept GRUFFALO is the property of the fictional *Gruffalo*. Anyone applying the concept refers to Julia Donaldson's fictional animal.

The objection might yet continue, that in the case of constructs, does not the creator of the construct have a purely mind-dependent concept of the property. GRUFFALO did not exist in the world for Julia Donaldson. She composed it in her mind. The response from IA is that GRUFFALO is a complex concept, the constituents of which are in the world. Minds can combine simple concepts into complex ones and form beliefs about them.³² The content of each constituent simple concept of constructs, which are necessarily complex concepts, are properties in the world accessed through mind world relations. Constructs therefore are accommodated within IA.

6.3. Values and IA

If content is information caused by the property represented to our minds, and properties are in the world, then what about political and moral values? Do they exist in the world? On IA, the answer is yes, and I draw out some of the implications of this position in this section. Values are properties in the world,

³² Recall that IA accepts the classical theory of concepts i.e. that concepts are definitions when it comes to complex concepts. See Jerry Fodor, *Concepts* (n 1) Ch 3; Eric Margolis & Stephen Laurence (ed.) *Concepts: Core Readings* (n 2) 67-68.

and their concepts are mind-dependent, without inviting relativism about them. On this account, the concept DIGNITY, for example, mentally represents the property of dignity, and the concept is therefore mind-dependent, but not the property. Dignity surely is not what it is because I think it to be so (a position Dworkin would agree with), but neither is it necessary to conclude that its content is determined by its relationship with other values (Dworkin would disagree).

On my account there is a distinction between the property, the concept, the word, and beliefs about the property. We might know the word 'dignity', but if there is a concept DIGNITY for which it is used, then there must be a property to which it applies. The word 'dignity' is the linguistic label attached to the property through the concept. Once I have the concept then I can have beliefs about dignity and know more about it based on information I gather about the property *dignity*. I can know about its relationship to equality or reason or democracy, if there are such relationships, and indeed also the differences between them, if there are such differences. What such an account of dignity or any other value requires is an investigation into instances of those values in the world. As is obvious, this claim is not based on an account of what the content of any of these values specifically is. Figuring that out is surely difficult given the countless controversies over many such values. As I pointed out earlier by relying on reason-giving accounts including Dworkin's, advancing substantive accounts of such values is the only way forward.³³ Adopting IA as

³³ Ronald Dworkin, 'Looking for Cass Sunstein', The New York Review of Books (30 April 2009), online: The New York Review of Books available at: www.nybooks.com/articles/archives/2009/apr/30/looking-for-cass-sunstein/? Last visited on 20/01/2014.

a theory of content determination of values holds promise for how judges ought to provide substantive accounts of values.

6.3.1 Reasoning with Values: A Non-Holist Alternative

IA 5: *Atomistic focus on instances has a primary role in reasoning with values. Information from instances causes nomic locking of minds to properties.*

Adopting IA as a theory of conceptual content opens the possibility of thinking about properties *atomistically*: we focus on the instantiations that locked our minds to the property and to which we think the concept applies. The content of DIGNITY, for example, is yielded by information about the property of dignity, if there is such a property. It is the property that determines content. In this sense the account is also *informational* i.e. information that a concept carries is a function of the property to which it is nomically locked. This entails that for each individual value, we grasp its content by investigating into instances of the value that we experience. Adopting IA thus provides a non-circular way forward to tracking the content of dignity which does not have to face up to challenges about initial content and publicity.³⁴ Conceptual content being dependent on the property accessed through instances, can be grasped by chasing the property atomistically. The same concept can also be shared by others through instances of the property, and it is identity of information about a property that would determine the identity of conceptual content.

One objection to this immediately comes to mind. Is not disagreement, particularly ‘theoretical disagreement’, precisely about that? How does IA provide any guidance in the face of disagreement over whether we are

³⁴ See section 4.3 in Ch. 4 above for an articulation of these problems. See also Murat Aydede, ‘Fodor on Concepts and Frege Problems’ (1998) 79 *Pacific Philosophical Quarterly* 289: for a view that even some atomist claims may face those problems.

speaking of the same property? A short answer to this objection is that the informational account asks for disagreement to be settled by paying closer attention to the instances that we think instantiate the property. This counsel may not result in settling the disagreement for us: we might realise that the instances are indeterminate, and we are unable to have a clear view of the property that the instances instantiate. Inability to grasp the property does not necessarily entail that the informational account provides no guidance on how to approach disagreements of this sort. Despite the possibility of failing to settle disagreements, the informational account has other benefits. Focussing on instances, and reasoning on their basis, might reveal to us the nature of knowledge and expertise required to investigate into instances. It reveals to us our own limitations in understanding the property. It is in this way that IA is illuminating.

When faced with multiple interpretations of a value concept, IA requires that we provide reasons for being convinced by any interpretation based on the instances that we have before us. Similarly, information from instances would form a clear basis for drawing analogies with other similar concepts. It is the content of a value concept that must warrant its relationship with other value concepts, and the content being caused by a property can be made more determinate by fixing our attention on that property.

There are objections that arise stemming from the argument that there are no direct perceptual experiences of properties represented by concepts of values. Allow me to withhold my responses for a few paragraphs. To start meeting those objections it might be wise to first situate the IA-based account

within existing theories of values. The idea is to demonstrate that its claims are not outliers in thinking about values,

Recall that on IA, it is information from instantiations of value that locks our minds to values, and therefore it is information that our minds respond to. In concept acquisition, a property in the world causes a crystallization, so to say, of information as a mental particular in our minds. We respond to other instances of the property as an instance of *that* property owing to the information we have about the property. The identical property that our concept locks us to, and that the new instances instantiate, inform our minds that the instances falls under the same concept. When employing the concept as a justification for a decision, it is again information that we turn to. It is the content of our concept that provides the information that acts as the basis of justificatory reasons for decisions.

When asked what justifies treating that information as a source of justificatory reasons, IA directs us to those instances to which we think the concept applies, and those from which the information about the property was initially gathered. Within this picture, coherence with information about other concepts might figure as a further source of beliefs that our decisions are right, but that relies on the similarity of the other concepts with that of the one in question. In all of this it is the instances we experience that act as a source of information, or facts, that we respond to. Being facts that we respond to, they can be said to be 'reasons'. We cite such facts as reasons for what we think the property in question is and as reasons for beliefs about the property that the concept represents. In other words, we cite them as justifications for what we think the property is and therefore on whether it applies to candidate cases.

Equating information with facts brings the informational-atomist account in the company of a view of values held by Joseph Raz, amongst others. On this view, values are properties that present us with reasons that we respond to favourably.³⁵ Reasons are facts that we respond to.³⁶ Values therefore can be reasons: they are facts that we can respond to. Information figures in this picture since facts generate information. They do so when they interact with minds. Facts are information *to* our minds. Our minds respond to information, and information thus acts as reasons. To illustrate, information that it is going to rain makes people carry umbrellas. Information that a disciplinary committee denied a party a chance to present her side of the matter is a reason for an appellate judge to decide that she did not receive a fair hearing.

To reiterate the point, whenever our minds respond to facts, facts act as information to our minds. There are of course cases where facts and information do not seem to be easily substitutable. For example, the fact that you promised to come to my place is a reason for you to come to my place. It is also a reason for me to conclude, in the absence of other defeating reasons, that you should come to my place. Information does not seem to aptly substitute 'facts' here. Your promise is surely a fact that is relevant, but in what sense is it information to our minds?

This doubt, however, does not go deep enough to pose problems for the view that facts that interact with our minds are information. In reasoning from

³⁵ Joseph Raz, *Value, Respect and Attachment* (Cambridge University Press 2001) 43: "...every property whose presence in an item...can in itself make an item a choice, or a positive or negative appreciation or preference, intelligible or justified, is an evaluative property".

³⁶ See Joseph Raz, *Practical Reasons and Norms* (OUP 1999) 17-18 and Joseph Raz, 'Reasons: Explanatory and Normative' reprinted in Joseph Raz, *From Normativity to Responsibility* (OUP 2011) 13-35 at 16-18: for the view that reasons are facts. See Joseph Raz, 'Reason, Reasons and Normativity' in Russ Shafer-Landau (ed.) *Oxford Studies in Metaethics* Vol.5 (OUP 2010) 2-24 at 6-7: for the view that reasons are facts that we respond to rationally, using our capacity of Reason.

the premise that you promised, to the conclusion that you ought to come to my place, the fact of your promising is information that my mind responds to. By virtue of being informed that you had promised, I know more about the reasons that ought to enter the calculus of my decision-making process. Just that when it is between you and me, our minds already have the information that you had promised. It does not count as new information, but is the sort of information that is constitutive of the question I posed: should you come to my place because you promised? The fact of promising is information, nevertheless.

What I am driving at is that if justification is about giving reasons, then providing information is central to justification. This is because reasons are information that our minds respond to. Such information is in the form of facts that I cite as reasons. Facts as information tell us something about the properties that we are considering. If it is a value concept that is cited as a justification, then it is information, or the content of the concept, that acts as a justification. It is information about the property the concept represents that is doing the work.

For example, if Noam were to cite respect for human dignity as a justification for a decision, he would provide an account of what dignity is to convince me why he thinks his decision is justified. It might be pointed out that I will accept dignity as a justification only if I agree that dignity is such a thing that is valuable, and therefore there must be some prior agreement between us on dignity as a value that justifies decisions. Why else would I count dignity as a reason that justifies Noam's decision?

This, however, is overstating the role of prior agreement. Imagine that I do not know that there is such a thing as dignity; not even the word 'dignity'. It

is quite possible that Noam points out to me that human beings have a capacity to reason autonomously of their desires and prejudices, and this capacity constitutes human dignity: a status attributed to human beings because of this capacity. Imagine that I find this to be convincing given the numerous examples he cites of this capacity (its instantiations), including Kant's examples of a duty to repay loans and the morality of committing suicide. I now learn that there is such a word as dignity, which stands for the concept DIGNITY that represents a human capacity to reason autonomously.

Having grasped this, I might find Noam's decision to be justified, only of course if I do not have reasons to doubt the worthiness of the capacity to reason. In a situation where I agree with Noam, what makes dignity a justification is the information about the human capacity to reason autonomously. This was not based on some prior agreement, but on learning something new that makes me agree with Noam. His reasons have *generated* agreement.

In case I did not agree with Noam, at least I would have a clear view of what he thought were justifications for his position: reasons that were a ground for his conclusions. My scepticism of his conclusions would have to engage with his justifications emanating from instances. This implies that I do not find dignity as the capacity to reason autonomously as persuasive, e.g. in the context of persons in vegetative states or in the context of animal rights. But Noam's account would demand reasons for why I disagree with him. His instances at least help in taking the discussion forward.

On Noam's part the work is done, whether of generating agreement or advancing the discussion, by pointing out instances which instantiate the

capacity to reason; that capacity remaining constant in all the instances he cites. This capacity is the property that the instances instantiate, and which the concept DIGNITY represents. These instances and the property they instantiate are information to my mind, and I treat them as reasons for agreeing or otherwise engaging with Noam's conclusions. The lesson being, that it is information about a property that acts as justificatory reasons in this case. Such information is usually accessed through instances of the property, but the property is unvarying across instances.

One might take this to be a combination of Plato's idea of universals, Aristotle's arguments for the role of instances; or when speaking of values, as Raz's social dependence thesis, on which we access universal values through social practices that instantiate them.³⁷ All such conclusions might be true. My point is to direct our focus back strictly to the property that a concept represents as the source of information, and thus reasons, when thinking about value concepts. This asks decision makers to lay bare the information they hold under their concepts of values when they employ values as justifications. Asking them to do so, surprisingly, throws up several challenges to existing theories of adjudication. While laying the implications of IA for adjudication in chapter 7, I point out the problems it poses for some minimalist theories of adjudication. Before taking up that task, let me first address two important objections that arise to the IA-based account.

³⁷ For the possibility of reading Plato's and Aristotle's views together see footnote 9 above. For a brief discussion of Raz's view see text to footnote 14 above.

6.4 Objections

6.4.1. What about concepts that we learn through theories?

The allegation here is, that concepts like human dignity or democracy are learnt through theories. How can they then represent properties in the world? Notice that the allegation is not that *all* concepts are embedded in theories. That is a general theory about the nature of concepts, known as the ‘Theory Theory’ of concepts. IA denies that theory since it is a species of an ‘inferentialist’ theory of concepts. The present objection is that *some* concepts are learnt through theories, and the question is whether IA can accommodate that view.

The response from IA is surprisingly straightforward for a seemingly sophisticated objection. Theories are explanations. They are explanations of phenomena. If a theory claims to explain the concept X, then it is a theory about the property X that concept X represents. The theory of property X provides us with information about the property that locks our minds to it. We then have the concept X. The concept X is thus theory mediated.

For example, suppose I come across a theory of autonomy for the first time. It is a theory that informs me that to be autonomous is to reason *independent* of one’s biases, inclinations, or prejudices which in turn qualifies us to give laws unto ourselves- to be *auto nomous* in the literal sense. Autonomy is that state of being, when one reasons in that manner. Call this the ‘negative theory’ of autonomy which explains autonomy to be the state of being where one reasons *without* biases in order to be justified in giving laws onto

oneself.³⁸ The theory therefore gives me access to such a state of being, which is the property that the concept AUTONOMY represents.

Or consider another theory of autonomy, not necessarily opposing the negative theory. On this theory autonomy is the situation where an individual has a set of valuable options before them and is free to choose between those options. Call this the positive theory.³⁹ The positive theory captures a desirable state of affairs for human beings, on the obtaining of which they can be autonomous. It captures a state of affairs that is valuable. This theory then captures a property- a desirable state of affairs- and that is what the concept represents. The theory informs us of that state of affairs, and we would have the concept AUTONOMY when our minds are locked to that property through the theory.

The perceptive mechanisms involved here is whatever sense perception we accessed the theory through: vision if we read, hearing if we listened to a podcast or e-book. Once our minds are locked to this desirable state of affairs, we have the concept AUTONOMY. We can now think of AUTONOMY in this positive sense, and form beliefs about it. One might ask that now we have two concepts of autonomy, and the reply would be that we have concepts of two different properties, but just the same word for it. Indeed, that is why the former is often called 'moral autonomy', and the latter 'personal autonomy'. Moral autonomy is an element in a theory of morality, while personal autonomy explains what it means for people to choose their own lives within a theory of a

³⁸ This is a Kantian account of autonomy. See Immanuel Kant, *Groundwork of the Metaphysics of Morals*, translated by Mary Gregor (Cambridge University Press, 1998) at 4:423, 4: 435-436.

³⁹ This is a crude attempt at summarising Raz's account of personal autonomy. Joseph Raz, *The Morality of Freedom* (Clarendon Press: Oxford, 1986) Ch. 14.

good life based on the value of freedom.⁴⁰ Indeed in the interest of clarity they are to be thought of as two different concepts: MORAL AUTONOMY and PERSONAL AUTONOMY. These are two complex concepts constituted by two concepts each. To take up PERSONAL AUTONOMY for analysis, it is constituted by the concepts PERSONAL and AUTONOMY, with personal referring to 'having to do with persons' and AUTONOMY referring to the desirable state of affairs where a *person* has valuable options. The two concepts - PERSONAL and AUTONOMY- represent two different properties, which combine to constitute the concept PERSONAL AUTONOMY.

If what I have said above is plausible, then concepts that we learn through theories are still representations of properties that we access through theories. No wonder that theories are always *of* something: a theory of justice, a theory of mind, a theory of law, or even a theory of theories. Theories explain phenomena and we might acquire concepts of those phenomena through theories. The fact of some concepts being theory-mediated, therefore, does not undermine IA.

This might be thought of as deviating from one of the fundamental features of an atomistic view of concepts: that concepts cannot be learnt as learning involves inferences.⁴¹ Atomism however restricts its non-learnable feature, or conceptual nativism, only to lexical and primitive concepts.⁴² For

⁴⁰ For a difference between the two though not exactly in the sense I have portrayed them, see Raz (n 39) 370 at footnote 2.

⁴¹ Laurence and Margolis relate these to the problems of conceptual nativism and compositionality that in their view also affects conceptual atomism. See Eric Margolis & Stephen Laurence (n 2) 64-67. They do however point out that Fodor has a plausible answer to this problem by allowing for the Classical Theory of Concepts in explaining complex concepts.

⁴² To be sure, Fodor's atomism posits a very strict form of nativism. However, his logic has been accepted by several of his critics. See R Jackendoff, 'What Is a Concept, That a Person May Grasp It?' (1989) 4 *Mind And Language* 68; Margolis and Laurence (n 35) 62-63.

complex concepts it allows for relations between the constituent concepts to figure. In any event, the view that I have offered above is a defence against the allegation that some concepts are learnt through theories. If my reply entails that some concepts can be learnt, then I accept that view even if it militates against some forms of stringent atomism. My sense is that allowing for theory-mediated concepts to be learnt falls more within the idea that theories are descriptions of complex properties, and Fodor's acceptance of the operation of concepts as definitions in such contexts, can account for my view.

6.4.2. Thick Evaluative Concepts

The view that values are evaluative concepts might be a source of objections for IA. The philosophical motivation driving those objections is non-cognitivism about values and the strongest form of that objection arises in debates over the nature of 'thick concepts' that I address in 6.4.4 below. The non-cognitivist objection is that the evaluative aspect of a property that makes it a value does not exist as a property in the world. Rather, what makes anything a value is a non-cognitive element such as an attitude or projection. It follows that we cannot have cognition of the evaluative aspect of values, and thus, there can be no mental representations of values.

Notice that for the non-cognitivist it is not necessary to reject that values exist. Only that they exist as a matter of our attitudes and not towards cognition-apt properties in the world. Without the appropriate attitudes, there are no values. It is of course for the non-cognitivist then to further point out what view

of concepts they hold and whether we can have *concepts* of values.⁴³ Such a picture of concepts at least cannot be IA, since for IA, if there are concepts involved, and we have beliefs about such concepts, then there must be properties in the world that are represented by concepts. On IA properties come first, concepts next, and only then attitudes follow.

It is however possible for IA to accommodate some non-cognitivist claims about values. To explain that with more clarity encapsulating the non-cognitivist challenges precisely might help:

1. If values are not properties in the world, then how does IA explain having concepts of values as mental representations of properties in the world?
2. For IA concepts come first, and attitudes subsequently. For the non-cognitivist, values are things that necessarily require having an attitude towards them. How can then IA be true if values necessarily involve having attitudes?

I am going to defend the following answers to these challenges:

1. If there are concepts of values, then at least a part of the account of values is necessarily about properties that their concepts represent. If values are unrelated to properties in the world, then there can be no concepts of values.

⁴³ I lay emphasis on 'concepts' because there is a possibility of non-conceptual thought. Views that admit of such thought argue that the world can be represented to our minds without being represented as concepts that hold information. Since my concern here is with claims about value *concepts*, non-conceptual thought does not beg my attention here. For a flavour of how non conceptual thought might figure in an Informational Atomist theory see Dretske (n 2) 111-123.

2. IA can accept that having concepts of some properties such as values are belief/attitude mediated just as some properties may be theory mediated. IA is compatible with the view that to form mind-world relations with some properties, and have mental representations of them, we must have certain other beliefs in place through certain other concepts (similar to the case of complex concepts).

To defend these answers, let me first set out a distinction between value and evaluation. Appreciating the distinction clarifies that possessing concepts of values requires no evaluation but applying them often does; evaluation not of the properties, but of the cases/instances about which there is disagreement on whether the concepts apply. Application of such concepts may require evaluation of beliefs that we have about properties that the concepts represent, and in such eventuality IA would direct our attention back to other instances of the property including those through which we acquired the concepts. Our first resort in cases involving evaluation is information from mind-world relations through which we acquired the concepts and/or to which we think the concepts apply. Without such instances we could not have formed beliefs in the first place about the property that the concept represents.

6.4.3 The value-evaluation distinction

The kind of evaluation involved when we speak about evaluative concepts is *cognitive*. Evaluation is a cognitive process that involves *ascribing* value to something. To understand what it is to be evaluative then, we must have a

grasp on what it means to assign value. As conventional value theory has it, and un-controversially so, value is about something being of worth.⁴⁴ This entails that value is relational to a large extent: It is something being of worth to someone. It is a relation between a thing that is of value, and valuers. There is no valuing without valuers: 'values are pointless without valuers'.⁴⁵ Worthiness is what builds the relation between values and valuers. What makes something worthy is too daunting a task for my project, but I can at least afford to make a general claim based on what I said earlier about values, reasons, and information.

Properties that are values, provide reasons that make a thing valuable/of worth to someone. On this view, a claim about universal values, for example, would be that universal values are properties that provide reasons for everyone.⁴⁶ Notice that I am not making a claim about why anything is valuable or not to anyone. Why something becomes valuable can surely be contextual, but at least values must be things capable of being valuable to valuers. On this view, some values can apply, in some sense *universally* to human beings and other beings, if our contexts are the same with relation to those values.

For example, if all human beings and some other living beings have the capacity to reason in an autonomous manner, that capacity being articulated as a status called dignity; and we think that our dignity should not be

⁴⁴ Raz, (n 35) 43-45. Even though Raz speaks of evaluative properties, he speaks of them as properties the presence of which makes something count for or against being a choice or preference. A property can do so only if it by itself counts for or against something. When I say value here, I am referring to those properties which always count in favour of something being a choice or preference. Raz himself speaks of values as 'positive evaluative properties'. In this sense they are properties that are valuable or worthy. Their opposites would be properties that count against something being valuable, and one might choose to call them evaluative properties in the sense that they provide a reason for a con/negative evaluation. Value concepts of the sorts that I refer to are properties that provide a pro reason.

⁴⁵ Raz, (n 14) 27-28.

⁴⁶ Raz (n 35) 46-50, 54-59: For a similar argument about the universality of values.

undermined at any time, rather we should protect and nurture it all times, then we have a universal value of dignity that applies to all such beings that have it. That capacity and status is a value because it is a fact of the matter about the world, which in turn is a source of reasons for us to consider it as worthy. Knowing about that status makes us want to protect and nurture it.

Properties such as dignity are consistently referred to as values because we think that they are generally things that have worth; and that is the generous sense in which we employ terms such as 'value concepts', or 'values', to describe them. When called upon to explain what those values are, however, we resort to information that we have about them through instances that we know of. We cite those as reasons for why they are valuable. A feature of values therefore is that they are properties that provide reasons in the form of facts or information that make them worthy.

Evaluation, in contrast, is a cognitive process that we are capable of engaging in. In common usage, we do not always talk of human values like dignity to figure in every instance of evaluation. Rather evaluation is at most times about assigning value, akin to assigning weight, for specific purposes. When we ask someone to evaluate, we expect them to weigh pros and cons of the objects of evaluation. In other words, we ask them to consider relevant reasons to arrive at a conclusion. In speaking of evaluative properties then, it seems that the very cognition of such properties involves this process. However, dignity, liberty, or other values do not seem to require any evaluation for us to possess their concepts. For sure, we do have disagreements about their content, and we do evaluate rival accounts of content. In articulating the content of the accounts we favour, i.e. in articulating the reasons for favouring

them, we do not engage in evaluation. Rather, we employ information and instances. We give reasons for why they are valuable, and those reasons are not evaluative, even though they may enter someone's evaluative calculus when they evaluate rival accounts.

In other words, *applying* value concepts might demand evaluation of the candidate cases, and we evaluate those cases based on information that we have about the values involved. It is the *cases/instances* that invite evaluation, and not the properties. IA therefore can explain how we can have value concepts such as DIGNITY or LIBERTY. But does IA contribute to concept application? It does. It asks us to focus on the information that we have of those properties and therefore on the instances of the properties to which we think the concept applies, including those through which we acquired them. What IA does not ask us to do at first instance is to look at all other concepts that we also call values and see what interpretation of the present concept fits best with the others. This is what distinguishes IA from Dworkin's prescription when it comes to how we ought to think about cases where value concepts apply.

6.4.4 IA, thick concepts, and the non-cognitivist challenge

The value-evaluation distinction has strong parallels in debates over the nature of 'thick concepts'. Debates over the nature of moral and ethical values have been heavily influenced by Bernard Williams' discussion of the idea of thick or substantive ethical concepts.⁴⁷ According to Williams, the essence of the idea of a thick ethical concept is that their application is both *action* and *world*

⁴⁷ Bernard Williams, *Ethics and the Limits of Philosophy* (Routledge 2006) 140.

guided.⁴⁸ They are action guided in the sense that they are typically related to reasons for action. For example, courage is a thick concept, and is action-guided, as courage is a virtue, and what is considered courageous in a situation is usually a reason for one to do that. That reason might be defeated by other reasons, say a prudential one, or on consideration of some other value that might apply. The fact however remains that a certain act being courageous counts in favour of an action.

On the other hand, courage is also world guided. It is world-guided in the sense that the concept can be rightly or wrongly applied, and people might agree that it applies or fails to apply to a situation.⁴⁹ The world-guided aspect of a thick concept is often spoken of as its descriptive element, and the action-guiding aspect as the prescriptive one. Much of the discussion around thick concepts has been in understanding whether there are indeed such elements, and if there are, then how, or even whether, they can be 'disentangled'.

The 'disentangling problem', points towards deeper questions relating to the fact-value distinction that the idea of thick concepts presents. Thick concepts force us to question any clear distinction between fact and value since they appear to be instances where fact and value are inextricably intertwined.⁵⁰ If some concepts have both descriptive and prescriptive content then fact and value are intertwined in such concepts, and to prove that, the distinction would require painstaking disentangling.

⁴⁸ *ibid.*

⁴⁹ *ibid* 141.

⁵⁰ For a clear statement of the problems posed by thick concepts, and an intellectual history of the debate see Simon Kirchin, 'Introduction: Thick and Thin Concepts' in Simon Kirchin (ed) *Thick Concepts* (OUP 2013) 1-19.

The disentangling problem is real if we accept the view that thick concepts have two distinct components. Accepting a two-component view of such concepts is what brings, what I shall call, 'dualist non-cognitivism' about thick concepts into the picture. On dualist non-cognitivism, thick concepts have a distinct world-guided or descriptive element that can be cognitive, and an attitudinal non-cognitive element that is not truth-apt. The descriptive-cognitive element is truth-apt in the sense that it can be spoken of as correct or incorrect in a community of speakers. Cognition of this element does not include it being evaluative in what is often called the orthodox sense of evaluation: that evaluation involves having a pro or con attitude towards anything.⁵¹ The evaluative aspect arises from attitudes that we develop towards the descriptive-cognitive element as a function of a non-cognitive element that is not truth-apt: something that cannot be spoken of as correct or incorrect.⁵²

Dualist non-cognitivism thus holds that there are no properties that exist as values in the world; rather the value aspect of properties arises as a propensity towards having an attitude towards the cognitive element of the properties. On such views therefore, every case of a thick concept is capable of being disentangled into the cognitive or world-guided element that is truth apt, and an action-guided, evaluative, or non-cognitive element that depends on our attitudes towards that property, and is therefore not truth apt.

⁵¹ Debbie Roberts, 'It's Evaluation, Only Thicker' in Kirchin, *Thick Concepts* (n 50) 78-96 at 78.

⁵² See Simon Blackburn 'Disentangling Disentangling' in Kirchin, *Thick Concepts* (n 50) 121-135 and Simon Blackburn, 'Rule-Following and Moral Realism', in Stephen Holtzman and Christopher Leich (eds.) *Wittgenstein: To Follow a Rule* (London: Routledge and Kegan Paul, 1981) 163-87: for such a non-cognitivist view. See John McDowell, 'Non-Cognitivism and Rule-Following', in Stephen Holtzman and Christopher Leich (eds.) *Wittgenstein: To Follow a Rule* (London: Routledge and Kegan Paul 1981) 141-62: for another non-cognitivist view that is opposed to Blackburn's.

Dualist non-cognitivism about thick *concepts* (as opposed to properties) is at odds with IA, since for IA attitudes towards properties come after possessing concepts of those properties. Thus, if dualist non-cognitivism holds that there are thick *concepts*, and a part of what makes something a thick *concept* is attitudinal, then such a view is incompatible with IA.⁵³ However, if the claim is that the content of thick concepts is the world-guided/descriptive/cognitive element, and the attitudinal element is unrelated to conceptual content, then the non-cognitive view might be IA compatible. In other words, IA can live with the view that there are some concepts the content of which necessarily invite a pro or con attitude. The attitudinal feature therefore is irrelevant for determining conceptual content of the concepts that represent the properties that they are attitudes about.

This means that for dualist non-cognitivism of thick concepts to be a view about those *concepts*, there is no place for the non-cognitive element under IA. However, as an explanation of the nature of the *properties* that the concepts represent, it might be possible on some views to argue that they necessarily invite certain attitudes. It would be a burden of such theories to lay bare the reasons for such properties inviting certain attitudes. The upshot for values would be that values are properties that invite a certain kind of attitudinal response, but such response is not a criterion for possessing the concept of that value. The content of a value concept would be its cognitive aspect, possession of which is enough to possess the concept of the value.

⁵³ For a similar view which alleges that the non-cognitivist view does not amount to a *conceptual* claim see Edward Harcourt and Alan Thomas, 'Thick concepts, Analysis and Reductionism' in Simon Kirchin *Thick Concepts* (n 50) 20-43 at 21. Their view is not one based on IA but asserts a similar conclusion that if an aspect of thick concepts is not truth-apt, then that aspect is also non-conceptual.

If non-cognitivist views were to square this with the view that values are necessarily properties with evaluative content, then they must propose a view of evaluation that is not dependent on attitudes.⁵⁴ This is so since attitudes come after concepts. The other plausible alternative for non-cognitivism of this sort is to argue that evaluation is not a part of the content of values or thick concepts but is relevant in some other way.

In deep contrast to dualist non-cognitivism, John McDowell's influential view on thick concepts holds that such concepts are (and I presume he means, are concepts of) evaluative properties that are in the world, which we can detect 'by virtue of our special affective and attitudinal propensities'.⁵⁵ On this view, which I shall call the 'monist view', thick concepts cannot be broken down or disentangled into descriptive and evaluative elements. Values, therefore, are properties in the world, and we can detect them as values given some attitudinal propensities that we have. Without such propensities, which I gather necessarily involve evaluation, the so-called descriptive/cognitive elements of the concepts would be *shapeless*.

To be shapeless means that there would be nothing in common to the various instances that are taken to be extensions of the concept in the absence of some evaluation.⁵⁶ For example, in the different instances of cruelty that we recognise, the bare physical facts that occur in all instances would have nothing in common for them to be characterized as instances of cruelty. Cruelty

⁵⁴ Debbie Roberts proposes a view which links evaluation to conceptual content. She calls this the 'inclusive view'. I discuss some aspects of this view in the following paragraphs. Debbie Roberts (n 51).

⁵⁵ John McDowell, 'Non-Cognitivism and Rule-Following', in Stephen Holtzman and Christopher Leich (eds.) *Wittgenstein: To Follow a Rule* (London: Routledge and KeganPaul 1981) 141–62 at 143.

⁵⁶ Simon Kirchin, 'Introduction: Thick and Thin Concepts' (n 50) 9.

therefore is an evaluative property in the world and exists as such. There is no aspect of cruelty that is descriptive, which can be distinguished from its evaluative element. You could not go on from one instance of cruelty to another and find some common descriptive element that is the cruelty-making property.

The monist view denies that there are non-evaluative properties in the physical world that count as values without interaction with our attitudinal propensities. Without reference to other controversies surrounding the monist view,⁵⁷ and at least at first glance, it seems to be incompatible with the account of concepts presented by IA. The monist view seems to imply that to possess value concepts, there must be a mind-world interaction where attitudes play a primary role. It is only because of certain attitudinal propensities that we can detect certain features of our world as values.

Without prejudice to the merits or demerits of McDowell's view, IA can accommodate views that hold that grasping some concepts require having certain beliefs in place. IA can allow that some properties are belief-mediated (thus attitude-mediated), just as some are theory-mediated.⁵⁸ It might be the case that our minds get locked to some properties only if we hold certain beliefs or have certain 'attitudinal propensities'.

For example, in order to form a mind-world relation with the property *cruelty*, we might have to hold beliefs about harming and/or suffering. The property of cruelty is such a state of affairs that can be detected only if we had these further beliefs, and indeed also the concepts necessary to form those

⁵⁷ For criticisms of the Monist view see Simon Blackburn 'Disentangling Disentangling' in Kirchin, *Thick Concepts* (n 50) 121-135 and Simon Blackburn, 'Rule-Following and Moral Realism', in Stephen Holtzman and Christopher Leich (eds.) *Wittgenstein: To Follow a Rule* (London: Routledge and Kegan Paul, 1981) 163–87.

⁵⁸ For a discussion of IA allowing theory-mediated concepts, see section 6.4.1 above.

beliefs. Notice that these other beliefs are not beliefs about cruelty, but about other properties such as suffering, or harm, without having attitudes towards which we could not have grasped cruelty. Let me illustrate this point. Imagine three different scenarios:

Scenario 1: Anoushka, a five-year-old, enters a room with her mother and sees a doctor amputate an unconscious person's leg. Given the phenomenon of mirror neurons, Anoushka relates what she sees to what it would feel if her own leg is being sawed off and is therefore horrified.⁵⁹ Her mother explains that this is a necessary surgical intervention and is beneficial to the person. Anoushka, if curious by nature, might now take an interest in how the surgery is being done, and might hope that it will be successful. At least she will not think of it being undesirable, contrary to her initial response.

Scenario 2: Anoushka enters a room with her mother and witnesses a person in a blue gown (a surgeon) saw off the leg of a person who is conscious and full of grief. Anoushka's mirror neurons fire the same way as in scenario 1. Additionally, she also feels the grief of the person whose leg is being amputated. She asks her mother to request the surgeon to stop. Her mother explains that this is a medical intervention like in scenario 1 and given the state

⁵⁹ Mirror neurons are neurons found in monkey brains, and on some studies, in human brains that mirror things that they perceive in the world as happening to themselves. Research in neuroscience has led to theories that hold mirror neurons to be the basis for phenomena such as phantom-limbs on one end of the continuum, to empathy on the other. For a popular-science description, see VS Ramachandran, *The Tell-Tale Brain: A Neuroscientist's Quest for What Makes us Human* (W.W. Norton & Co. New York 2011) Ch.4. For the original reporting of the discovery and the characterization of such neurons as 'mirror neurons', See V. Gallese, L. Fadiga, L. Fogassi, and G. Rizzolatti, 'Action recognition in the premotor cortex' (1996) 119:2 *Brain* 593-609. The precise role of mirror neurons and even their existence in human brains has been a matter of debate, even though some studies have identified similar neurons in human brains. As is evident, I only apply them hypothetically here.

of medical research, it is possible to have an amputation without general anaesthesia, and the patient was not feeling any pain. Anoushka might now be interested in how this happens, but given the grieving person in the room, also feels sad.

Scenario 3: Anoushka enters a room with her mother and witnesses a few people holding down a man and injuring his leg. The man is resisting and crying out in pain making it clear that it is being done against his will. This greatly troubles Anoushka. She screams at the people in the room to stop hurting the other man. Her mother asks Anoushka to run out and ask someone to alert the police, while she herself asks the assailants to let go off the man. Anoushka's mother explains later to her that the people in the room were harming the man and were being cruel. Anoushka now learns a new word 'cruel', but she also experiences a new state of affairs towards which she was predisposed in a particular manner, which in turn made her act in a particular way.

Notice that in all three scenarios there is something in the state of affairs in the rooms that makes Anoushka respond in different ways. In all three she must have the concept PAIN and beliefs about it (here, that pain is undesirable) to react to the amputation/injury. In the second scenario she also has the concept GRIEF and beliefs about it, which were reflected in her expression of sadness and sympathy. It is evidently untrue that she understands and reacts to the situations appropriately only when the situation is explained to her by her mother. But surely the acquisition of the concepts of ANAESTHESIA,

AMPUTATION, and SURGICAL INTERVENTION are aided by her mother's explanation.

In scenario 3, Anoushka acquires the concept CRUELTY. It is a state of affairs that she had not witnessed before, but she did react to it in a manner expected of other human beings. She might not have had a word for the situation but given what she already knows, and how she feels, she can now identify it as a distinct state of affairs. Anoushka must already have attitudes towards *pain*, *unwillingness*, *violence*, *anger* etc. to detect a situation of CRUELTY. Some of these properties, such as *pain* and *anger*, are feelings and basic emotions that Anoushka experiences given her biological nature as a human being; while some like *unwillingness*, have a more complicated history, perhaps having developed as she experienced them in life. In scenario 3 she experienced a complex situation involving several components including *suffering*, *violence*, *anger*, *unwillingness*, and *fear* that she now identifies as cruelty. She has the concept CRUELTY since she has a mental representation of such a state of affairs, here by first-hand experience of scenario 3.

The point being, that it is surely possible that to access some properties, we require having certain attitudes in place that aid us in detecting the property.⁶⁰ Such attitudes however are attitudes towards *other* properties that figure in the case of the property in question. That does not entail that the content of the concept of such attitude-mediated properties are determined by inferences from other concepts. The clear picture is that the content of the concept, CRUELTY in our case, is the property of a cruel state of affairs to

⁶⁰ This possibility is not denied by the nativist claims of IA as those claims are restricted to primitive concepts. See Margolis and Laurence (n 2) 67; Jerry Fodor (n 1). Critics too recognise this feature of Conceptual Atomism. See Bridges, 'Informational Semantics' (n 12).

which our minds are locked through certain instances- actual or virtual. To access that property might require knowing other properties or having attitudinal propensities towards some properties, or both; but the property exists as a property in the world just as the other properties that are relevant to acquiring CRUELTY are also in the world. Perhaps it is best understood to be a property that is a complex state of affairs, which is thus represented to our minds through a combination of many concepts and beliefs.

In sum, IA can accommodate theory-mediated and belief-mediated concepts. What it cannot accommodate is a view that there can be concepts of values without there being corresponding properties in the world. The content of a concept, including value-concepts, is information about properties in the world that the concept represents.

6.5 Conclusion

This chapter has presented an Informational Atomist account of concepts and conceptual content as an alternative to a holist account that has inspired accounts of reasoning with values. At the heart of this account is the view that the content of concepts is information about properties, determined by mind-world relations. This entails that if concepts are employed as justifications, and justifications are dependent on conceptual content, then justification requires attention to instantiations of the properties that the concepts represent. In the next chapter I draw out some implications of this view for adjudicative institutions. In presenting an Informational Atomist account of concepts and their content, I considered objections that may arise, including those from the literature on thick concepts. Given that some views on the nature of thick

concepts might appear to be at odds with the account I propose, some further concluding clarifications might shed light on the distinctiveness of my proposal.

The nature of thick concepts has recently received close scrutiny, especially in the contributions to Simon Kirchin's edited volume.⁶¹ The objective of such scrutiny is to illuminate the nature of thick concepts which include the nature of many values. In contrast, my endeavour here has been rather limited. It presents an account of conceptual content, which would apply to concepts of values as well. It is instructive to remember here that IA is a view about concepts and their content; whereas, views about evaluative properties and 'thick concepts' are also views about the nature of particular sorts of *properties*. Even though the debate has become known under the rubric of 'thick *concepts*', and prominent views revolve around concepts such as CRUELTY and COURAGE; such views are about what courage and cruelty are, and therefore aimed at properties. It is of course legitimate to speak of the nature of properties as if we were speaking of the concepts that represent them. After all, concepts represent properties, and hold information about them. However, questions about the nature of concepts specifically focus on how properties are represented to our minds, rather than the nature of any particular property or class of properties. The thrust of my arguments here has been that given the sorts of things concepts are, and given what conceptual content is, they are best understood in an atomist manner. This applies to concepts of values as well. And if providing justifications is dependent on conceptual content, then justification should track the content of our concepts by focussing on the mind-world relation between concepts and properties.

⁶¹ Simon Kirchin *Thick Concepts* (n 50).

On the question of whether thick *properties* exist in the world with evaluative features, or without them, IA is mostly inert. It is not a view about the nature of properties. It is however sensitive to a question about properties that involves attitudes. If values were properties that conveyed evaluative information to us, then evaluative information, whatever that is, would be represented to our minds. That is all very well for IA. However, it is impossible for IA to allow that conceptual content is constituted by attitudes about the property *that the concept represents*. Thus, attitudes about a concept cannot be constitutive of its conceptual content, even though it might be the case that attitudes about *other* properties can be constitutive of the content of another concept.

To conclude, there are at least two lessons to be learnt from IA as an account of conceptual content that are instructive for thinking about how one might reason with values, and who might be in a good position to reason with them. These are the two lessons the implications of which I draw out in the next chapter. The first is, that since conceptual content is locked to properties in the world, searching for content should be aimed at instantiations of properties. This entails the second lesson, that competence of reasoning with value concepts must focus on the competence to determine the content of those concepts.

IA is normatively fertile in this context due to its focus on instances. The following chapter defends an IA-based prescriptive account of reasoning with values.

Chapter 7. Content and Justification in Adjudication

7.1 Introduction

The task of this chapter is to extend the non-holist account of reasoning with values to adjudication. I will call the account an atomist one. It recommends that we investigate the content of each value concept atomistically: by paying attention to their instances and the properties that they instantiate. We turn to other value concepts when there are good reasons stemming from instances, and through them, the property that the value concept represents.

The account leaves the question of relationship between values open. What it denies is the claim that we should work with value concepts by presuming that they are necessarily related, and that their content is determined by their relationship with other value concepts. It is premised on the simple claim that for value concepts to be related, they must first have individual content.

Atomism both explains and prescribes how individual content is determined. It will of course be the burden of the atomist account to explain along the way why Dworkin's value holism pays scant attention to the far-reaching question of initial content, even though at times there are hints at how it could be resolved. This chapter will then point out why the atomist account has significant implications for both judicial reasoning and judicial competence in employing moral and political values.

It goes unsaid for atomism about values that conceptual content is central to justification. Accepting *that* conceptual content is central has proven to be far easier than explaining *how* content is determined in the first place. It is the latter question that would guide reasoning with values. Indeed, we noticed in previous chapters that there are polarising debates on the nature of conceptual content, and thus determining the content of vague value concepts is controversial, to say the least. Such controversies must be dealt with head on, but the focus in legal theory has been on much else. Taking the role of conceptual content to be a truism has perhaps denied the close attention that an account of content determination deserves. If the focus of thinking about the problems of indeterminate values in adjudication would have firmly remained on conceptual content, then perhaps the disproportionate emphasis on conceptual exceptionalism and the notion of substantive disagreement would have been avoided.

Some of the justifications I offer for this conclusion stem from an IA-based account of conceptual content, while others germinate from a reason-giving account of adjudication argued for in chapter 2, which too shares common ground with Dworkin. I will then defend this conclusion from arguments that hold that judges ought not to provide substantive accounts of the content of values. In this, I will pay particular attention to arguments from judicial minimalism and arguments that privilege the legislature over the judiciary.

7.2 Justification beyond agreement

Before elaborating on the atomist account, a few preliminary clarifications are warranted on the nature of justification. Since the atomist account is about how judges ought to offer *justifications* when employing moral values, some clarity on how I use the terms 'justification' and 'justificatory reasons' are in order.

I will rely on two senses in which a reason can be a 'justificatory reason' or a 'justification'.

(1) Justificatory reasons are 'guiding reasons'.¹ They guide us towards conclusions (whether as an action or belief).

(2) Justificatory reasons are also explanatory reasons as we cite justificatory reasons in explaining why we arrived at a conclusion.²

Every explanatory reason, however, may not be a justificatory reason since the reasons that a decision maker actually employs as a justificatory reason may not be considered to be a justified reason by others and even by herself when she comes to possess other reasons.³

Whether the test for justification should be subjective or objective in this sense is the contest between 'objectivists' and 'subjectivists' about justification. Subjectivists hold that one's decision can be held to be justified if one thought

¹ This is to borrow Joseph Raz's terminology in *Practical Reasons and Norms*. Raz suggests that reasons can be understood as explanatory, evaluative, or guiding. The three are interrelated since a guiding and an evaluative reason should also be capable of explaining the reasons for an action. Guiding and evaluative reasons thus also figure as explanatory reasons. Joseph Raz, *Practical Reasons and Norms* (OUP 1999) 15-16. John Gardner too employs the terminology of guiding reasons to describe justificatory reasons. John Gardner, 'Justifications and Reasons' in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (OUP 2007) 91-120.

² *ibid.* This is a view held both by Raz and Gardner.

³ See John Gardner and Timothy Macklem, 'Reasons' in Jules L. Coleman, Kenneth Einar Himma, and Scott J. Shapiro (ed), *The Oxford Handbook of the Philosophy of Law* (OUP 2004) 441-476 at 442-445.

that the reasons that they acted upon were the ones that applied to them.⁴ Objectivists on the other hand hold that actions and beliefs are justified on reasons that *actually* applied to one, independent of what one believed applied to them.

What is at issue here is the *class* of reasons to be considered to determine whether a person was justified in her actions or beliefs. Depending on contexts, policy makers might choose either.⁵ My concern here is not to assess the merits of fixing subjective and objective standards in given contexts. Rather, I am concerned with what should be a source of 'guiding reasons' for decision-makers and thus on what would constitute a source of *objectively* justified reasons.

When value concepts are employed as justifications, the content of the concept is one such central and uncontroversial source of justificatory reasons. An atomist account is relevant to adjudication precisely because it explains how one could justifiably determine content.

The content of the concept is a source of justificatory reasons because it acts as a *ground* for the claim to correctness of the decision. At the minimum when we speak of justification we speak of a ground for a conclusion.⁶ To employ the term liberally, the ground must count towards the soundness of the conclusion. What then counts as a sound ground? To borrow from Wittgenstein, justifying grounds have a more settled character than the candidate conclusions. I take this from a reading of Wittgenstein's *On Certainty* where he

⁴ For a discussion see Gardner (n 1) at 93-94.

⁵ For example, in tort law, tests of foreseeability in fault liability can be based both on subjective and objective tests. Whereas strict liability is based on a test of subjective reasons.

⁶ Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justification* (Columbia University Press 2007) 13-14.

equates justification to 'giving grounds', and where justification is possible, as being a more settled ground.

Despite Wittgenstein's view that what is settled at one time may become unsettled later, I rely on his view that when we *give* justifications we rely on firmer grounds at that time.⁷ In explaining the nature of grounds Wittgenstein employs the metaphor of the banks of a river: 'And the bank of a river consists partly of hard rock, subject to no alternation or only to an imperceptible one, partly of sand, which now in one place now in another gets washed away, or deposited.'⁸ Again: 'The mythology may change back into a state of flux, the river-bed of thoughts may shift. But I distinguish between the movement of the waters on the river-bed and the shift of the bed itself; though there is not a sharp division of the one from the other.'⁹ Though it is clear from Wittgenstein's words that no ground is free of revision, at least at given points of time, some grounds are firmer than others.

One might point out that firmer ground here is no more than agreement. Is justification then a prisoner to prior agreement? Perhaps yes, if the question was limited to how and why we employ *words*: why we assign sounds, and letters of the alphabet, to properties/concepts. Since there seems to be no good reason for how sounds and letters map on to simple properties and their concepts,¹⁰ agreement on such arbitrary assignment is a good ground for justifying their further use. The benefits of coordinated use follow. However, in

⁷ For example, he equates justification to giving grounds: 'Giving grounds, justifying the evidence, however comes to an end...'. See Ludwig Wittgenstein, *On Certainty* (Basil Blackwell Oxford 1969) at 204.

⁸ *ibid* 99.

⁹ *ibid* 97.

¹⁰ I say simple concepts and properties since there might be good reasons to assign certain words to them, e.g., the words brown and cow to the concept BROWN COW.

the realm of concepts and properties, justifications can be at a level deeper than the fact of agreement.

Facts about the world can *generate* agreement. Such facts are prior to agreement, and their awareness makes us respond in similar ways to them. Perhaps one could say that justification here emanates from *showing* or *demonstrating* or *drawing one's attention* to something. Indeed, perhaps that is what Wittgenstein meant when he said in the context of family resemblances in games: "*look and see* whether there is something common to all".¹¹ The commonality is to be discerned by observation of *instances* of games.¹² Instances would yield an understanding of the meaning of 'game'. Understanding is dependent on 'looking' and 'seeing'. This would presumably include generating common understanding i.e. agreement, if our understandings are controlled by careful looking and seeing.

In this, there is a striking similarity between Wittgenstein's appeal and Quine's views on observations sentences that I referred to in chapter 4.¹³ The insight I want to draw upon is that agreement too is on content. And questions of content therefore precede agreement on them, except in cases such as the assignment of words to phenomenon. When we seek to generate agreement, or to arrive at a conclusion even otherwise, we cite reasons rooted in our attention to instances of properties.

It might be thought, perhaps rather too easily, that my appeal to Wittgenstein's views on family resemblances is misplaced since they are precisely a germinating ground for holism, and thus count against atomism. It

¹¹ Ludwig Wittgenstein, *Philosophical Investigations*, GEM Anscombe, PMS Hacker and Joachim Schulte trans. (Oxford: Wiley-Blackwell, 2009) at section 66 (emphasis supplied).

¹² *ibid.*

¹³ Section 4.2.4 in Ch. 4 of this thesis.

is not my intention to intervene in scholastic debates on how to develop an overall understanding of Wittgenstein's philosophy. What I want to draw attention to is Wittgenstein's rare remarks that touch upon questions of conceptual content. What is apparent from the text of his remarks is that he asks us to look at what we count as instances of a concept to discern its meaning (content):

“77...In such a difficulty always ask yourself: How did we *learn* the meaning of this word...? From what sort of examples? In what language-games? Then it will be easier for you to see that the word must have a family resemblance of meaning.”¹⁴

The emphasis on examples here is a plea for searching how we come to know about the meaning of the word through connections between instances of *its* use. To understand games, we look at instances of games, and to understand values therefore we look at instances of values. Nothing, according to Wittgenstein, however, guarantees that looking at many instances will provide an essence of what a game is. We might at best find family resemblances for the meaning of words. This conclusion should not deter us from assuming that close examination of instances will not yield determinate properties that count as the content of concepts. Indeed, Wittgenstein's focus in these sections of *Philosophical Investigations* is primarily on the *use of words*. However, given that words are labels, many remarks on them travel

¹⁴ Wittgenstein, *Philosophical Investigations* (n 11) at section 77.

through to concepts and properties they stand for. In this sense some of his remarks here do bear upon conceptual content.¹⁵

My reference to his remarks is limited to demonstrating that instances can not only be illuminating as a justificatory ground, but also have the potential to generate agreement in our understanding of the property in question.¹⁶ In this sense, instances of a property have a central role in justification.

I elaborate further on the role of instances, and the different kinds of instances, in 7.3 below. The discussion above was to argue on the nature of a firmer ground and its role in justification.

With these clarificatory remarks, I now elaborate on the constituents of an atomist view of reasoning with values in adjudication.

7.3 Constituents of an atomist account: Instance-based reasons.

If determination of conceptual content is central to justification and the atomist account, then justification at the minimum means that judges must provide what I call *instance-based reasons*. Instance-based reasons are constituted by information that judges hold under the concepts that they employ. They reveal the sources of information that the judge holds under a concept. They reveal what the judge's view of the content of a concept is, which is a fundamental

¹⁵ Wittgenstein's remarks on family resemblances are usually counted as an argument against the traditional view that concepts are definitions. See Eric Margolis & Stephen Laurence, 'Concepts and Cognitive Science' in Eric Margolis & Stephen Laurence (ed.) *Concepts: Core Readings* (1999 MIT Press) 3-81 at 15. In other work, especially in *On Certainty*, his remarks are closer to questions of how conceptual content is determined. There is considerable debate on how to characterize his views. For a discussion see Roger F Gibson, 'Quine, Wittgenstein and Holism' in Robert L Arrington and Hans-Johann Glock (eds), *Wittgenstein and Quine* (Routledge 1996) 80-96 at 90-94.

¹⁶ I had referred to this power of generating agreement in the context of the concept of dignity in section 6.3.1 in Ch. 6 of this thesis.

aspect of the judge's understanding of the property that the concept represents.¹⁷ I take conceptual content to be *reason/s* not only because it is information that we respond to,¹⁸ but also because in justification in the explanatory sense, such information will be cited as a judge's explanatory reasons for why she thinks the concept applies.

Instance-based justification in the realm of constitutional adjudication is motivated by two factors: reason-giving views of constitutional adjudication, and the agreement generative potential of instance-based reasons that in turn has legitimacy-generative potential.

In chapter 2, I had argued constitutional adjudication to be a reason-giving institutional process.¹⁹ On such views, courts are authoritative bodies that issue binding directives, and therefore rights-determination by courts must have a claim to legitimacy. Reason-giving views of adjudication typically cite deliberative, dialogic, and accountability-based considerations as counting towards reason-giving as a virtue. Accounts such as Mattias Kumm's Socratic contestation, and Dworkin's constructive interpretation also take rational claims to truth as grounds for favouring robust reason-giving as opposed to minimalist views of constitutional adjudication. These benefits of reason-giving are captured by the instance-based view as it advocates reason-giving based on conceptual content.

In the context of moral and political disagreement, an instance-based view is further motivated by the idea that adjudicators must provide reasons

¹⁷ Conceptual content is one of the fundamental aspects of the judge's understanding of the property, as her understanding might also include beliefs that she might form about the property which in turn might include its relationships with other properties.

¹⁸ Section 6.2.2 of Chapter 6 of this thesis (for a discussion of conceptual content as information).

¹⁹ See, section 2.5 of this thesis for a discussion of such views.

that are agreement-generative.²⁰ Indeed content-based reasons have an equal if not better claim to resolving moral and political disagreement based on value concepts when compared to minimalist accounts that do not rely on reason-giving.²¹ The agreement-generative potential of information from instances can have legitimacy-generative benefits in the adjudication of moral and political disagreement. I argue for such benefits in 7.4.1 below while defending instance-based reasons from minimalist views of adjudication. Those arguments are theoretically complemented by how instance-based reasons figure within a general account of legitimate authority.

Towards this end I proceed by accepting the three central tenets of the service conception of authority as being necessary though not sufficient conditions for legitimate authority: that the authority must be better placed to adjudicate a dispute, that it must consider the relevant reasons that apply to the dispute, and that the parties will be better-off by relying on the authority's decision rather than their own reasons.²²

I choose the service conception as it focuses on the nature of reasons that are operative in an authoritative relationship, and instance-based reasons are identified here as a category of justificatory reasons. In referring to Raz's account I will refer to his classification of reasons found in *Practical Reasons and Norms*.²³

²⁰ See section 7.3.1 below for a discussion of the agreement-generative potential of instances. See also a pp 267-269 of this thesis for how information from instances can be agreement-generative

²¹ See section 7.4.1 below for a discussion of this feature and how it compares to minimalist accounts of adjudication.

²² Joseph Raz, 'Authority, Law and Morality' in *Ethics in the Public Domain: Essays in Law and Morality* (Revised edition, Clarendon Press 2001) 210-237; Joseph Raz, 'Authority and Justification: Revisiting the Service Conception' (2006) 90 *Minnesota Law Review* 1003.

²³ Joseph Raz, *Practical Reasons and Norms* (OUP 1999). Doubts have been cast on Raz's classification of reasons, but they apply to exclusionary reasons. See Gardner and Macklem (n 3) at 460-463: for a defence of Raz's view of exclusionary reasons.

Within the service-conception, instance-based reasons must necessarily be a part of the *operative reasons* for a decision.²⁴ They must be a part of the reasons that guide the judge to a specific conclusion. In this, they have a legitimacy-generating role as they form a part of the '*dependent reasons*'-- reasons that apply to a case before the authority. If a judge thinks that a concept applies to a given case, then the content of the concept must necessarily form a part of the dependent reasons that figure in deciding the case.

By figuring as operative and dependent reasons, instance-based reasons therefore figure as relevant reasons that a legitimate authority must consider. They also figure in articulating expertise as a ground of legitimacy, which is part of the tenet that the authority is in a better position to adjudicate the dispute. By focussing on experience and reflection on the instances of a concept, instance-based reasons would exhibit the authority's claim to legitimacy. In the context of judicial authority, a judge must provide an account of the content of the concept that governs the judge's understanding of the property that the concept represents. The judge's understanding therefore must be based on reasons other than the conclusions that she thinks are warranted, and on some firmer ground that can supply reasons for her decision. Indeed, revealing such reasons would bolster a judge's claim to being a legitimate adjudicative authority.

It might be thought that revealing such reasons is not a requirement for legitimacy under the service conception, as it only stipulates that the pre-emption thesis be satisfied i.e. that the judge's reason acts as an exclusionary reason. Though this is true, the pre-emption thesis is a requirement to establish

²⁴ *ibid* 33-34.

the *fact of the existence of authority*. It does not prohibit any condition such as being transparent about dependent or operative reasons. When moral and political disagreement stems from concepts of value, transparency about instance-based reasons serve as a potentially legitimacy-generating feature. Revealing such reasons would bring novel information to bear upon a disagreement and it would demonstrate, *inter alia*, the agreement-generative power of instances as well as the cognitive expertise required in applying value concepts involved.²⁵

By cognitive expertise I mean that the judge should have a good grasp of existing knowledge about the content of the concept. This would include accounts of the concept in legal sources,²⁶ scholarly work on the concept beyond legal sources, and an awareness of the variety of ways in which the concept is applied. As innocent as this might sound, such a position is controversial since it stands in opposition to prominent existing views, and also because it entails taking a serious view of competence conditions that must be satisfied for a judge to employ values in adjudication.

Influential views on adjudication and the role of value concepts in law hold that judges should not reveal instance-based reasons, and even that they

²⁵ Indeed, a large part of the claim to legitimacy of legal actors in deciding legal disputes is cognitive expertise. James Penner, 'Common Law Cognition and Judicial Appointment' (2000) 38 *Alberta Law Review* 683; James Penner, 'An Untheory of the Law of Trusts, or Some Notes Towards Understanding the Structure of Trusts Law Doctrine' (2010) 63 *Current Legal Problems* 653-675 at 661 (for the view that in Trusts Law at least it is cognitive expertise over legal doctrine that determines most disagreements in law where some decisions can be *demonstrated* as being *mistaken* by legal analysis. Such an argument would support the view that it is cognitive expertise over the law that should have a central role in matters relating to adjudicating legal disputes).

²⁶ I take the role of legal sources to be minimal in cases involving values since disagreement about values arise because there is not enough settled doctrine on how values figure in the law.

should not employ value concepts²⁷ I shall address such objections in 7.4 below. Indeed, such views, and even views such as Dworkin's that counter them, do not provide any reason to be sceptical of the competence of existing constitutional courts in employing values in adjudication. An atomist account however brings alive the controversies about the competence of constitutional courts by demanding cognitive expertise that goes beyond the law.

That cognitive expertise of the *law* is a condition judges must satisfy is acceptable to contrasting views on judicial reasoning. For example Dworkin's ideal judge, Hercules, must possess cognitive expertise over all areas of law to discover the institutional character of law.²⁸ Institutional character, for Dworkin, is articulated in contested value concepts, the content of which Judge Hercules must determine by constructing a political theory that both controls, and is controlled by institutional history. Dworkin, however, does not rely on cognitive expertise when it comes to determining the content of those contested moral and political concepts. In his earlier work Dworkin relied on the notion of fit with institutional history, including paradigms, to test Hercules' conception of those contested concepts. In *Justice for Hedgehogs* he relies on holist arguments for content determination. Others have argued that in most areas of law, say the law of trusts, where there is a critical mass of legal materials available, legal actors do not require theoretical ascents such as Dworkin's to find answers to

²⁷ Christopher McCrudden, 'Human Dignity and the Judicial Interpretation of Human Rights' (2008) 19: 4 E.J.I.L. 655 at 685-689 (alluding to the fact that values concepts such as dignity are useful because they are placeholders); Connor Gearty and Virginia Mantouvalou, *Debating Social Rights* (Hart Publishing 2010) (for Gearty's view that discourages courts from employing moral and political values in adjudicating rights issues.); and Cass Sunstein, 'Leaving Things Undecided' (1996) 110 Harv. L. Rev. 4. (for the view that judges should avoid explicit reasons such as instance-based reasons and should rely on Incompletely Theorised Agreements instead).

²⁸ Ronald Dworkin, *Laws Empire* (Hart Publishing 1998) Chs. 3 and 7; Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) Ch. 4.

legal disputes. Cognitive expertise of the law alone is enough.²⁹ This latter view does not squarely apply to the context of this thesis since the problems that moral and political values raise for adjudication in public law are precisely because there is not enough content that the law settles for us in this regard. The question therefore is precisely about how we go about generating that critical mass of content. An atomist account suggests that cognitive expertise again figures prominently. This time around, it is not expertise of the law alone, but expertise over other materials where such concepts figure, including those that develop familiarity with instances of those concepts.

Cognitive expertise is however not the only demand that instance-based reasons place on authorities. Neither is it the only feature of judicial reasoning they reveal when instance-based reasons are supplied. This will become clearer in my discussion on the constituents of instance-based reasons below. For this, it is necessary to return to what a judge must do in providing instance-based reasons.

Providing instance-based reasons entails that the judge lays bare the information that she has acquired from mind-world relations formed with instances to which the concept applies. In laying bare such information, attention undoubtedly is on the property that the concept represents, via instances or their representations/mediums, through which the judge acquired the information that she holds. Offering instance-based reasons when employing values as justifications therefore warrants an account of what would count as instances and mediums in the case of value concepts?³⁰

²⁹ Penner, 'Untheory of the Law of Trusts' (n 25).

³⁰ Though I distinguish between instances and mediums here, mediums merely represent instances of a property. For example, a photograph of a dog is a medium that represents a dog

Perhaps the most likely instantiations in the case of value concepts are found in philosophical accounts of values. For ease of reference I will call such accounts theories. Theories are obvious candidates for familiarity with instances since, at least to begin with, sophisticated understandings of most values are developed by acquainting ourselves with existing theories of values.³¹ For example, understandings of dignity are developed by acquainting ourselves with influential accounts of dignity. Constitutional Courts of several jurisdictions such as Germany and Hungary refer to Kant's understanding of dignity as its source of the content of dignity.³² Other courts routinely speak of self-respect, and autonomy when they speak of dignity.³³ Such terminology is often traceable to Kantian roots of the concept of dignity. This is not to say that most courts *do* employ theories of dignity. The argument is that when they rarely do, it is accounts such as Kant's, or Kantian terminology that has filtered into other discourses that figure in thinking about dignity. Theoretical engagement with dignity, including in the realm of law, too, draw upon or respond to existing influential accounts.³⁴ This much is hardly controversial

which is an instance of the property of *doghood*. Given that mediums represent instances, I will use the terms interchangeably.

³¹ Recall that in section 6.4.1 of chapter 6 of this thesis I had defended the claim that informational atomism allows for the view that many of our concepts are learnt through theories.

³² Kai Moller, 'On Treating Persons as Ends: The German Aviation Security Act, Human Dignity, and the Federal Constitutional Court of Germany' (2000) *Public Law* 457 (for the use of the Kantian conception by the Federal Constitutional Court); Catherine Dupre, The Right to Human Dignity in Hungarian Constitutional Case Law in The European Commission for Democracy Through Law, *The Principle of Respect for Human Dignity* (Proceedings UniDem Seminar, Montpellier, 2-6 July 1998), (1998) 46-54, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD\(1998\)026-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1998)026-e). Accessed on 08/03/2011.

³³ Christopher McCrudden (n 27) at 685-689 (for a discussion of cases across jurisdictions that employ the concept of human dignity in matters involving personal autonomy).

³⁴ For example see J Waldron and Meir Dan-Cohen, *Dignity, Rank, and Rights* (New York: OUP, 2012) (For Waldron's status-based conception of dignity being articulated in contrast to the Kantian conception); M Rosen, *Dignity: Its History and Meaning* (Harvard University Press, 2012) (For a typology of the application of dignity and recognising the centrality of the Kantian conception); J Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (2010) 41: 4 *Metaphilosophy* 464 (where Habermas' engagement with the concept of human dignity begins with an acknowledgement of the centrality of the Kantian conception);

when values are thought of in the realm of understanding generally. When it comes to courts articulating their sources for what they take the content of values to be, then controversies abound. I will return to the mistaken reasons for such controversies in 7.4 below. Let me first indicate another source of the content of values, which theories of values are in turn dependent upon.

When one encounters theories about a value, one inevitably finds their authors transcending theories and engaging with what they take to be instantiations of value in the world. For example, in explaining what dignity is, Kant not only states dignity to be a status that is accorded to the human capacity of Reason; but he employs examples including 'repaying ones debts', acting honestly, deliberating on suicide to demonstrate how one can be capable of such reasoning.³⁵ Thinking about whether one has an obligation to repay one's debts, and what according to Kant is the correct method of reasoning about the obligations that we have, is an instantiation of the property of dignity which is the capacity to reason autonomously of inclinations and prejudices. Those who have engaged with Kant's view on dignity, or indeed even been critical of it, draw our attention to instances where dignity figures, whether in the Kantian sense or otherwise. Such instances need not be only those from which one acquires the concept for the first time. Instances include those to which we think dignity applies. Michael Rosen for example draws attention to the dignity of the dead.³⁶ Scott employs the instances of slavery and working

Remy Debus, 'Human Dignity Before Kant' in Remy Debus, *Dignity a History* (OUP 2017) 203-236 (For evidence of Kant paying his debts to Rousseau, the Stoics, and Roman philosophers in understanding the concept of human dignity).

³⁵ Immanuel Kant, *Groundwork of the Metaphysics of Morals*, translated by Mary Gregor (Cambridge University Press, 1998) at 4:397 and 4:422-4:431.

³⁶ M Rosen *Dignity* (n 34) 121-123.

conditions as central instances that represent concerns about human dignity.³⁷ He takes them to be instantiations of the property of treatment of individuals with respect. Similarly, scholarship on dignity employ instances of undignified treatment such as torture, slavery, persons in vegetative states or the death penalty to elucidate the content of dignity.

By drawing attention to the role of instances, my intention is to argue that the instances point towards a property. Such a property does not have to be a physically perceivable property in the world, e.g. a DNA strand. It could be non-physical (to employ the term generously) in the sense of an idea, a relation between things, or some mental phenomenon such as a concept. Indeed, what I have relied on in this thesis is a concept of a concept. What is to be retained by the focus on instances is that the instances convey information about a property that co-varies in a law-like manner with every instance that we think to which the concept applies. For example, if a Kantian were to give instances of moral obligations where the status of dignity figures; she would have to explain how the phenomenon of autonomous reasoning involved in yielding each moral obligation is *identical*. The point being that instances are good justificatory grounds in arguing for the content of a value only if the property involved is identical in each of the instances. In informational atomist terms, the information conveyed by the instances about the property must relate to the property in a law-like manner.

³⁷ Rebecca J. Scott, 'Dignite/ Dignidade: Organizing Against Threats to Dignity in Societies After Slavery' in Christopher McCrudden (ed), *Understanding Human Dignity* (Proceedings of the British Academy and OUP 2013)

7.3.1 Instances and paradigms

If the role of instances is to direct our attention to the property, then is focussing on instances any different from the view that instances are paradigms or exemplars: that they collect enough agreement for us to anchor disagreement about values?³⁸ Paradigms for Dworkin were stable shores where disagreements could be anchored and thus, were firmer grounds for testing competing conceptions of a concept.³⁹ Conceptions having stronger justification in the paradigms were to be preferred. Do instances play a different role than this?

Paradigms were employed as plateaus of agreement that anchored substantive disagreement just as Gallie's exemplars did.⁴⁰ Agreement is central to paradigms. The instances-based view recognises the value of agreement but holds that agreement does not determine the content of concepts; instances and other sources of information do.⁴¹ If conceptual content is a ground for justification, then one must go beyond agreement. This is especially significant for judicial decision-making based on value concepts, since courts often rely on them to counter majoritarian understandings of what values mean and require.

Instances that disagreeing parties agree upon, undoubtedly anchor competing arguments. However, anchoring is one of the roles that instances might play. Indeed, on my criticism of Gallie in Chapter 3, such anchoring instances point out from an external point of view *that* people agree on them. They do not explain *why* people agree on them. It is reasons for the latter

³⁸ See Chapter section 3.1.1 of Chapter 3 of this thesis for a discussion of Dworkin's view on the role of paradigms.

³⁹ Ronald Dworkin, *Laws Empire* (Hart Publishing 1998) 46-49.

⁴⁰ Susan Hurley, *Natural Reasons* (OUP 1999) Ch. 3.

⁴¹ See pp 267-269 above for a discussion of this claim.

explanation that would count as justificatory reasons for a conclusion that an instance is paradigmatic of a property or not.

In this sense, Dworkin's and Gallie's reliance on paradigms does not explain how any instance becomes paradigmatic. That would require reasons beyond the fact of agreement. A revelation of such reasons could turn out to be a disappointment. Agreement surely can be for diverse reasons. There could be strategic reasons for agreeing. For example, Christopher McCrudden provides evidence for the fact that negotiators agreed on human dignity as the basis for all human rights in the Universal Declaration of Human Rights for strategic reasons.⁴² On a similar vein, agreement could also be for prejudiced reasons, or mistaken reasons. The *fact* of agreement on instances therefore might have little to do with justification. Rather reasons for agreement are material.

Dworkin's paradigm-based view does suggest the existence of such reasons. Reflecting on paradigms yields reasons for preferring some conception over others. It however falls short of explaining what constitutes those reasons and is opaque and restrictive on this front. It is opaque because if the reasons for preferring a conception is the dimension of fit, then those reasons are coherence-based. In this sense they are reasons for belief-confirmation and not content-determination. Again, Dworkin was clear about the relevance of fit to his theory of law, but not so to his theory of value concepts. For value concepts, it is unclear as to what the coherence-based constitutive reasons for paradigms are. The explicit explanation available is that values must make sense in terms of other values. My argument has been that

⁴² McCrudden (n 27).

such a claim is best understood as a prescription based on content-holism as it is unclear why values are to be understood as integrated. Paradigms therefore remain un-investigated in Dworkin's work on values, as he prefers content-holism instead of extending the method of constructive interpretation.

In this sense, Dworkin's paradigm-based view is also restrictive in that it restricts the relevance of paradigms to conceptions alone and does not apply them in the realm of interpretive concepts. Instead, he proposes holism to determine the content of interpretive concepts. It is not my contention that the paradigm-based view cannot yield a non-holist theory of content-determination, or that it would be opposed to the instances-based view. Rather, the point is that paradigms had the potential of explaining much more than the fact of agreement. Perhaps if Dworkin had explored the role of paradigms in explaining how the content of interpretive concepts was determined, then he might have been drawn towards shedding more light on the question of initial content. Indeed, Dworkin's holism would then be restricted to confirmation-holism alone as there would be an alternative picture of content based on paradigms. Such a picture would perhaps be one where the content of interpretive concepts was determined by a close examination of instances. It would be unduly speculative for me to imagine what such a reconstruction of constructive interpretation entails. The picture of instances that I provide below would, in my opinion, accommodate Dworkin's constructive interpretation but not his holist prescriptions. I therefore propose the instances-based view as an alternative, and not as one superior to constructive interpretation in the realm of value concepts.

7.3.2 Instances and Justification

The role of instances in the atomist account can be explained along three classes of instances. The first class is that of *original instances*. Such instances are the first ones through which one experiences a property and gets information about it. Since information is equated to reasons in my account, we could say that original instances provide original reasons. Original instances are thus not about anchoring agreement, but about concept *acquisition*, and are the first steps in the process of concept *attainment*.⁴³

Original instances can be of diverse kinds: the first use of a word by someone, a text, a picture, or some audio-visual media. Their status and role in reasoning can also be varied. An original instance can be a part of instance-based reasons for a judge if original reasons still figure prominently in the judge's understanding. For example, for a judge who might have acquired the concept DIGNITY by learning the word dignity when someone pointed out a well-dressed person walking with his head held high, this original instance may not be of great significance in offering instance-based reasons.

Of course, a candid judge could refer to it to point out why dignity inhabits the neighbourhood of status and self-respect in some shallow sense. For such a judge, original reasons could be defeated by reasons/information from other instances, say when she read Cicero, or Kant or gets acquainted with the Catholic view of dignity. Original reasons are thus defeasible. Their role in

⁴³ I say 'process' because such instances may not lock our minds to the property in a law-like manner. Even after experiencing them we might fail to recognise other instances as instances of the same property. On informational atomism, concept acquisition may come cheap, but concept attainment does not. We can acquire concepts easily once we experience an instance of the property. But whether we have attained sufficient information about the property that may count towards mastery of the concept is an altogether different question. Jerry Fodor, *Concepts: Where Cognitive Science Went Wrong* (OUP 1998) at 151.

justification depends on the strength of other instances of the property that one encounters. The depth, richness, or other qualities of later instances can undermine the role of original instances. Even when defeated, original instances retain some importance in private reflection of a judge who might think it important to reflect upon how she acquired a concept. Its relevance to instance-based reasons is however contingent on the strength of information conveyed by other instances.

The second class of instances could be called *operative instances*. These instances are crucial for instance-based reasons. They are instances that a judge takes to be material for determining the content of the concept. Operative instances might include original instances. That depends, to repeat, on the strength of the original and other succeeding instances. Operative instances simply put are more reliable instances through which the judge acquires information that determines her understanding of the property. Since information is equivalent to reasons that the judge responds to and employs as justification, it can be said that operative instances provide operative reasons. Whatever else instance-based reasons include, they must include operative reasons.

The third class of instances are those to which the judge *thinks* the concept applies. We could call such instances *cognisable instances*. The judge can recognise these instances as instantiations of the property and thus conclude that the concept in question applies. In reaching such a conclusion, operative reasons figure. They guide the judge in spotting other instances of a property. In doing so however, the judge tries to establish the identity of the property in the cognisable instances. She does so, based on the information

that she acquires from operative instances. Cognisable instances are a crucial part of judicial decisions since they are the conclusions which a judge arrives at when she thinks that a value applies to a case in hand.

Cognisable instances must rely on instance-based reasons to be justified conclusions, and that there is a story to be told about how judges relate instance-based reasons to cognisable instances. The story is not unknown to literature on legal reasoning. Much of legal reasoning, including common law reasoning and constitutional reasoning, employ methods such as analogical reasoning to relate concepts to cases, and past cases to present cases. On an atomist account, what is paramount in applying concepts to cognisable instances is establishing the identity of property.

To sum up the discussion on instance-based reasons, on an atomist account, to involve a value concept in a justificatory relationship with a decision requires invoking the theories that a judge relies on as well as the operative instances that govern her understanding of the concept. It also requires explaining the relationship between the operative instances and cognisable instances of the concept that she employs.

7.4 Objections from strategic decision-making and democratic legitimacy

Objections to the atomist account might stem in the philosophical realm from alternative views about content-determination. Through chapters 4,5, and 6 I have perhaps defended the atomist account to a reasonable degree from holism-rooted objections.

There are however another set of objections that arise in applying the atomist account to adjudication. This set of objections arises from views within debates on the proper role of courts vis-à-vis democratic legitimacy and their institutional competence. At the outset, I must state that since the atomist account extends an epistemology of concepts generally, to values, it would apply to any decision-maker justifying decisions based on political and moral values. All such decision-makers on this account must provide an account of the content of values. In this sense, the atomist account does not discriminate between reason-giving authorities.

This non-discriminating nature of the atomist account saves it from criticisms that might emerge from debates over the institutional competence of courts vis-à-vis other decision-making authorities. I have in mind here debates over democratic legitimacy, and judicial deference.⁴⁴ However, the strong relationship that the atomist account has to reason-giving, gravitates it towards certain positions in such debates.

Views that deny reason-giving then stand in opposition to the atomist account. Given, that many views privileging democratic legitimacy over judicial review, or arguing for greater judicial deference, do not deny the importance of reason-giving, not all such views would breed discontent about the atomist account.⁴⁵ Many such accounts might agree with the view that reason-giving is

⁴⁴ Aileen Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22 *Law and Philosophy* 451 (for a critique of Jeremy Waldron's views on judicial review, democracy and legitimacy). For Waldron's view see *infra* note 44. For the central issues in the debates surrounding judicial deference, see J. King, 'Institutional Approaches to Judicial Restraint' (2008) 28 *Oxford J Legal Studies* 409; A. Young, 'In Defence of Due Deference' (2009) 72 *Modern Law Review* 554; A. Kavanagh, 'Judicial Restraint in the Pursuit of Justice' (2010) 60 *University of Toronto Law Journal* 23.

⁴⁵ J Waldron, 'Moral Truth and Judicial Review' (1998) 43 *Am. J. Juris.* 75; 'The Core of the Case' (2006) 115 *Yale Law Journal* ; 'Judges as Moral Reasoners' (2009) 7 *I·CON* 2 (Waldron does not argue that judges or legislators should or should not give reasons. His argument is about whether they are better or poorly equipped, institutionally, to give reasons.)

central to decision-making in the interests of accountability.⁴⁶ There however remain arguments within several accounts that advocate strategies that discount the importance of reason-giving. Such arguments in Anglo-American literature can perhaps be divided into two broad categories. First are arguments for ‘shallow justification’ exemplified by Cass Sunstein’s *Incompletely Theorised Agreements*.⁴⁷ The reason for shallow justification usually resides in assigning greater weight than reason-giving to other values to be realised through adjudication. Second are a subset of arguments within views that privilege democratically elected institutions over courts without reference to the question of content. Such arguments however do not immediately translate into arguments against the atomist account. I will therefore only briefly point out some implications that such arguments might have on atomism and vice versa. It is arguments from ‘shallow justification’ that particularly militate against the atomist account and that is what I examine in detail below.

7.4.1 Shallow Justification

Shallow justification is the view, prominently elaborated by Cass Sunstein, that judges ought not to give deep theoretical justifications for decisions.⁴⁸ Sunstein’s discussion of shallow justification is in the context of his version of

⁴⁶ For a discussion that courts are, and must be, reason-giving authorities see the discussion on reason-giving accounts of adjudication in section 2.3 in Chapter 2 of this thesis.

⁴⁷ Cass Sunstein, ‘Leaving Things Undecided’ (1996) 110 *Harv. L. Rev.* 4. Though this work has been later published as a book, I refer to the original article since it expressly refers to ‘reason-giving’, which has been omitted from the book. The substantive arguments remain the same.

⁴⁸ *ibid* 14-15 and 20-21.

decisional minimalism. Decisional minimalism is the view that judges should not decide more than what is necessary, 'saying no more than necessary to justify an outcome, and leaving as much as possible undecided'.⁴⁹ It is a view that aims at reaping the benefits of 'constructive silence' by judges.⁵⁰ Fine nuances are a clear virtue of Sunstein's exposition of minimalism. He lays out the varied strategies adopted by courts in constitutional adjudication, and advocates several strategies that courts should adopt.⁵¹ Those who hold a reason-giving view of adjudication can agree with many of Sunstein's favoured strategies, e.g., that judges should not decide issues more than those that are necessary, and that judges should not attempt to lay down wide rules with a view towards governing a wide range of future cases.

Proponents of reason-giving views could also agree with many of the values that Sunstein seeks to achieve and preserve through minimalism: a) promoting democratic legitimacy by leaving things open for other institutions, primarily legislatures; b) respecting pluralism by announcing sensitive moral matters involving core beliefs shall not be determined unless absolutely necessary; and c) that given moral uncertainty and lack of information in several disagreements brought before courts, minimalist strategies would reduce judicial errors.⁵² What motivates preserving or attaining these three values is what Sunstein calls 'theoretical disagreement': deep disagreements that 'divide society'.⁵³ If judges could be maximalist without having serious socio-political

⁴⁹ Ibid 6.

⁵⁰ Ibid. 7.

⁵¹ Ibid. 23-25. Specifically, he identifies four strategies. 'Narrow' and 'Shallow' justification are what he favours; and 'Deep' and 'Wide' justification are discouraged.

⁵² Ibid. at 15-19.

⁵³ Ibid. at 50 and 21. At 50: "Brown appears to be the strongest argument against the claim that I mean to defend here: that minimalism is the appropriate course for large-scale moral or political issues on which the nation is sharply divided."

repercussions given the divisive ramifications of theoretical disagreement, then minimalism would not be necessary. It is therefore the background of divisive theoretical disagreement that motivates minimalism. What is that background picture more precisely?

To be sure, it is disagreement about moral beliefs of disagreeing parties. As Sunstein points out in relation to judicial error, it is uncertainty about moral matters that minimalism seeks to address.⁵⁴ Theoretical disagreement about moral issues therefore motivates minimalism. In Sunstein's words:

'All I am suggesting is that when theoretical disagreements are intense and hard to mediate, the Justices can make progress by putting those disagreements to one side and converging on an outcome and a relatively modest rationale on its behalf'.⁵⁵

Moral uncertainty here clearly resembles the concerns with substantive disagreement that I discussed in Chapter 2. The question precisely is about how courts should decide when questions of rights are brought before them based on indeterminate constitutional provisions. Take for instance the minimalist and incremental theory of judicial restraint offered by Jeff King.⁵⁶ King too roots his concerns in indeterminacy when he describes the application of his incrementalism and principles of judicial restraint as 'aids to legal interpretation under conditions of uncertainty in social rights adjudication.'⁵⁷ He identifies one of his central objectives as clarifying the following concern:

'...[H]ow judging, in most contemporary rights adjudication as well as in social rights adjudication, focuses on the application of fairly vague terms that in practice invite judges

⁵⁴ *ibid.* at 8.

⁵⁵ *ibid.* 21.

⁵⁶ Jeff King, *Judging Social Rights* (Cambridge University Press 2012).

⁵⁷ *Ibid.* 294.

to evaluate the process of decision-making taken in respect of certain interests.⁵⁸

In advocating ‘constitutional avoidance’ i.e. choosing non-constitutional remedies over constitutional ones when both are available, King cites ‘serious uncertainty’ as the primary reason for choosing non-constitutional remedies.⁵⁹ Even in applying judicial incrementalism, King is concerned with ‘adjudicating vague constitutional social rights under conditions of uncertainty’.⁶⁰

King proceeds to advance a sophisticated and cautious theory of judicial restraint in the light of four principles: the polycentric nature of social rights disputes, the institutional competence of courts, democratic legitimacy, and flexibility.⁶¹ He prescribes distinct strategies that courts should adopt in adjudicating social rights specifically. Some such standards may not count against an atomist account e.g. those of particularisation, and cautious expansion.⁶² Even the strategy of ‘constitutional avoidance’ does not challenge an atomist view. Such strategies do not affect the atomist account as its concern is not how specific rights issues would be best adjudicated. Rather, the focus is on when litigants do base their arguments on constitutionally entrenched values, and courts invoke them as justificatory reasons, what method should courts follow. In fact, King perhaps recognises such cases when he states:

‘...[I]ncrementalism may be inappropriate when there is a great need for clarity as to the legal meaning of a vague legal term, because without it there will be a substantial and harmful amount of uncertainty. In this situation, uncertainty is viewed not as an opportunity for other institutions to test different options, but

⁵⁸ *ibid* 97.

⁵⁹ *ibid* 281.

⁶⁰ *ibid* 291.

⁶¹ *ibid* 8-10.

⁶² *ibid* 294-297.

rather as the continuity of chaos and unfairness for those citizens who require a clear statement of their rights. This is the primordial function of courts, and the role must, if social circumstances call for it, be exercised.⁶³

King's prescriptions therefore do not resemble Sunstein's shallow justification as a general counsel against theorising. Even his advocacy of courts adopting vague standards such as "reasonableness" or the "right to meaningful engagement" does not count towards how values should be employed in adjudication.⁶⁴ In fact, one of the benefits of vague standards is to provide flexibility to other organs of the state, which might have more expertise. If such organs, in turn, choose to employ vague values as justifications then the atomist account would provide standards for assessing the justifiability of their actions.

This reiterates the non-discriminating nature of the atomist account that I pointed out earlier. To return to the question of indeterminacy, the concerns highlighted by Sunstein and King are precisely the sorts raised by arguments based on constitutional values: what view of constitutional values such as dignity, democracy, secularism, autonomy, or privacy should courts take to decide rights issues. How should courts go about deciding such issues? Here Sunstein recommends shallow justification as opposed to viewpoints such as Dworkin's that argue for substantive reasons on such issues by providing deep theoretical justifications.

I am aware that Sunstein does not specifically recommend shallow justification for cases involving values. In fact, his recommendation is against

⁶³ *ibid* 294.

⁶⁴ *ibid*.

deep theorisation generally. However, it is his general recommendations against theorisation that militates against the atomist account. Of course, the counsel against theorisation might be sound advice in some contexts. For example, if none of the parties base their arguments on constitutional values, then it might not be wise for a court to invoke them as justifications. Likewise, if the content provided by an earlier decision clearly applies to a case before a court, and none of the parties contests the previous decision, then the court may not delve into determining the content of the value in addition to the existing decision. Indeed, in both these instances the court relies on prudential reasons that discourage theorising. It is prudential to not engage in complicated and potentially controversial actions when unwarranted.

However, if the contest before a court is precisely on the basis of a constitutional value, and parties assert their rights on the basis of a value, then determining the content of values is warranted, and this may qualify as deep theorising by Sunstein's standards. Sunstein, however, recommends that courts should not engage in deep theorising and rely on Incompletely Theorised Agreements (ICA) instead. I had referred to ICA in Chapter 2 in the context of criticising McCrudden's 'placeholder' role of values. There ICA had figured as an account that advised against theorisation but recognised the reason-giving nature of adjudication. Now I seek to examine if ICA can sit well with the reasons why adjudication is a reason-giving exercise. In this, I will examine only the strand of ICA that Sunstein reserves for adjudication, as opposed to constitution-making: that judges should rely on narrow, concrete, justifications for their decisions. Such justifications will succeed in promoting values dear to minimalism: they will not involve judges in deciding controversial moral

disagreement mired in uncertainty. This being the priority for minimalism of the ICA variety, it can be understood as an attempt at *managing* disagreement by postponing the determination of fundamental issues. The attempt is managerial since it advocates strategies aimed not at addressing the substantive issues agitated before a court, but at viewing the resolution of the dispute as an instrument towards maintaining social cohesion.

In my criticism of ICA, I will highlight that even achieving the aim of maintaining social cohesion is not the monopoly of ICA. Rather it is improbable that ICA, or minimalism generally, is the reason for why court decisions achieve social cohesion. Indeed, minimalism can turn out to be detrimental to social cohesion if the expectation of litigants from a judicial decision involving their core beliefs, is a compelling argument for what vision their constitutional values articulate. Such an expectation is belied by ICA as it asks judges to refrain from providing substantive content to values. That would require deep theorising, on the atomist account at least. It would require stating the theories that judges rely on, and the operative and cognisable instances that instance-based reasons would reveal. Atomism thus stands challenged by ICA.

The challenge can be met at three levels, which can be imagined in an order of priority. At the first and a fundamental level is the background picture for atomism and reason-giving as opposed to that of minimalism. Minimalism's background is managing moral disagreement in the sense that one should settle on the minimum reasons possible on which people can agree. Reason-giving's motivating background picture is the justification of authority as

accountability to reasons, and the right of litigants to justifications for why their rights are protected or denied.⁶⁵

Unlike managing disagreement, reason-giving expects authorities in liberal constitutional democracies to articulate what values their societies stand for. Sunstein's minimalism, on the other hand trades on assumptions that indeterminacy about moral issues can be invoked to foster: that moral disagreements in constitutional cases might lead to devastating impacts on social cohesion, and that the proper role of adjudicative bodies is to thus manage disagreement at any cost without making deep value judgments.

These are assumptions at best, as constitutional courts across jurisdictions, more often than not have invoked values to arrive at controversial decisions as opposed to managing them by achieving agreement between the parties.⁶⁶ In numerous cases courts clearly decide on controversial rights issues involving moral disagreement.⁶⁷ ICA recommends that in such cases courts justify their decisions on the minimum reasons possible. That seems implausible, especially when litigants themselves invoke value-based arguments. Courts must provide a view of those values unless they think that those values do not apply.

In addition, on the background reasons that I have articulated for reason-giving, providing minimum reasons in the sense of not stating the content of

⁶⁵ Rainer Forst has a book length argument for a right to justification that individuals have as a feature of justice. Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justification* (Columbia University Press 2007). See also Matthias Kumm, 'Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review' (2007) 1 EJLS 1.

⁶⁶ To take dignity as an example see McCrudden (n 27) (for evidence of the numerous cases where dignity has been employed as a justification).

⁶⁷ There is abundant literature on Constitutional courts affirming or denying constitutional rights too: headscarf cases, abortion, sexual orientation, pornography, affirmative action, religious symbols, hate speech, and the list can continue on the instances that are the staple of constitutional rights cases across jurisdictions.

values would amount to arbitrary decision-making by authorities. The background picture of reason-giving cannot allow for decision-making that does not consider the very reasons that are invoked by parties before them.⁶⁸ Sunstein's ICA could of course be plausible if it could articulate some other value for why reason-giving is valuable; one that is not rooted in the autonomy of persons, or in the legitimacy and accountability of authorities.

On a different note, Sunstein says that minimalism sits between the two extremes of reasonlessness and maximalism.⁶⁹ In this sense it might be construed to be a virtue in an Aristotelian scheme. This argument however does not come cheap. Perhaps providing the content of values is well within the 'mean' of reason-giving. The extreme ends of the continuum are perhaps reasonlessness on the one hand and working out all possible applications of a value on the other. The virtue of reason-giving lies in between where the content of the value is stated and then related to the case at hand as a cognisable instance. Reason-giving does not require that a decision-maker work out all possible applications of a value. Indeed, the atomist account contends that there are no reasons without conceptual content in a context where a concept is employed as a justification.

At the second level, it is implausible that judges will find reasons that will be acceptable to parties in a moral disagreement on the basis of values, unless the force of their reasons converts one party to see reason in the decision. Recall Gallie's valuable insight that in essential contestations disagreeing parties do see some rationale in why their opponents think as they do. Indeed,

⁶⁸ One could call such reasons as 'dependent reasons' within a service conception of authority. Dependent reasons being reasons which ordinarily apply to the parties, and thus an authority must consider them.

⁶⁹ Sunstein (n 47) at 15.

this is what leaves hope for conversion and agreement. In all likelihood, decisions in cases where moral disagreements are involved need not result in conversion or agreement on the particular issue. Rather, parties might accept the decision of institutions for the reason of their trust in such institutions. They might see value in having such institutions and abiding by their orders. However, gaining such trust requires exhibiting values that build such trust. Shallow reason-giving will surely not build trust in persons who hold and articulate views on a constitutional value. Only robust reasons for why their view is (in)sufficient to warrant the outcome they seek could maintain the trust of persons, which might have been the reason why they approached the adjudicatory institution.

It would be vain to suppose that parties will be willing to settle for shallow reasons when they hold views about a value. Even if they employed a value in their arguments purely for rhetorical reasons, only a substantive account of the value could both address such rhetoric and respect the autonomy of persons. This surely is an idealistic picture of decision-making on constitutional issues, and many litigants do view litigation as a strategic step in their struggle for causes. However, the fact that litigants approach courts, or even any other institution, reflects the limited hope that they might have from such institutions. When they put their case forth, they do so, on the strength of their reasons. It would be contemptuous to think that litigants would settle for any less than an account of what view of values institutions take when adjudicating their rights.⁷⁰

⁷⁰ Some reason-giving views hold that judicial review holds legislatures, executives, and also court accountable on deliberative reasons, and thus enhance democracy. See Sandra Fredman, 'Adjudication as Accountability' in Nicholas Bamforth and Peter Leyland (ed.), *Accountability in the Contemporary Constitution* (OUP 2013) 105-124; Kumm (n 66): for a view of how judicial review institutionalising deliberative accountability.

At the third level, ICA does not easily result in either promoting democracy or preserving plural viewpoints. Minimalism in general holds that the silence of courts on fundamental issues would leave the option for democratic institutions to decide on those matters, and thus minimalism promotes democracy.⁷¹ I assume that ICA being a minimalist strategy would promote democracy since if courts settled on outcomes based on shallow reasons and refused to articulate the content of values, then that leaves content-determination to democratic legislatures. Making this transition, however faces, two challenges.

First, conditions of reason-giving and legitimacy of authority also apply to democratically elected institutions, especially so when the issues for determination arise out of value-based disagreement. Despite the many qualified pleas for the independence of legislatures and their deliberative value, disagreement would be subject to electoral and other political considerations when before democratically elected institutions such as legislatures.⁷² If this turned out to be true, then decisions by such institutions would not achieve the virtues of reason-giving and legitimacy of authority. If democratically elected bodies however provided substantive content to constitutional values, then the demands of atomism would also apply to them. In this sense the non-discriminating feature of atomism would envelop those institutions within its fold. Only that atomism kicks in at a later point: once courts have deferred to democratic institutions then atomism applies to such institutions.

⁷¹ Sunstein (n 47) 7-9, 19-20.

⁷² Joseph Raz, 'The Politics of the Rule of Law' in *Ethics in the Public Domain* (Clarendon Press Oxford 2001) 370-378 at 376: 'Legislatures, because of their pre-occupation with current problems, and their felt need for re-election by a public all too susceptible to the influences of the short term, are only too liable to violent swings and panic measures.'

This brings me to the second and related challenge: ICA at the level of democratic institutions would violate the conditions of reason-giving and legitimacy of authority again. If democratic institutions did not consider and articulate substantive reasons such as the content of values, then they would violate the conditions of legitimacy, reason-giving, and trust. The adverse consequences of shallow reasoning that I articulated in the context of courts would feature in the context of democratic institutions too. If legislatures routinely fail to provide convincing reasons for their conclusions, especially when faced with deep disagreement, it will have implications for their legitimacy as authoritative institutions, despite being democratically elected.

Underlying this conclusion is the view that electoral democracy, which seek justification from consent, is neither the sole, nor a good, determinant of legitimacy.⁷³ Expertise, fair procedures, and modes of reason-giving equally, if not more significantly, feature in conferring legitimacy. Defending such a conception of legitimacy would be a much longer project not within the remit of this thesis. However, clarity on where a reason-giving account would stand qua the legitimacy debate is worth mentioning.

Preserving pluralism is the other value that ICA seeks to achieve. In my view, the same arguments that apply in the context of democratic legitimacy apply here. Reason-giving, autonomy, and legitimacy are values that must be realised along with preserving plural viewpoints. In constitutional cases, it is ordinarily state action that is contested by disagreeing parties. As much as it is in the interest of the state to allow for plural opinions to persist, it must pay heed

⁷³ Joseph Raz, 'Government by Consent' in *Ethics in the Public Domain* (Clarendon Press Oxford 2001) 355-369. (For a criticism of consent as a basis for political legitimacy).

to the fact that often such opinions are contested as being opposed to particular individual rights and values that constitutions and other laws guarantee. When such disagreements surface, what disagreeing parties expect is a vindication of their views on constitutional values, for if they consider themselves a part of the political community of the state, then their disagreeing opinions must be adjudicated on the mantle of constitutional rights and values. The value of preserving plural opinions might lose its priority when such opinions are contested based on constitutional values, which in turn are values that parties holding plural and contesting opinions subscribe to. Indeed, it would be a mistake to think that the parties in a constitutional disagreement have fidelity only to their viewpoints in a disagreement. The fact that they employ constitutional values to justify their opinions reveals that there might be reasons for them to hold constitutional values as a reason for belief and action.⁷⁴

In sum, ICA does not sit comfortably with a reason-giving account despite Sunstein's testimony. First, it cannot be justified on the background picture that motivates reason-giving. Second, in the case of employing values as justifications, ICA cannot count as a reason-giving account since there are no reasons without content when values are employed as justifications, and providing content on the atomist account requires what might count as deep theorisation. Third, ICA is not conducive as a strategy in resolving deep moral disagreements, since the reason why parties approach institutions in such cases are rooted in the trust that they have in such institutions as genuine

⁷⁴ This conclusion may be supported by Rawls' idea of Public Reason. However, extending the idea too easily to constitutional adjudication is tricky. See Samuel Freeman, 'Public Reason and Political Justification' (2004) 72 *Fordham L. Rev.* 2021.

reason-giving authorities. Fourth, ICA does not easily translate into promoting democracy and preserving pluralism.

7.4.2 Democratic Legitimacy

The atomist account of reasoning with values might face challenges from some views that root themselves in the value of democratic legitimacy. I am particularly concerned with a view that holds that legislatures are better suited to decide constitutional issues involving moral reasoning. On such views, since moral reasoning requires taking all possible aspects of an issue into account, courts are unsuited for such reasoning given the constraints that legal reasoning places on them. Legislatures not being shackled by such constraints are perhaps therefore better moral reasoners than courts. This is a view proposed by Jeremy Waldron.⁷⁵ Waldron's views on the proper role of courts has developed over the last few decades through his influential works on law, disagreement, and judicial review. It would be impossible for me to do justice to his views in the closing chapter of a thesis. Indeed, it is not my intention to deal with all such arguments here, since, as I pointed out in my discussion of shallow justification, most arguments from democratic legitimacy are not challenges to an atomist account. The method of reasoning with values prescribed by the atomist account applies to any decision-making institution that has the burden of giving reasons. In fact, Waldron places a substantial

⁷⁵ Waldron 'Judges as Moral Reasoners' (n 45). Though the literature on the merits of democratic legislative decision-making vis-à-vis judicial review is vast, I am here concerned with the question of reasoning with values and hence choose Waldron's account that pointedly addresses the issue and simultaneously captures the core arguments against judicial review.

degree of trust on the reason-giving potential of legislatures and draws upon examples where legislatures have engaged in robust reason-giving.⁷⁶

There might be several reasons to be sceptical of the reason-giving potential of legislatures including the fact that there is neither established practice, nor established norms that require legislatures to give robust reasons for decisions. Neither has the potential of legislatures to act on interest-driven reasons escaped the attention of jurists.⁷⁷ On such views, the independence and fairness of legislatures, including their potential to achieve such values within prevalent models of electoral democracies are suspect. Be that as it may, my objective here is to examine if Waldron's view of legislatures being better moral reasoners, at least in an ideal world, poses any challenges for what the atomist account prescribes.

In my view, Waldron's view does not pose a challenge to the atomist account. Indeed, much of his phrasing of the problem is fertile ground for atomism to develop, despite Waldron's commitment to interpretivism as a theory of law generally. Waldron takes the nature of constitutional adjudication involving moral issues to be '...major issues of political philosophy with significant ramifications for the lives of many people...They define the major choices that any modern society must face, choices that are focal points of moral and political disagreements'.⁷⁸

His prescription for engaging with such issues is to debate them 'freshly on the merits'.⁷⁹ Indeed he recommends that '...Those who make decisions on these matters need to confront all the issues of value and principles that they

⁷⁶ *ibid* 20 and notes 51-52.

⁷⁷ Raz (n 72); Fredman (n 74).

⁷⁸ Waldron 'Judges as Moral Reasoners' (n 45) at 22.

⁷⁹ *ibid* 23.

raise, whether those values or principles are privileged abstract formulations of a Bill of Rights or not.’⁸⁰

From Waldron’s own words, he treats questions of rights involving moral and political values as those that need to be dealt with on the merits without at least the constraints of judicial review. He clearly states that “Instead of encouraging us to confront these disagreements directly, emphasis on judicial review is likely to lead to these ‘watershed issues’ being framed as questions of interpretation of those bland and noncommittal formulations”.⁸¹ The bland and noncommittal formulations here are a reference to interpretive arguments that lawyers make to argue that the commitments to a Bill of Rights already govern such moral issues. Waldron’s own view is that instruments such as bills of rights were not intended to govern the resolution of deep-seated moral disagreements in society and are inadequate to deal with such disagreements.

Without commenting on whether moral and political disagreements in a society are always apt for ‘fresh’ thinking on the merits, an atomist account would not be challenged by any view that pleaded for robust reason-giving on merits on any issue. An account such as Waldron’s would have to employ an atomist account if it employed values as justifications for decisions. Since Waldron does imagine such disputes to involve values, whether enumerated in bill of rights or not, stating the content of values uninhibitedly would occasion the prescriptions of the atomist account. One might point out that since Waldron is an interpretivist about law, he would not

⁸⁰ *ibid.*

⁸¹ *ibid.* 22.

recommend atomism and instead rely on Dworkin's holism about values. That could as well be true. His view then would have to answer the criticisms that I advanced against Dworkin's value holism. His views about moral reasoning on constitutional issues at least pose no threat to the atomist account.

7.4 Conclusion

The atomist account of reasoning with values holds that in adjudication, whether by courts or by other reason-giving institutions, the content of values must be uninhibitedly stated if they are to be employed as justifications. Decision-makers must reveal the sources from which they gather the content of values by stating the theories and other operative instances of values that they rely on. They must also explain how information from operative instances establish identity with cognisant instances. The account is one that extends a theory of content of concepts generally to values, and in turn extends that theory to justification based on values. It requires decision makers be explicit about the content of value concepts. Whether in courts or in other decision-making institutions, justification is anchored in content, and content is best approached atomistically by being attentive to instances that are sources of information to our minds.

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