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Philosophy and Constitutional Theory: The Cautionary Tale of Jeremy Waldron and the Philosopher's Stone

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1. Introduction

What is, or ought to be, the relationship between moral philosophy and constitutional theory? If one is writing about the latter, how far does one need to consider the implications for one's arguments of different possible underlying stances in the former? How far can constitutional and political theorists ignore core moral philosophy and meta-ethical debates? Can they *afford* to? If not, how deeply into the philosophy must one delve? This paper seeks to pose some answers to these far-reaching questions by considering in detail a particular case study: an author whose work is of the highest importance in constitutional theory but which, it will be argued, reveals the perils of an inadequate engagement with core philosophy.

That author is Jeremy Waldron, famous for his 'persistent'[1] - even 'fanatical'[2] - opposition to strong rights-based judicial review of legislation.[3] In setting out that case, he has carved out a position as one of the most influential figures in contemporary constitutionalist debate. As Goldsworthy notes '[w]hatever one's point of view', Waldron's scholarship on the authority of the elected legislature and the issues raised by 'subjecting their enactments to judicial review, is essential reading'.[4] Fellow critics of the authority of the judicial branches on rights-issues 'have found a powerful champion', while supporters 'have the unenviable task of responding

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[1] A Kavanagh, "Participation and Judicial Review: A Reply to Jeremy Waldron" (2003) 22:5 Law and Philosophy 451 at 466.

[2] J Waldron, "Compared to What? Judicial Activism and New Zealand's Parliament" (2005) NZLJ 441 at 442.

[3] See, for example, J Waldron, "A Rights-Based Critique of Constitutional Rights" (1993) 13 OJLS 18; J Waldron, "Participation: The Right of Rights" (1998) 98 Proceedings of the Royal Aristotelian Society 307; J Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999); J Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999); J Waldron, "The Core of the Case Against Judicial Review" (2006) 115 Yale Law Journal 1346.

[4] J Goldsworthy, "Legislation, Interpretation, and Judicial Review" (2001) 51:1 University of Toronto Law Journal 75 at 86.

to his critique.'[5] While Waldron's opposition to strong judicial review[6] is of interest as a strong challenge to the constitutional status quo in those parts of the world – such as the US - where such practices are well-established, he has become a particularly important force in those parts where such systems are *not* currently in place, where calls for reform are particularly common (and perhaps more realistic).

In the UK, for example, the legal-political constitutionalist debate is as strong as ever, as shown by ongoing arguments over aspects of the Human Rights Act 1998, the balance it strikes between the courts and elected political institutions,[7] and the seemingly never-ending "will they-won't they?" controversy over Conservative plans to replace it with a British Bill of Rights.[8] A similar story can be told throughout the Commonwealth, where relatively recent constitutional reforms have also sparked extensive debate - between pro and anti-Charter camps in Canada, for example,[9] and in particular the debate over whether the non-use of the section 33 "override powers" by the Federal Parliament shows the Canadian system to

[5] *Ibid*. For examples of the plethora of critical engagements with Waldron's work, see J Raz, "Disagreement in Politics" (1998) 43 American Journal of Jurisprudence 25; T Christiano, "Waldron on Law and Disagreement" (2000) 19:4 Law and Philosophy 513; D Estlund, "Waldron on Law and Disagreement" (2000) 99:1 Philosophical Studies 111; Kavanagh, *supra* note 1; D Enoch, "Taking Disagreement Seriously: On Jeremy Waldron's Law and Disagreement" (2006) 39:3 Israel Law Review 22; RH Fallon Jr, "The Core of an Uneasy Case For Judicial Review" (2008) 121:7 HLR 1693.

[6] That is, to a system allowing the judicial strike-down of primary legislation enacted by a representative legislature on the basis of it being deemed incompatible with an entrenched Constitution or Bill of Rights. In strong-form systems, the only recourse for elected representatives - and, indirectly, the people - involves a departure from the ordinary majoritarian process, through a constitutional amendment procedure. See further, M Tushnet, "Alternative Forms of Judicial Review" (2003) 101 Michigan Law Review 2781.

[7] See generally, A Kavanagh, *Constitutional Review Under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2009); T Campbell, KD Ewing & A Tomkins, eds, *The Legal Protection of Human Rights: Sceptical Essays* (Oxford: Oxford University Press, 2011).

[8] Conservative plans to replace the HRA with a British Bill of Rights and Responsibilities were set out in the run-up to the 2015 General Election (Conservative Party, 'Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Human Rights Laws (October 2014) available: <https://www.conservatives.com/~/media/files/downloadable%20files/human_rights.pdf> accessed 25 January 2018). Despite the Conservatives gaining a majority in that election, we are yet to see these proposals taken up, and they are currently on hold in the midst of Brexit. On the Bill of Rights debate see M Amos, "Problems with the Human Rights Act 1998 and How to Remedy Them: Is a Bill of Rights the Answer?" (2009) 72:6 MLR 883; H Fenwick, "The Human Rights Act or a British Bill of Rights: creating a down-grading recalibration of rights against the counter-terror backdrop?" (2012) PL 468.

[9] See, for example, J Allan, "An Unashamed Majoritarian" (2004) 27 Dalhousie Law Journal 537; WJ Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge: Cambridge University Press, 2007). More generally, see JL Hiebert, "Parliamentary Bills of Rights: An Alternative Model?" (2006) 69:1 MLR 7.; S Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge: Cambridge University Press, 2013).

have "collapsed" into one of judicial supremacy over rights.[10] Similarly the merits of Australia's continued refusal to adopt any form of general protection for fundamental rights at the federal level continues to be debated,[11] even as some individual Australian states adopt statutory protection - modelled on the UK's Human Rights Act - through a non-entrenched piece of legislation in which judicial decisions are subject to reversal or avoidance through the ordinary lawmaking process.[12] In addition, the New Zealand government has recently announced its intention to pursue an amendment of the New Zealand Bill of Rights Act 1990 to formally include a mechanism for judicial declarations of inconsistency.[13] The developments there, and particularly what form and wording they will take, will no doubt be watched with interest by those concerned with the balance between judicial and legislative power on rights issues. In these politically-charged contexts, the arguments in which Waldron has become a key figure 'have taken on a particular urgency',[14] making Waldron himself an unavoidable voice in contemporary constitutionalist and political debate throughout the Commonwealth, and beyond.

All of this gives some support to the shortlisting of Waldron by sympathetic commentator James Allan as one of those rare academics who might actually succeed, against 'the overwhelming odds', in gaining possession of 'the philosopher's stone'.[15] That is, 'legal academia's equivalent of immortality',[16] and one may add, infinite fortune,[17] putting him alongside the likes of Bentham, Hart, Fuller, and Dworkin, whose work seems likely to endure far beyond their lifetime.[18] For Allan, it is Waldron's 'strong defence of the elected legislature against the pretensions and purported moral superiority of the unelected judiciary'

[10] For this concern, see M Tushnet, "New Forms of Judicial Review and the Persistence of Rights and Democracy-Based Worries" (2003) 38 Wake Forest Law Review 813. Section 33(1) of the Canadian Charter provides that 'Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15'.

[11] See, for example, the special edition of Queensland LR (2018) 35:2 edited by Gee and Ekins, dedicated to the rise in judicial power.

[12] For example, the Charter of Human Rights and Responsibilities Act 2006 in Victoria. On 'statutory', or 'Parliamentary Bills of Rights', see Hiebert, *supra* note 9.

[13] The announcement can be found here: A Little and D Parker, "Government to provide greater protection of rights under the NZ Bill of Rights Act 1990"(*Beehive - The official website of the New Zealand Government,* 26 February 2018) <https://www.beehive.govt.nz/release/government-provide-greater-protection-rights-under-nz-bill-rights-act-1990> accessed 1 March 2018.

[14] KE Whittington, "In Defense of Legislatures" (2000) 28:5 Political Theory 690 at 690.

[15] J Allan, "Jeremy Waldron and the Philosopher's Stone" (2008) 45 San Diego Law Review 133 at 134.

[16] *Ibid* at 136.

[17] Because, of course, not only could the philosopher's stone be used to create the Elixir of Life, but it could transform any metal into pure gold.

[18] Allan, *supra* note 15 at 134. No doubt one can think of examples of their own. The list given in the text is Allan's (apart from Dworkin, whose staying power he expresses some doubt over).

alone that will lead him safely to this prize,[19] but one might also add to this his strong interventions in the controversial and topical areas of the legal regulation of hate speech,[20] and the moral and legal stance on torture in current times.[21] This is no easy task, however, and in what follows the story I will tell of Waldron's work is quite different. It will be argued that Waldron's tale is not one of success, but instead a cautionary one, showing the dangers that lie ahead on this path for those who fail to engage properly with debates in moral philosophy.

These dangers rear their heads in a number of ways in Waldron's thought, all of which, it will be suggested, stem from an unconvincing attempt to brush aside core philosophy. Waldron's well-known "irrelevance argument" rejects outright the pertinence of the philosophical debate surrounding moral objectivity and the status of moral judgements (the "moral realist/anti-realist" or "objectivist/anti-objectivist debate") to the issue of decision-making authority at the heart of constitutionalist debate.[22] But, as this paper will argue, this argument, on a number of possible interpretations, leads Waldron into incoherence, the most serious of which sees Waldron actually become entangled within the debate he claims is irrelevant. But the problems of incoherence do not stop there. A closer look at Waldron's scholarship - which at times makes explicit, but rather casual, forays into the anti-realist/realist debate - gives rise to a problematically inconsistent picture of where he stands on that issue. The problem increases further when one tries to piece together the various strands of Waldron's wide-ranging scholarship; again, we find that his engagement with core philosophy risks endangering the coherence of his thought as a whole. That is problematic in itself, but the issue is not merely one of philosophical inconsistency; at times, his stance on the philosophical issue leaves some of his key arguments on constitutional authority open to some sharp rejoinders, many of which rely on comments that Waldron himself makes, and some of which go to the heart of his work.

The lesson to be learned from this, it will be argued, is that the path to the philosopher's stone must be paved with rigorous and consistent philosophy. One must think, and think carefully, about the philosophical implications and background of one's work, and take care in setting this out in a clear, thorough and coherent way.

The argument will unfold as follows: first, some key philosophical concepts will be defined. Then, a temporary digression from Waldron's work will take place while the author sets out

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[19] *Ibid* at 134–135.

[20] J Waldron, *The Harm in Hate Speech* (Cambridge: Harvard University Press, 2012).

[21] J Waldron, *Torture, Terror, and Trade-Offs: Philosophy for the White House* (Oxford: Oxford University Press, 2010). For discussion of Waldron's influence in political theory and jurisprudence more generally, see R Stacey, "Democratic Jurisprudence and Judicial Review: Waldron's Contribution to Political Positivism" (2010) 30:4 OJLS 749.

[22] This argument first appeared in J Waldron, "The Irrelevance of Moral Objectivity" in RP George, ed, *Natural Law Theory: Contemporary Essays* (Oxford: Oxford University Press, 1992), and largely repeated in later work (see J Waldron, "Moral Truth and Judicial Review" (1998) 43 American Journal of Jurisprudence 75; Waldron, *Law and Disagreement, supra* note 3, ch 8.

his own anti-realist stance in the philosophical debate at issue - a particular brand of moral scepticism drawing on aspects of the work of the pragmatic philosopher Richard Rorty (**section 2**). The work done here will be needed for when the article considers some of the consequences of anti-realism for the constitutionalist debate - the beginnings of a sequel to Waldron's tale.

The article will then begin the story of Waldron's lack of (coherent) engagement with the philosophical realist/anti-realist issue with a rejection of his irrelevance case, noting the inconsistencies it reveals on various possible interpretations (**section 3**). The next part turns to a detailed examination of Waldron's own philosophical position, presenting an holistic, original philosophical analysis and deconstruction drawing on various comments made within his scholarship (**section 4**). This is an area of his thought which has to date has received no real attention. However, Waldron's meta-ethical stance is one which, especially given the unconvincing nature of his irrelevance case, may be of real importance to the strength of his constitutionalist projects, and, in the case presented here, to the coherence of his thought more generally. The lessons to be learned are also of significance to those involved in both moral and constitutional theory more generally. In light of this, the philosophical deconstruction of Waldron's work set out in this paper seeks to make an essential contribution to the literature in that area.

Waldron's arguments on the fundamental constitutionalist issue of decision-making authority will then be used as a demonstration of the problems the philosophical issue can cause him – which it will be argued are far more than merely trivial issues of theoretical inconsistency. For this purpose, **Section 5** looks in particular at his criticisms of the popular *instrumentalist* approach to constitutional authority, along with responses to these. It will be contended that the answers to Waldron's anti-instrumentalist case, while problematic if one accepts, or remains equivocal on, their realist assumptions (both of which Waldron seems to do) lose all force if these assumptions are rejected. That will complete the cautionary tale of Waldron and the philosopher's stone; the final section will sketch the beginnings of a sequel - on the implications of taking an openly anti-realist path in the constitutionalist debate.

2. Prologue: Realism, Anti-Realism, and a Sceptical Perspective

This first section will introduce the key philosophical concepts which will be a central theme in the tales which follow - "realism" and "anti-realism". Following this, I will set out my own sceptical stance in that philosophical controversy, a necessary first step in some of the later arguments made below. For reasons of space, notwithstanding the plethora of contributions to this philosophical controversy, only a brief outline of the sceptical perspective, and the grounds on which it is held, will be offered.

2.1. *Waldron on "Realism" and "Anti-Realism"*

As Waldron's work is the primary focus of this article, his definitions are a useful point of entry into the relevant philosophy. In setting up his irrelevance argument (discussed in the next section, below), Waldron states what he means by "realism" and "anti-realism". "Moral realism" is defined as the 'claim that some moral judgements are objectively true, while others are objectively false'.[23] More technically the core realist claim is as follows:

> 'There are facts which make some moral judgements (that is, some statements of value or principle) true and others false, facts which are independent of anyone's beliefs or feelings about the matters in question'.[24]

By "anti-realism", unsurprisingly, Waldron means 'the philosophical denial' of this claim.[25] So anti-realists 'deny that there are moral facts which determine the truth or falsity of the judgements people make'.[26] In the absence of such objective matters of fact to render our judgements 'correct' or 'incorrect', all we are left with are 'moral judgements and the people who make them'.[27]

Those are, in basic terms, the key players in the realist/anti-realist controversy, and we will return to these definitions throughout when examining Waldron's arguments and positions. For now, having briefly introduced these broad positions, the perspective taken by the present author - itself a form of anti-realism - will be set out.

2.2. *A Sceptical Perspective*

Similar to other brands of scepticism, such as that put forward by James Allan, the approach advocated here rejects the notion that there is 'some real, external component to values', or 'mind-independent' qualities[28], with which our beliefs concerning values and morality can and should be brought into line. Put another way, 'there are no objective moral values, no moral rights and wrongs whose status as such is somehow independent of what other people, or even oneself, happen to think or feel'.[29] Allan makes this as an apparently empirical claim.

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[23] Waldron, *Law and Disagreement, supra* note 3 at 164.
[24] *Ibid* (footnote omitted). There are numerous ways of putting the "realist" position - here Waldron relies on the general formulation put by R Walker, *The Coherence Theory of Truth: Realism, Anti-Realism, Idealism* (London, Routledge, 1989) at 3.
[25] *Ibid*.
[26] *Ibid* at 165.
[27] *Ibid* (italics removed).
[28] J Allan, "A Doubter's Guide to Law and Natural Rights" (1998) 28 Victoria University of Wellington Law Review 243 at 245.
[29] J Allan, "Internal and Engaged or External and Detached?" (1999) 12:1 Canadian Journal of Law and Jurisprudence 5 at 11.

He denies the existence of these features on the basis that, contrary to what is the case regarding 'factual consequences in the natural, causal world', the 'evidence seems...to be against there being any such "higher", mind independent values' or 'external, imposed criteria' as regards issues of morality and value.[30] My scepticism takes a different path: to drop or discard these very ideas. That is, to put aside *the idea* that these qualities exist, rather than to state that they *do not*, as a matter of fact, exist.[31] The result is the same - a rejection of the core realist claim, positing the existence of moral facts - the argument is different.

2.2.1. *The World Does Not Speak*

The argument is a pragmatic anti-foundationalist one, stemming from the ubiquity of human description. Evaluative notions such as "morality" (along with "moral" and "immoral"), "rightness" ("right" and "wrong"), "justice" ("just" and "unjust") and other such concepts rife in normative discourse, are terms of the human language. As Rorty argues, one consequence of this is that only if we imagine the world as either 'itself a real person or as created by a person' who spoke this language (God, say) can any sense be made of the idea that any notion 'has an "intrinsic nature"' or objective content to act as a constraint on how one defines and applies it in the claims they make.[32] The problem is, it is submitted, an obvious one; '[t]he world does not speak. Only we do'.[33] So while the 'world is out there...descriptions of the world are not';[34] the only descriptions, evaluations, and applications of the notions within them ("right", "wrong" etc) we have are those preferred by particular individuals. Given that it is descriptions we are concerned with, this seems to leave us very much on our own, and free to describe as we see fit.

It might, however, be pointed out that even if the notions applied in moral claims are creations of human language, this does not necessarily make their content freely created and optional. Perhaps there is still something independent to serve as a constraint on the way we describe and apply these concepts. This is how I read the suggestion made by Upton commenting on Rorty's so-called "epistemological nihilism", that even if 'our contact with the extra-mental world is contact with something under a description, it does not necessarily

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[30] Allan, *supra* note 28 at 246. See also J Allan, *Sympathy and Antipathy: Essays Legal and Political* (Ashgate, 2002) at 89–90.

[31] And actually, the path which leads me to moral scepticism also leads me to harbour some strong doubts about the idea of "matters of fact" more generally, such that I am sceptical of Allan's. That is a big claim, which I cannot discuss any further here. *Moral* scepticism is big enough for this article. For a fearless expounding of a comprehensive anti-foundationalism extending beyond moral philosophy and into other pursuits like science, mathematics and general epistemology see R Rorty, *Philosophy and the Mirror of Nature* (Oxford: Princeton University Press, 1980) (especially Part II).

[32] R Rorty, *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989) at 21.

[33] *Ibid* at 6.

[34] *Ibid* at 5.

follow that all descriptions are totally optional'.[35] The realist certainly believes so. For the realist, the constraint comes from "reality" or "the way things are". The realist - the character Rorty calls the 'metaphysician' - does 'not believe that anything can be made to look good or bad by being redescribed', or, if they do, 'they deplore this fact and cling to the idea that reality will help us resist such seductions'.[36] They cling to the idea that 'deep down beneath all the texts, there is something which is not just one more text but that to which various texts are trying to be "adequate"'.[37] That maybe we are not so alone after all.

However, the ubiquity of language now becomes a problem, leading to a larger, sceptical, argument against such realist ideas of a "reality", "way things are" or objective properties beyond the beliefs of individuals to appeal to as a constraint on their acceptability; holding on to such ideas is pointless. The 'attempt to get behind appearance' and our own preferred descriptions to some kind of independent "way things are" is, as Rorty puts it, 'hopeless'.[38] The problem is that 'there is nothing to be known about anything save what is stated in sentences describing it'.[39] This point can be traced back to Wittgenstein, who pointed out that it is 'only in language that we can mean something by something',[40] such that there is 'no way to think about either the world or our purposes' *except* through language.[41] Thus there is, again as Rorty puts, 'no way to divide' the "reality", or whatever within it is the focus of our comments, 'in itself from our ways of talking about' it.[42] And with that, the realist project is doomed. "Objective reality" - a "way things are" independent of belief, or what one happens to think - becomes the name 'of something unknowable'.[43] Putting this idea to use involves the 'impossible attempt' to step outside of our preferred descriptions and compare them with 'something absolute' - something which is more than *another* such description.[44] The pragmatic point here is that treating as a goal of inquiry, or constraint, something which is unknowable means that there is no way of establishing when the goal has been reached, or recognising when the constraint is being violated, and that this renders the exercise unworkable and pointless. The very idea of an objective "reality" and the like - ground independent of belief - along with the idea that our claims can be seen as attempting to accurately represent or approximate something beyond themselves, is thus set aside on the grounds that it fuels such a pointless and unworkable exercise.

To put this all into some context, this line of thought leads the sceptic to oppose suggestions that moral claims, 'like any other factual belief', present claims 'about the world which can be

[35] TV Upton, "Rorty's Epistemological Nihilism" (1987) 3:2 The Personalist Forum 141 at 149.
[36] Rorty, *supra* note 32 at 75.
[37] R Rorty, *Consequences of Pragmatism* (Brighton: Harvester Press, 1982) at xxxvii.
[38] R Rorty, *Philosophy and Social Hope* (London: Penguin Books, 1999) at 49.
[39] *Ibid* at 54.
[40] L Wittgenstein, *Philosophical Investigations* (New York: Macmillan, 1953) at 18.
[41] Rorty, *supra* note 37 at xix.
[42] Rorty, *supra* note 38 at xvii.
[43] *Ibid* at 49.
[44] Rorty, *supra* note 37 at xix.

assessed...as true or false'.[45] The idea that we can, as one moral realist puts it, 'detect moral aspects' of the world and situations within it 'in the same way we detect (nearly all) other aspects: by looking and seeing', and that as long as we pay 'careful attention to the world' while doing so we can 'improve our beliefs...make them more approximately true'[46] is precisely the kind of exercise I suggest we set aside. One cannot be sure that what one is "detecting" or "seeing" is anything more than the meaning *we* give to "the world" or the so-called "moral aspects" within it. The process of paying careful attention to the world, the moral facts, reality etc, cannot be shown to amount to anything more than paying attention to *our own* preferred descriptions. With ultimately nothing beyond the preferred descriptions of individuals and groups to be appealed to, all that remains are the competing claims and beliefs themselves, and those who make them.

2.2.2. *All by Myself: Despair or Freedom?*

With all that, I see the situation in much the same way as Arthur Leff in concluding his classic article on the defensibility of normative propositions. As he put it, in characteristically blunt fashion: 'it looks as if we are all we have'.[47] To many, this is a frightening prospect. Indeed, Leff himself was moved to end that article with a despairing poem, finishing with the plea: 'God help us'.[48] Moore saw this as evidence of the 'emotional dejection' he claims 'many people experience if they come to believe the truth of moral skepticism'.[49] Given Leff's career moves following that article, it is hard to disagree with that assessment; he devoted the rest of his life to the task of writing a legal dictionary, working at such a pace that, as he admitted, he would not complete until the 'year 2075'[50] - which sounds very much like saying it is something he never would, and never wanted to, complete. Quite an intellectual crisis.[51]

That apparent debilitation was from someone who openly *accepted* the sceptical premise; however the biggest fears are expressed by those who vehemently oppose it. As one commentator aptly notes, it is a common tendency of the believers in moral truth to suggest that it is the sceptic's anti-realist views that are 'responsible for the Hitlers of the world and the sociopaths among us - not to mention the...garden-variety prevaricators, confidence men,

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[45] M Platts, "Moral Reality" in G Sayre-McCord, ed, *Essays on Moral Realism* (New York: Cornell University Press, 1988) at 282.
[46] *Ibid* at 285.
[47] A Leff, "Unspeakable Ethics, Unnatural Law" (1979) 6 Duke Law Journal 1229 at 1249.
[48] *Ibid*.
[49] MS Moore, "Moral Reality Revisited" (1992) 90:8 Michigan Law Review 2424 at 2449, n79.
[50] SZ Leff, "Some Notes About Art's Dictionary" (1985) 94:8 Yale Law Journal 1850 at 1850.
[51] See further PE Johnson, "Nihilism and the End of Law" (1993) 31 First Things 19. The point in the text is that Leff apparently *intended* to leave the worlds of legal and moral philosophy behind for good. However, as it happened, Leff's career was irreversibly cut short due to his untimely death from cancer in 1981. What work might or might not have followed is therefore an unfortunate matter of speculation.

and swindlers'.[52] Indeed, it seems to be something of a self-assigned mission taken up by many to 'save the world from the horrible acts that are supposed to result when people become moral skeptics of any variety'.[53] A first hand example of this tendency is Leo Strauss' bizarre, but no doubt sincere, concern that a rejection of natural right and wrong will lead to the breakdown of 'civilised life', and even 'cannibalism'.[54] Ronald Dworkin was another well-intentioned defender of civilisation; he sought to defend our ability to 'live decent, worthwhile lives', and build communities which are 'fair and good' against what he called the 'denigrating suggestions' of moral scepticism.[55] However bizarre this all may sound, it seems there are many people in this world who take comfort in the idea of the constraints of objective truth and its ability to protect us against such evils - to protect us from ourselves - and who cling to such metaphysical blankets.

I do not mean to belittle all this. The popularity of metaphysical blankets is perhaps understandable; history has shown us the evils humanity can do, and we continue to see this almost every day it seems. Whatever helps you sleep at night. I do, however, see these concerns, when directed against scepticism specifically, as misguided, to say the least. I see no logical or empirical connection between rejecting the idea of objective truth, and the holding of dangerous, violent or uncivilised tendencies. If anything, plenty of evidence may be found to suggest it works the other way.[56]

While this article does not purport to set out a full justification for the sceptical stance taken (quite a task, which would require at least a full article in its own right), rather simply to explain what it is, it can perhaps be briefly noted that there is an alternative and brighter perspective on where the rejection of moral realism leaves us. Rather than a cause for despair, or fear, the discarding of objective moral truth may be seen as something *liberating*. The rejection of the realist conception of objective truth leaves us free. It leaves us free to describe, evaluate - to *create* - as *we* see fit. In a sceptical world of optional description, we bow down to no authority other than ourselves; not "Truth", "the way things are", "God" or any other metaphysical authority in which many people seem to take comfort. For if morality is the construct of language, and we discard the idea that there is anything to which our

[52] EM Gander, *The Last Conceptual Revolution: A Critique of Richard Rorty's Political Philosophy* (Albany: State University of New York Press, 1999) at 51.
[53] W Sinnott-Armstrong, *Moral Skepticisms* (Oxford: Oxford University Press, 2006) at 13.
[54] L Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953) at 3.
[55] R Dworkin, "Objectivity and Truth: You'd Better Believe It" (1996) 25:2 Philosophy and Public Affairs 87 at 139.
[56] The plethora of religious wars and tensions throughout the world, historically and today - the Christian crusades, Catholic-Protestant violence; Sunnis and Shia; Jews and Muslims in Israel and Palestine - to name but a few. Such worldviews, with their attachment to the idea of independently-given unquestionable rules of conduct and the consequent moral certainty and rectitude of their actions, are clearly far from the idea of scepticism. Think also of the acts committed by various totalitarian regimes in the 20th Century; these were not obviously premised on the sceptical idea that there are no objectively right answers or natural right - quite the opposite.

descriptions are trying to be adequate, then each individual themselves steps into these metaphysical shoes - the shoes that God once filled - and becomes the supreme moral legislator. Thus, on the sceptical, anti-realist view I put forward, the individual becomes, to borrow a term from Leff, a Godlet.[57] Like Gods, their utterances - their evaluations and normative statements - are performative: they do not 'describe facts or conform to them but instead constitute[] them, create[] them'.[58] What is declared to be "right", "good", "bad", *is* just that, *because* it has been so declared. This liberation and empowerment is, as far as I can tell, far from the "denigrating" of "worthwhile" lives and communities.

3. Really Irrelevant? The Incoherence of Waldron's Irrelevance Thesis

We can now begin the first chapter of Waldron's cautionary tale - his irrelevance case. This holds that 'the truth or falsity of moral realism makes no difference to the justification of judicial review' of legislation on rights grounds.[59] Put the other way around, shifting the focus from the legal branches to the political, this also entails that the realist/anti-realist issue makes no difference to the justification of leaving issues concerning rights and morality to be determined ultimately by the elected political branches.

This is a big claim, of some consequence (perhaps surprise) to those theorists who engage in the age-old philosophical realist/anti-realist controversy, and especially to those who also take sides in the constitutional debate. As should be clear from this article, I am someone who does precisely that. As a moral sceptic and contributor to the constitutionalist debate over where and how decision-making power in society should be distributed and exercised, I am one of the many directly caught by Waldron's irrelevance claim. So it seems that, when wearing my sceptical hat, I have little, if anything, of interest to say on the issue of constitutional review, or, more fundamentally, decision-making authority within a constitutional system. Fortunately, however, Waldron's argument fails. The point of this section, then, is that Waldron's attempt to deflect the challenge of philosophy - to downplay its significance to constitutional theory - is unsuccessful. Not only that, but the reason it fails leads Waldron straight into the curse of incoherence.

3.1. *Waldron's Irrelevance Argument*

[57] Leff, *supra* note 47 at 1235–1237.
[58] *Ibid* at 1231.
[59] Waldron, *supra* note 22 at 77. See also Waldron, 'The Irrelevance of Moral Objectivity' (fn16), and most recently Waldron, *Law and Disagreement, supra* note 3, ch 8. There are slight differences and nuances in the way this argument is presented within these, but these need not concern us here; the fundamental thrust of his argument, that it is disagreement and arbitrariness that are the real concerns, remains the same. What follows concerning the technical details of Waldron's argument will draw largely upon the relevant chapter of *Law and Disagreement*, as the more recent formulation.

Given Waldron's longstanding opposition to strong judicial review, it should come as no surprise that he largely argues for his claim of the irrelevance of the realist/anti-realist controversy on the basis that it makes 'no difference' to *his* conclusion that the 'practice of judicial review of legislation' on rights grounds *cannot* be justified.[60] Specifically, in 'The Irrelevance of Moral Objectivity',[61] Waldron argues for the irrelevance of the philosophical issue on the grounds that it makes no difference to the conclusion that judicial decision-making on the controversial moral issues implicated in rights protection is 'arbitrary'.[62] Waldron's point here is that 'moral decision-making in law is likely to be as arbitrary...for a moral realist as it is for any opponent of moral objectivity'.[63] As 'arbitrariness is there, on either meta-ethical account', the realist/anti-realist issue makes no difference, and is therefore irrelevant to, the issue of the (lack of) justification for judicial review of legislation on rights grounds, and the appropriateness of the moral decision-making it requires of judges.[64]

For Waldron there are three senses in which moral decision-making by unelected judges - where 'a judge sometimes has to assert his [or her] view of what is right over the view taken by a legislature or electorate'[65] - might be seen as "arbitrary": it may be '"unpredictable"', or perhaps '"unreasoned".[66] But Waldron's main concern is with 'explaining the democratic legitimacy'[67] or 'political legitimacy'[68] of this. The decisions of judges, determining issues of 'social principle and value', lack 'authority or legitimacy' over the determinations of those issues by elected legislators, or the people themselves.[69] This is the charge of "arbitrariness" that concerns Waldron and which he devotes a large proportion of *Law and Disagreement*, and much of his other work, to pressing home.[70] Whether any, and if so which, of these concerns about the "arbitrariness" of moral decision-making by judges are convincing is not directly relevant for present purposes. The argument of concern here is a relative one; his point is that *if* judicial decision-making *is* arbitrary (as he thinks it is), then it *remains so,* regardless of whether a realist or anti-realist philosophical approach is taken. It is the way Waldron supports *this* point, it will be suggested, that is problematic.

To show that moral decision-making by judges remains "arbitrary" on *both* a realist *and* anti-realist approach, Waldron casts the situation in what he describes as realist *and* anti-realist terms. So for Waldron, 'if moral realism is true', then it would be accurate to say that 'what the judge is imposing on his [or her] fellow citizens...is a belief of his [or hers] about the

[60] Waldron, *supra* note 22 at 76.
[61] Waldron, *Law and Disagreement, supra* note 3, ch 8.
[62] *Ibid* at 170.
[63] *Ibid*.
[64] *Ibid* at 186.
[65] *Ibid* at 184.
[66] *Ibid* at 168.
[67] *Ibid* at 184.
[68] *Ibid* at 168 (emphasis removed).
[69] *Ibid*.
[70] See *supra* note 3, for examples.

moral facts'.[71] In an anti-realist world, the judge would be imposing their mere 'subjective preference[s]'.[72] The idea that judges would be imposing their own subjective preferences and attitudes on society is often, Waldron notes, treated as the cause for concern. But for Waldron, it is not their metaphysical status that is the real reason for this discomfort. Even if realism were the case, judicial imposition would still be problematic because the determinations of others - 'legislators and voters' for example - could equally be conceptualised in the way the realist would conceive of judicial decision-making; they too reflect *'their* beliefs about the moral facts'.[73] Waldron's crucial point here is about the *reason* this apparent symmetry, even on the realist account, is a problem:

> 'in the absence of any account of how one could tell which of two conflicting beliefs about the moral facts is more accurate, the imposition of one person's or a few people's beliefs over those of the population at large still seems arbitrary and undemocratic'.[74]

Essentially, the concern seems to be that if both legislators and judges have their views about what the moral facts are and what they require, and if there are no means of establishing who has got it right - so that they are ultimately of equal epistemological weight - then why should the views of a few judges prevail?[75] If one accepts that there is "an absence of any account" of how to distinguish accurate (or more accurate) moral beliefs from inaccurate (or less accurate) ones, then, Waldron tells us, judicial decision-making is "arbitrary". So Waldron's irrelevance argument hinges on this premise that there is indeed "an absence of any" such account, even leaving the realist premise untouched. This is the key to, but also the undoing of, Waldron's attempt to deflect the realist/anti-realist philosophical issue.

3.2. *The Incoherence of Waldron's Irrelevance Argument*

Waldron's premise is open to a number of interpretations, and is problematic for different reasons depending on which is taken. All of them, however, it will be argued, lead Waldron into an apparent incoherence of some kind.

Taken literally, Waldron's key premise concerning the "absence of any account" of how to distinguish accurate from inaccurate moral beliefs, even presuming the cogency of moral realism, can be quickly dismissed. If Waldron means to report that there is *no test at all* for the accuracy of moral beliefs, it can instantly be replied that this is simply not the case. As Smith points out, there are a plethora of accounts (given by moral realists) of how to

[71] Waldron, *Law and Disagreement, supra* note 3 at 184.
[72] *Ibid*.
[73] *Ibid*.
[74] *Ibid*.
[75] This is a point which could equally be put the other way around - why should the views of legislators prevail if they cannot be established as epistemologically superior? In fact, it is my view - based on my sceptical philosophy - that *no one's* moral beliefs can be established as epistemologically superior, so why should *anyone's* prevail?

determine 'which moral beliefs are objectively true'.[76] Smith notes a range of examples, but I would add that Waldron *himself* mentions such accounts just a few pages earlier when he notes that, for example, a realist utilitarian 'will claim that the development of a utilitarian ethics' represents 'progress towards the truth'.[77] So if this *is* what Waldron means by the premise of his irrelevance argument, it simply cannot be maintained.

However, that Waldron himself mentions such accounts in the relevant chapter of *Law and Disagreement* should probably point us away from this literal interpretation. Waldron surely would have noticed the clear contradiction here. A more tenable interpretation, then, would be another one identified by Smith: that there is an absence of any '*successful'* or '*plausible*' account how to determine which moral beliefs are objectively true, rather than of *any account at all*.[78] There is also evidence to support this interpretation. For example, Waldron writes that 'though they [realists] insist that there is some fact of the matter, they offer nothing *which would help* distinguish a mere arbitrary opinion from a well-grounded belief.'[79] The words I have emphasised here suggest that Waldron's criticism is that, while realists may well offer some *purported* means of distinguishing mere arbitrary opinions from well-justified beliefs, the means they *do* offer are, it turns out, *unhelpful* for that purpose. Likewise, Waldron immediately follows his mention of the realist utilitarian who 'will claim that the development of a utilitarian ethics...is progress towards the truth' with the objection that '*there is nothing he can say to so support these claims'*.[80] So here Waldron's problem with realist theorists seems to be that they *cannot back up* their claims to epistemological authority - they cannot convincingly establish their claims to have a theory providing a sound means to moral truth, which can then be used to decide between competing beliefs. Waldron appears to make something like this explicit in his forceful critique of modern moral realists that, while they believe their claims to be descriptive in nature, 'they are quite *unable to demonstrate* the truth of their judgements, or *show* how they correspond to moral reality', and that they should therefore qualify their substantive moral claims with the rider that it is '"only my opinion"'.[81]

Whether or not a claim delivers on its promises - can be supported, certified, or adequately demonstrated - is an evaluative judgement; it involves an *assessment* of the validity of whatever claims to moral truth realists make. As should be clear by now, Waldron's negative assessments are all ones I wholeheartedly endorse. That is not the problem here. The problem is that these are not claims it is open to *Waldron* to make in the course of an irrelevance case. As Tasioulas points out, Waldron's argument 'focuses on the implications of what, on anyone's view, must be a serious defect' in the realist position; the 'putative absence of a

[76] D Smith, "The Use of Meta-Ethics in Adjudication" (2003) 23:1 OJLS 25 at 39.
[77] Waldron, *Law and Disagreement, supra* note 3 at 179.
[78] Smith, *supra* note 76 at 39. (emphasis added).
[79] Waldron, *Law and Disagreement, supra* note 3 at 180 (emphasis added).
[80] *Ibid* at 179.
[81] *Ibid* at 180 (emphases added). See also 186 (no beliefs about moral facts 'can be certified as superior or naturally prevalent on any credentials other than the fact that some people find them congenial').

reliable' means of identifying moral truths.[82] Pointing to such a fundamental defect in realism seems 'indistinguishable from an attack' on realist theories,[83] and even the very idea of realism itself (depending on how literally one takes the words "can" and "unable" in Waldron's comments above). Indeed this is the reason Waldron's points sound so attractive to those who, like the author, are moral sceptics.

But while an anti-realist would be more than happy to accept Waldron's point about the unfulfilled promise of realism, realists themselves will obviously be rather less keen. At the very least, those realists putting forward their own favoured moral theories, and, as Waldron himself notes, which *they* regard as facilitating 'progress towards the truth' and relying on 'basic propositions' which are 'true', would surely *not* accept that there is 'nothing [they] can say to support these claims',[84] or that they are unable to demonstrate their truth. If such realists thought their claims to moral objectivity, and to a convincing means of establishing that status, *were not*, and more fundamentally *could not* be supported, then surely they would not advance them at all. So for a realist to be able to accept Waldron's irrelevance claim it seems that they would have to forgo their realism. If this is the case, then Waldron's irrelevance argument necessarily becomes entangled in the debate he claims to be irrelevant in the very process of establishing that it *is* irrelevant. This is self-defeating.

Waldron might respond that his premise of the lack of any (plausible) account of how to distinguish accurate from inaccurate moral beliefs is epistemological only. That is, it relies only on a claimed absence of the lack of a successful means of *accessing* moral truth, which, strictly speaking, leaves the issue of the *existence* of moral truth untouched. Waldron could fall back on his initial definition of "realism" here and point out that, as he sees it, realism is an entirely *metaphysical* claim that 'there *are* facts which make some moral judgements...true and others false'; facts which *do exist* independently of belief.[85] Rejecting the idea that we can access these moral truths says nothing of this core realist claim as to their existence, and therefore cannot, strictly speaking, be characterised as an anti-realist position. If this *is* Waldron's response, it would be beneficial for him to clarify this, in order to avoid the problems above. However, the difficulties with attributing this strictly metaphysical view of realism and anti-realism in light of his other work are discussed in the next section below (see especially **section 4.2**).[86] Anticipating that argument for the moment, for the different

[82] J Tasioulas, "The Legal Relevance of Ethical Objectivity" (2002) 47 American Journal of Jurisprudence 211 at 239.
[83] Smith, *supra* note 76 at 106.
[84] Waldron, *Law and Disagreement, supra* note 3 at 179.
[85] *Ibid* (footnote omitted, and emphasis added).
[86] The author is grateful to the anonymous reviewer for pushing this possibility. Others have taken issue with this possible interpretation of Waldron's claim on the basis that only the most implausible versions of realism separate meta-ethics and epistemology in such an extreme way. As Smith puts it, most realists 'do not simply assert that *a* form of [realism] is correct', but also 'make specific claims about the nature of objective moral truth' including 'at least the outlines of an epistemology' (Smith,

elements of Waldron's engagement with philosophy to hang together, it seems that something has to give. Because of this, it is not clear that this interpretation is one that Waldron would want to take.[87]

Thus, on each of the interpretations of Waldron's irrelevance case considered above, his key premise leads him into some form of incoherence; or at least it is not clear how he can avoid it doing so. This is important in its own right for anyone concerned with applying core philosophy to constitutional theory, but in the context of the argument of this article it has a particular significance; it marks a failed attempt to deflect the philosophical issue, or at the very least a failure to engage adequately and coherently with it.

4. The Plot Thickens: Waldron's Stance on the Realist/Anti-Realist Issue - A Tale of Two Waldrons?

The fact that Waldron has often argued that this fundamental issue of moral philosophy is irrelevant to his constitutionalist case has not stopped him making a number of forays into exactly this issue in his work. Leaving aside the irrelevance thesis for the moment, it is these forays themselves that are the subject of this section. Pinning down the stance of a theorist as prominent and influential as Waldron is not only of philosophical interest, however; having

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supra note 76 at 40.. See also Tasioulas, *supra* note 82 at 219. If correct, these criticisms would not refute Waldron's argument; he can continue to insist that when he attacks their epistemology he leaves their metaphysical claim, and therefore their realism, standing. They would show his irrelevance argument to be itself largely irrelevant to the way realism *actually* looks. But on his own terms, Waldron's claim would stand. The difficulty I discuss below concerns how this interpretation would fit with what Waldron has previously said on the subject of realism and anti-realism in his earlier work.

[87] A final way out would be to interpret Waldron's key premise in light of his general concern with disagreement in politics. On this interpretation, Waldron's premise regarding the absence of any account of how to tell accurate from inaccurate moral beliefs would be read as the absence of any *successful* account, where "successful" means "capable of resolving disagreement". This would explain why Waldron sees it as significant that, unlike in science, there is nothing in the realm of moral theory that 'even begins to connect the idea of there being a fact of the matter with the idea of there being some way to proceed when some people disagree' (Waldron, *Law and Disagreement supra* note 3 at 178). However, this would require Waldron to rely on an account of political justification that is straightforwardly self-defeating; if a claim can be dismissed merely because others are not convinced to accept it, then that claim itself can be dismissed, because there are plenty who object strongly to such a conception of valid justification (see Smith, *supra* note 76 at 44. The realist instrumentalists considered below in **section 5** to name but a few). On this ground, Waldron's irrelevance case would fall quite quickly into incoherence. As such it is even less plausible than the interpretation considered above. For this reason, although it is certainly a possible interpretation of Waldron's key premise, it is not one that will be pursued further. In any case, the number of interpretations his irrelevance case is open to is itself problematic, and enough to support the current argument.

questioned the coherence of his irrelevance case above, his own stance in the perhaps not-so-irrelevant debate comes back into the frame for constitutional theorists.

Yet while Waldron's irrelevance argument has received some attention, and, of course, considerable attention has been paid to his anti-judicial review, pro-legislature argument in the constitutionalist debate, Waldron's own stance in the philosophical controversy has received very little. Indeed, to the extent that it has been looked at, it has taken the form of a mere footnote-length glance.

For example, in the article in which he made the favourable comments on Waldron's work (quoted earlier), Allan briefly notes, in a couple of footnotes, that Waldron is a 'self-proclaimed noncognitivist in the moral realm', and holds that there 'are no mind-independent truths' in this area.[88] Aileen Kavanagh deals with Waldron's philosophy in a similarly cursory footnote. But her interpretation is quite different - quite the opposite, in fact. For she takes it as read that, while some would regard the idea of a '"morally right"' decision dubious, Waldron does not.[89] Her assumption that 'there is such a thing as a morally right and wrong decision', independently of what people happen to think is, she states, 'not in contention with Waldron'.[90]

That Allan has Waldron down as an anti-realist, and Kavanagh takes it as read that he is the opposite, should give us immediate pause for thought. At the very least, it suggests that a closer look at Waldron's stance is needed. It is also a spoiler as to the case made in this section – one of apparent inconsistency, or at least a problematic lack of clarity because, as discussed below, there is evidence supporting *both* of these interpretations of Waldron's philosophical stance, and it is not clear how they can, or should, be reconciled.[91]

4.1. *A Tale of Two (Or More?) Waldrons*

Allan's treatment of Waldron's philosophical stance is understandably brief. He was, after all, relying on Waldron's *own* declaration. In an article on moral truth, rights, and judicial review, prior to the publication of *Law and Disagreement,*[92] Waldron expressly tells us that one of the views he holds is anti-realism. He points to sceptics such as Hume and Hare as providing

[88] Allan, *supra* note 15 at 141, n30. See also 141, n33 ('Waldron sees moral evaluations in terms of sentiments, not in terms of claimed true beliefs').
[89] Kavanagh, *supra* note 1 at 460, n30.
[90] *Ibid*.
[91] For another brief look at Waldron's stance - again, confined to a footnote - see Enoch, *supra* note 5 at 30, n20. (suggesting that Waldron, 'at times sounds like an antirealist'). Enoch's treatment is slightly more promising in that he recognises that 'much more needs to be said on the relation between metaethics and political philosophy in general, and in Waldron's political philosophy in particular'. However, as far as I am aware, he has not himself returned to the subject. The analysis presented here is a much-needed contribution to that task.
[92] Waldron, *supra* note 22.This article also contains a version of Waldron's irrelevance case.

the 'accounts of moral judgment [he] find[s] most convincing'.[93] And, to avoid any room for doubt, Waldron writes of anti-realists in the first person; one 'of the views that *I* hold [is] anti-realism';[94] '*we*...discover that there is simply no room for realist conceptions like moral truth and moral objectivity, and *we* put those ideas quietly and untendentiously aside'.[95] Even more strongly, Waldron writes that, 'for *us* non-cognitivists...the realist is making some wretchedly misbegotten category-mistake in assimilating moral judgments to judgments about matters of fact'.[96] Reading this article, putting his first-person alignment with anti-realism, anti-realists, and anti-realist ideas together with his open rejection of realist concepts, gives one the impression that Waldron is indeed a trenchant anti-realist. In fact, that last comment above would make a worthy rallying call for all anti-realists. So Allan seems justified in his rather brief noting of Waldron's anti-realist stance.

Unfortunately matters are not that straightforward. In the chapter of *Law and Disagreement* where the latest formulation of the irrelevance arguments rejected above are found, Waldron seems to want to distance himself from the anti-realist school of thought. There, one finds statements like; 'of the various views about justice and rights that compete in our society, surely some are more acceptable than others', and that '[s]urely...*some of them are true and others false*'.[97] At least that is what he describes as 'a philosophical possibility'.[98]

Even if Waldron merely considers it to be a "philosophical possibility" here, that is already a large step back from the hostility shown to realism in the earlier article just noted: the accusation that realists are "wretchedly misbegotten" in viewing moral claims as statements about matters of fact does not seem to entertain any such possibility, however slim. Gone too are the first-person attachments to the anti-realist position. For example, when defining anti-realism here, he writes that *'[t]hey* deny that there are moral facts which determine the truth or falsity of the judgements people make', and, in a sentence otherwise strikingly similar to that found earlier, Waldron writes that '*they*...discover that there is no room for any realist notion of moral truth and moral objectivity, and *they* put those ideas quietly aside'.[99] It is now *they* (no longer *we*) who are the anti-realists.

The absence of the explicit attacks on realism from his previous article on moral truth and judicial review, along with this shift from the first to the third-person regarding anti-realists, particularly in some claims otherwise identical, could suggest a number of things. It might

[93] *Ibid* at 75, n1.
[94] *Ibid* at 77 (emphasis added).
[95] *Ibid* at 78 (emphases added). Note also the precursor to this quote: 'Some philosophers (me, for example) find first that emotivist or prescriptivist patterns of analysis provide what appear to be the best accounts available of what is going on when moral judgments are made and thought about and followed.'
[96] *Ibid* at 78–79.
[97] Waldron, *Law and Disagreement, supra* note 3 at 164 (emphasis added).
[98] *Ibid*.
[99] *Ibid* at 176. (emphases added).

simply represent the full flowering of Waldron's irrelevance case. Given his view that the realist/anti-realist debate is of no consequence to the constitutionalist issue, he would presumably see his own stance in that debate as irrelevant. Indeed, if he is at all convinced by his irrelevance case he *must* see his own philosophical stance as irrelevant. Seeing his own philosophical views as inconsequential, Waldron may simply see no need to mention them; those views would not (again, as they *should* not) add anything to his irrelevance argument. In light of this, he may have wondered why he *ever* saw the need to mention them. However, while this might explain the absence of explicit *attacks* on realism, and the change of phrasing, we would still be left with the apparent *embracing* of the idea of moral truth noted above ("surely some of them are true and others false").

So it seems this explanation will not do. An alternative that would explain both the shift away from explicit hostility to realism, *and* the sympathy now shown to their cause (at least entertaining it as a possibility), is that Waldron has changed his mind. It is possible that, by the time of *Law and Disagreement,* Waldron is no longer so convinced that realism makes some "wretchedly misbegotten mistake", and that he no longer sees anti-realism as more convincing. Thus, the apparent differences in Waldron's position, and in tone, may represent nothing more than a change of heart on the philosophical issue. As briefly noted above, some commentators do take it as read that, at this point at least, Waldron is ultimately a realist, and thinks that there *are* such things as moral facts regarding moral rights and wrongs, accepting realist concepts like "moral truth" and "moral objectivity".

Further weight might be added to this explanation for the apparent tale of two Waldrons by looking at evidence from his more recent work. In a rigorous formulation of his "core case" against judicial review, Waldron writes that '[b]ecause rights are important, it is likewise important that we get them right', leading him to concede that we must therefore 'take outcome-related' justifications put forward in the constitutionalist debate 'very seriously indeed.'[100] Instrumentalist approaches, and the significance of that concession and others like it, will be returned to in the next section. For now, the point is that this again sounds like realist-talk; getting issues of rights "*right*" sounds, especially in light of his earlier comments about there being "true" and "false" positions on these moral matters, like realist-talk. This is certainly how Hutchinson takes Waldron at this point. He reads comments like these, and others which see Waldron intimate the importance of choosing procedures that 'are most likely to get at the truth about rights' (or at least briefly entertain such suggestions),[101] as insisting that 'there is some objective ground or moral facts-of-the-matter' where rights are concerned.[102]

[100] Waldron, "Core of the Case", *supra* note 3 at 1373.

[101] As discussed below, he dismisses these approaches on the grounds that they turn out to be question-begging in circumstances of disagreement. He does *not* reject the possibility that one side to this disagreement might actually have "moral truth" on their side.

[102] AC Hutchinson, "A 'Hard Core' Case Against Judicial Review" (2008) 121 Harvard Law Review Forum 57 at 58.

There does seem to be something in this; an anti-realist would certainly not entertain comments such as these, yet alone show sympathy to their concern for reaching "right answers", or getting "at *the truth* about rights". On our view - on the view of anti-realism as defined by Waldron earlier[103] - there is no (objective) "truth" to be had, making this a hopeless dead end, rather than - as Waldron puts it - an 'honourable approach' taking the 'possibility' of reaching the 'wrong answer' to substantive questions of rights, 'very seriously'.[104] In valuing the approach of "getting things right", therefore, Waldron does seem to imply the existence of objective moral truth; conceptualising rights as 'objective moral entities'.[105]

Further such claims can also be found in Waldron's later work on the absolute moral and legal indefensibility of torture. In his consideration of what Christian teaching can add to this debate, Waldron sees it as 'reassuring' that 'secular moral thought *can* make sense of the objectivity of value'.[106] But not only is Waldron comforted by the attachment of moral theory to those realist concepts he once lambasted as "wretchedly misbegotten", he wants more. The Christian perspective on torture, which he 'yearned for'[107] in the debate post-9/11 is, again, to use his own words, 'a form of *radical* objectivity that goes beyond common-or-garden moral realism'.[108] This yearning, and this desire to place such a radical form of realism more prominently in the moral debate on torture seems a world away from putting the realist concepts of moral truth and objectivity aside, as the anti-realist Waldron once did.

All of this might suggest that the later Waldron has, finally, come down - and come down big time - on the side of realism (whether he will change his mind again - if indeed he has done so - is of course another matter).

If this "change of mind" explanation *is* taken, however, one should probably be aware that this would not be first time Waldron would appear to have done so. In an article published several years *before* 'Moral Truth and Judicial Review' (the article which saw Waldron openly align himself with anti-realism), one finds statements which again seem to align him with the *realist* case, cast in realist terminology, using realist concepts - the very same terminology and concepts rejected by Waldron in the later article. Criticising Freeman's instrumental defence of judicial review,[109] Waldron raises the likely possibility of disagreement, where 'a number of citizens think a piece of legislation respects and even

[103] See above, p6.
[104] Waldron, *Law and Disagreement, supra* note 3 at 252.
[105] Hutchinson, *supra* note 102 at 58.
[106] Waldron, *supra* note 21 at 269.
[107] *Ibid* at 261.
[108] *Ibid* at 269.
[109] S Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review" (1990) 9:4 Law and Philosophy 327. Instrumentalist approaches to constitutional authority are discussed in the next section below.

advances fundamental rights' while others 'believe it unjustifiably encroaches on rights'.[110] In such a situation, he states, 'no doubt from a God's-eye point of view, one of these positions is ultimately true and the other false'.[111] The idea of a "God's-eye point of view", and that judgements concerning rights can "no doubt" be "true" and others "false" are, as discussed earlier, typically *realist* ones. They require the idea of independent content to moral values and evaluations; having this independent content, it is not down to any individual to decide what is right or wrong. *God* says; the world says; the thing-in-itself-says; the intrinsic nature of reality, or whatever metaphor one can find to make this realist-foundationalist point, says.

Furthermore, they are typically realist ones according to *Waldron's own definitions.* Consider the technical definition of realism from *Law and Disagreement* quoted earlier (in **Section** 2): to claim that from a "God's-eye point of view" a moral position is true or false is to claim that there are moral facts independent of our belief which render moral judgements true or false. Recall that in 'Moral Truth and Judicial Review', Waldron states that 'we [anti-realists] discover that there is simply no room for *realist conceptions like moral truth and moral objectivity,* and that we put those ideas quietly and untendentiously aside',[112] and in 'The Irrelevance of Moral Objectivity' that 'they [anti-realists]...discover that there is no room for any *realist notion of moral truth and moral objectivity*'.[113] In these descriptions of the anti-realist position, Waldron sees "moral truth" as a "realist notion". If "moral truth" is a realist notion, and if the issue of rights is (as Waldron characterises it) a moral one,[114] then the idea that one position in the moral disagreement over rights likely to arise is "true" and others "false" is clearly a realist idea. This earlier Waldron accepts (and with "no doubt" - which is far from "putting aside") the very realist notions the later Waldron we came across rejects as an anti-realist. So if Waldron *has* changed his mind, he seems to have done so several times; from realism to anti-realism, and back again.

4.2. *The Difficulty of Putting Waldron Together Again*

Which of these possible explanations for the inconsistencies in Waldron's stance is the "correct" one remains unknowable. Ultimately it is only Waldron himself who can know his own position(s) and reasoning with certainty. It might be that all of the comments mentioned above can be clarified in a way which shows them to be perfectly compatible with one another. One possibility is that Waldron might believe that there *is* such a thing as "moral truth" out there, but only that we cannot ever find it, or be sure of when we are or are not finding it. Perhaps there is truth out there, but we can never achieve it, because of our own

[110] J Waldron, "Freeman's Defense of Judicial Review" (1994) 13:1 Law and Philosophy 27 at 36.
[111] *Ibid*.
[112] Waldron, *supra* note 22 at 78. (emphasis added).
[113] Waldron, *Law and Disagreement, supra* note 3 at 176 (emphasis added).
[114] *Ibid* at 225 ('rights themselves are morally complicated') and 226 ('In the area of rights...it is precisely questions of...moral priority that are at stake').

limited capacities, cognitive biases, or inherent fallibility. Or perhaps there is truth out there to be had, and we are *capable* of getting at it, but we can *never tell* whether we have, and so should be reticent about pushing those truths. This would return to the epistemologically sceptical interpretation of Waldron considered above in relation to his irrelevance case.

Enoch very briefly considers such possibilities, pointing to some comments of Waldron that might support this interpretation. For example, in a footnote in *Law and Disagreement* Waldron seems to pinpoint his scepticism specifically on the issue of how to *grasp* objective values, rather than their very existence:

> 'As long as objective values fail to disclose themselves to us, in our consciences or from the skies, in ways that leave no room for further disagreements about their character, all we have on earth are *opinions or beliefs* about objective value'.[115]

This point seems to target just the accessibility, reliability, or defensibility of our moral judgements, not the idea that they *can be independently "true"* at all. So perhaps there is room for Waldron to hold on to the *idea* of objective moral truths in the abstract. This would dissolve the inconsistencies set out above by clarifying precisely which part of the "realist" case Waldron is and is not attacking. I would be sceptical of this for a number of reasons, however.

As set out in **section 2, above**, I see this problem in knowing precisely when we are getting closer to moral truth, or distinguishing between less accurate and more accurate descriptions of a supposed (moral) reality as itself a reason for setting the idea of such reality aside; it sets us out onto a fruitless path, and one which does not, in light of the ubiquity of language, and the linguistic nature of "reality", make sense. If this is Waldron's stance, then my point would be, based on the sceptical anti-realism set out above, that he does not go far enough; he ends up holding on to a pointless and practically redundant metaphysical concept. However, I understand that this is a controversial argument and that not everyone will be convinced. Nor might they be particularly keen to let go of their metaphysical faith. It is possible that Waldron would share this reluctance. Indeed as set out above, in *some* moods at least he seems rather attached to it. This first point amounts to a mere philosophical disagreement, but the problems for Waldron on this interpretation go deeper.

First, it is difficult to see how even this more nuanced "anti-realist" case could be squared with those stronger comments of Waldron that he, as an anti-realist, "puts the *idea* of moral truth aside" (**see p18, above**). Pointing out that the *only* problem with the realist case is that we cannot know whether we are reaching the moral truth with our evaluations, or cannot convincingly show to others that we are, while maintaining that such truth might still exist, does not put the idea of moral truth to one side; *it presumes it*.

[115] *Ibid* at 111, n62. See Enoch, *supra* note 5 at 30, n20.

Perhaps again Waldron only ever intended to put the idea of moral truth aside when it comes to *explaining* moral judgement as a practical matter - he finds no *practical* room for the concept when it comes to explaining what is actually going on when people are making moral evaluations, because he denies it is something they can ever access. Waldron *does* specifically identify himself as an emotivist,[116] so maybe his point was that all the evaluator is ever, in reality, getting at is their own feelings on the matters at hand, rather than truth itself.[117] This would take us back to the epistemologically sceptical interpretation of Waldron; objective moral truths exist, but we find nothing but our emotions and sentiments.

However, if this is what Waldron meant by his self-declared "anti-realism", then it requires him to take a definition of realism which includes at its core a claim to epistemic accessibility and defensibility, either wholly or in part (because only then will the epistemological attack in the quote above amount to *anti*-realism). But if that is the case - if anti-realism (in his view) may deny only the reliable accessibility or defensibility of moral facts in circumstances of disagreement - then there really is no hope for Waldron's irrelevance thesis. Because then on each of the interpretations offered above, it would turn out to rely wholly on anti-realist grounds, *as defined by Waldron himself*. This would not only see Waldron commit the fatal error of taking sides in a debate to dismiss its relevance, but would confirm that Waldron's concerns surrounding the arbitrary nature of the moral decision-making required by judicial review *do* have *something* to do with anti-realism itself after all.

Finally, however, even if that definitional inconsistency can be overcome, this more nuanced "anti-realist" case would still not solve the problem of substantive inconsistency in Waldron's philosophical stance. For the more recent Waldron not only promotes the existence of moral truths in the *abstract*; on some topics, he appears to take some confidence in his view that *he* has these (radically) objective truths on his side.

For example, to support her comment that she and Waldron are in agreement on the existence of objective moral truth, and that Waldron is even 'keen to stress' the realist idea of moral rights and wrongs 'independently of what people believe', Kavanagh points to his statement from *Law and Disagreement* that '"rape is wrong even in societies where it is a common practice"'.[118] Here Kavanagh is taking Waldron not only as accepting the *idea* of objective moral rights and wrongs, but as regarding this particular statement as an example of such a moral truth. Waldron appears confident that *he knows* this moral truth, and that those who deny it (even whole societies in his example) *are wrong* to think otherwise. Of course, this could be reading too much into Waldron's comment here - he could merely be stating that it is *his* judgement that rape is wrong even in societies that think otherwise, and that any

[116] Waldron, *supra* note 22 at 75.
[117] *Ibid* at 78 ('Some philosophers (me, for example) find first that emotivist or prescriptivist patterns of analysis provide what appear to be the best accounts available of what is going on when moral judgments are made and thought about and followed').
[118] Kavanagh, *supra* note 1 at 460, n30. The quote is from Waldron, *Law and Disagreement, supra* note 3 at 105.

disagreement does not affect this universalised *subjective* judgement, rather than making any claim about the independent foundation of his view. Without such a rider though, especially in light of the above sympathy shown to the idea of objective moral truths, it is plausible to interpret this claim in the stronger, epistemologically confident, moral realist sense.

The same can be said of Waldron's later interventions on torture. In this later work, so strong is his confidence in the 'moral status' of torture as an 'abomination'[119] that we see Jeremy Waldron - otherwise so trenchant in his call to respect the inescapable fact of disagreement, and the legitimacy of democratic participation on issues of rights - declare it to be 'a matter of shame' that the US even *opened* a 'national debate' on the issue.[120] Such is his rectitude that we see Waldron come dangerously close to forgoing his central political philosophical premise and suggest that some things simply *should not be open to disagreement* - at the very least there is a tension in his denigrating of the positing of views opposed to his own absolutist view of the moral status of torture. With that, his belief 'that the wrongness of torture was constant before and after the terrorist attacks',[121] comes across as more than just a personal belief, and, rather, metaphysically and *epistemologically* self-assured. Of course, I do not mean to suggest that holding strong moral preferences necessarily makes one a realist - on my view sceptics are just as able as anyone to hold moral values. However, in light of the (radically) objectivist sympathies - even yearnings - shown in this work, along with this uncharacteristically negative view of disagreement, it is hard to resist the suspicion that Waldron's sometime realism is playing an active role in his moral and political interventions these days. That is, it seems as though, at least when it comes to some of his own fundamental moral beliefs, Waldron goes beyond merely accepting the purely metaphysical *possibility* of objective moral truths, and puts his epistemology where his metaethical mouth is, throwing the weight of that radical realism for which he long yearned in the torture debate rather conveniently behind his own moral preferences.[122] In these situations, the epistemic scepticism - such as it may be - seems to have been put aside.

It seems, then, that Waldron's philosophical quandaries go deep. He is at best vague on the realist/anti-realist issue, at worst, incoherent. These problems go to the heart of his irrelevance case and his concerns about the arbitrariness of judicial moralising. As will be clear from the lengthy and winding discussion above, the task of getting all of his positions to hang together coherently at the same time is a formidable one – perhaps impossible. As we have seen, plausible interpretations which would avoid the problems noted in one area of his thought raise or re-raise the issues in another. In each case it is his problematic engagement with the philosophical issue that gets in the way. Whether these problems are insurmountable,

[119] Waldron, *supra* note 21 at 4.
[120] *Ibid* at 261. This is despite his occasional protests that he does 'not purport to say what a Christian *must* think on this matter', or has 'no right to insist' on what the Christian position should actually be (269).
[121] *Ibid* at 4.
[122] See also *Ibid* at 10 (contrasting his view on the constant moral wrongness of torture with those who disagree with his absolutist stance: 'I don't really think philosophers like Elshtain believe that there was a change in moral reality after September 11...').

or can be overcome with some much needed clarification, it seems that Waldron is far too casual in his approach to core philosophy. Indeed the various comments made on the realist/anti-realist discussed above are often very brief, almost "by the way" points. Depending on whether one sees the above problems are surmountable or not, Waldron either gives insufficient thought to his own philosophical stance and its consequences, or pays insufficient attention to explaining it clearly. Either way, the dangers of failing to fully recognise the importance of philosophy to constitutional theory are evident.

5. Anti-Instrumentalism and the Curse of Realism

As the final part of Waldron's cautionary tale presented here, this section will take a closer look at the core constitutionalist issue of decision-making authority that concerns him. The instrumentalist approach to decision-making authority - popular in constitutionalist debate - will be examined. This is a case in point because, as will be seen, it is very much a *realist*-fuelled approach to constitutionalist theory, and one against which Waldron lays some heavy criticisms. But he attempts to do so while leaving their - and perhaps even his own - realist presuppositions untouched. This, it is suggested, leads his argument into difficulties. The argument will be that the responses to Waldron's anti-instrumentalist case - while arguable if one accepts, or remains equivocal, on their realist assumptions - lose all force if these assumptions are rejected. For Waldron's tale, the significance of this is that it shows, in concrete terms, the difference the realist/anti-realist issue can make to the force of his own arguments. It also sets the scene for the sequel to Waldron's tale; a philosophically grounded, openly anti-realist constitutionalist approach - one in which instrumentalism, as popularly conceived, has no place.

5.1. The Instrumentalist Approach and its Justification

The instrumentalist approach holds that 'the justification of political authority must ultimately rest on its instrumental value to "good government"'.[123] In the context of rights and constitutional theory, Kavanagh adopts this approach to hold the constitutional design 'that is most likely to yield morally right decisions, or is likely to yield the most morally right decisions, is most justified'.[124] Thus, the (lack of) justification of constitutional review, for Kavanagh, 'hinges crucially on its conduciveness to producing good outcomes for human rights'.[125] This kind of approach is widespread in constitutional and political theory. For example, for Rawls, the 'fundamental criterion for judging any procedure is the justice of its

[123] A Kavanagh, "Constitutional Review, the Courts, and Democratic Scepticism" (2009) 62:1 Current Legal Problems 102 at 113. Kavanagh's use of the "instrumental condition of good government" draws on J Raz, *Ethics in the Public Domain* (Oxford: Oxford University Press, 1994) at 117.
[124] Kavanagh, *supra* note 1 at 460. See also Kavanagh, *supra* note 123 at 113.
[125] Kavanagh, *supra* note 123 at 125.

likely results'.[126] Similarly, Dworkin argues that the 'best institutional structure is the one best calculated to produce the best answers'.[127] Raz goes as far as to call it 'the natural way to proceed' on the issue of rights in society 'to assume that enforcement of fundamental rights should be entrusted to whichever political procedure is...most likely to enforce them well'.[128] Some go even further and hold that '[g]overnmental institutions...are justified solely by the consequences they produce, including the consequences for rights violations'.[129]

The justification for adopting this instrumentalist condition of authority - of delivering decisions 'in accordance with right reason'[130] - is twofold. It stems from the moral nature of political decision-making, along with the importance of these decisions for society. Kavanagh explains both of these reasons straightforwardly as follows. Political decisions, she notes, often have 'a moral content'[131] - that is, they 'involve a choice between states of affairs or actions which are morally right or wrong, better or worse, independently of what people prefer'.[132] Because of this, 'it seems clear that a good governmental decision-procedure must be acceptable from a moral point of view', and, to be so acceptable, a decision-making procedure or institution must be 'likely, by and large, to produce morally right decisions'.[133] In addition, because the moral nature of these decisions means that they will 'inevitably affect the moral quality of our lives and institutions', an institution can only have the authority to make them 'if they can generally make them well'.[134] And by making a decision "well", Kavanagh once again means reaching a 'morally correct' outcome.[135] On these grounds, a decision-making procedure or arrangement is 'acceptable only insofar as it is designed to reach morally correct decisions'; if it is not likely to reach such decisions, it 'cannot be justified and should not be adopted'.[136]

All this talk of "morally correct" decisions instantly raises the spectre of moral realism - confirmed explicitly by Kavanagh when she writes that in putting forward her approach she 'assume[s] that there is such a thing as a morally right and wrong decision', independent of belief.[137] The significance of this will be returned to below, but first we will take a look at Waldron's response to such instrumentalist approaches.

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[126] J Rawls, *A Theory of Justice*, revised ed (Cambridge: Harvard University Press, 1999) at 202.
[127] R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1996) at 34.
[128] Raz, *supra* note 5 at 45.
[129] L Alexander, "Is Judicial Review Democratic? A Comment on Harel" (2003) 22 Law and Philosophy 277 at 283.
[130] Kavanagh, *supra* note 1 at 460.
[131] *Ibid* at 461.
[132] *Ibid* at 460.
[133] *Ibid* at 462.
[134] *Ibid*.
[135] *Ibid*.
[136] *Ibid*.
[137] *Ibid* at 460, n30.

5.2. *Waldron's Anti-Instrumentalism*

In *Law and Disagreement* Waldron titles his discussion of instrumentalist approaches to authority 'The Trouble With Rights-Instrumentalism'.[138] The title leaves no room for doubt where that discussion ends up, but Waldron in fact begins by *praising* the idea behind such approaches. It is 'honourable', he says, because it takes 'very seriously' the possibility of reaching the 'wrong answer'.[139] On 'matters of principle' such as this, we are told, this would have the disastrous consequence that rights are 'violated'.[140] Likewise, in a later article Waldron writes that '[b]ecause rights are important, it is likewise important that we get them right', meaning that we must 'take outcome-related' arguments in the constitutionalist debate 'very seriously indeed'.[141] It will be noted that this sentiment accords with the justification for instrumentalism noted above - that the nature of the issues involved in rights decisions are such that they have the potential to greatly affect our lives and that the moral quality of these decisions is therefore of great importance. However, while initially praising the instrumentalist approach in theory, and apparently supporting much of the ground on which it is justified, Waldron objects to its use in practice.

5.2.1. *Instrumentalism as Question-Begging*

Waldrons overarching attack on the instrumentalist approach is that it is 'question-begging' in the context of disagreement.[142] It is question-begging to 'use rights instrumentalism as a basis for the design of political procedures among people who disagree',[143] because putting it into practice 'presupposes our possession of the truth in designing an authoritative procedure whose point it is to settle that very issue'.[144] It either presupposes our possession of the truth about rights and what they involve, or the truth about how to access that moral truth. These slightly different presuppositions are entailed by different ways of operationalising the instrumentalist goal.

The first is what one might call "direct instrumentalism", which presents the instrumentalist task as 'an empirical one, to be settled by the way the world is.'[145] The idea is that the records of various institutions are to be compared and an inference drawn as to which *is* more likely to reach the "correct" result from an inspection of which *has* done so more often.[146] This is

[138] Waldron, *Law and Disagreement, supra* note 3 at 252ff.
[139] *Ibid* at 252.
[140] *Ibid*.
[141] Waldron, "Core of the Case", *supra* note 3 at 1373.
[142] Waldron, *Law and Disagreement, supra* note 3 at 253.
[143] *Ibid*.
[144] *Ibid*.
[145] Alexander, *supra* note 129 at 279.
[146] T Campbell, “Human Rights: A Culture of Controversy” (1999) 26:1 Journal of Law and Society 6 at 13–14.

partly what Kavanagh has in mind when she states that the 'judicial record of upholding rights matters a great deal' when assessing the justification for constitutional review.[147]

Waldron is right that this kind of approach, observing the record of various institutions and arrangements, clearly requires a standard of what the "morally correct" result is, or what it means to "uphold rights". Without it, it can be asked how one could say whether the correct or best outcome has been reached in any given decision, and therefore whether it counts for against that decision-making arrangement. Without a substantive standard of "moral truth" to use as a benchmark in assessing the past record of competing arrangements and institutions this empirical approach is practically unworkable. But it is precisely this issue - what the "moral truth" or "correct outcome" is - that people disagree over.

However, Waldron's critique of instrumentalism as question-begging also catches those who take a less direct - 'more modest' - instrumentalist approach.[148] Instead of relying on a particular view as to what the right outcome is and assessing the past record of institutions on this basis, this approach focuses on more 'general institutional considerations about the way in which' they make their decisions, including the 'factors which influence' them.[149] A particularly popular example of this kind of argument focuses on the influence of public opinion on the decision-maker. The 'popular accountability' of elected politicians, we are frequently told, 'generates a risk that a popular decision will be chosen, even if it is not the right decision'.[150] It is easier for judges, because of their unelected nature, to 'withstand popular pressure...and to make the right decision'.[151] Raz makes this point when he writes that there are 'ample reasons to suspect that members of the legislature are moved by sectarian interests to such a degree that they are not likely even to attempt to establish what rights (some) people have'. [152] This, again, makes it less likely that 'the correct content of rights' will be 'revealed' or 'discover[ed]'.[153]

By focusing on general institutional considerations, rather than the past decision-making record of institutions, this may allow conclusions to be drawn about which institution is 'most likely to get at the truth about rights, *whatever* that truth turns out to be'.[154] But it itself comes with the presupposition that one knows which factors make truth more or less likely to be "discovered". And just as there is disagreement over rights themselves and what the correct

[147] Kavanagh, *supra* note 123 at 118.
[148] Waldron, *Law and Disagreement, supra* note 3 at 253.
[149] Kavanagh, *supra* note 1 at 466.
[150] Kavanagh, *supra* note 7 at 345.
[151] *Ibid* at 347.
[152] Raz, *supra* note 5 at 46.
[153] *Ibid*. As another example see MJ Perry, *The Constitution, The Courts, and Human Rights* (New Haven: Yale University Press, 1982) at 102 ('As a matter of comparative institutional competence, the politically insulated...judiciary is more likely, when the human rights issue is a deeply controversial one, to move us in the direction of a right answer (assuming there is such a thing) than is the political process left to its own devices, which tends to resolve such issues by reflexive, mechanical reference to established moral conventions').
[154] Waldron, *Law and Disagreement, supra* note 3 at 253.

outcome is in a right dispute, we are 'not in possession of any uncontroversial moral epistemology'.[155] In fact, disagreement is so widespread that even 'professional epistemologists' do not have 'the sort of consensus about *paths* to moral truth that would be required for a non-question-begging instrumental defence' of procedures to be used 'among those who disagree'.[156] So again, as it was in relation to direct empirical instrumentalist approaches, Waldron's point is that what factors make reaching "moral truth" more or less likely is a controversial matter - subject to widespread disagreement - but one must rely on a particular view in designing and justifying decision-making procedures on an instrumentalist basis; that is, one which pursues the "right" or "just" outcome .

5.2.2. *The Instrumentalist Response and the Curse of Realism*

All of the above seems well-placed; there is widespread disagreement in society over rights - we see it every day. Indeed this is only to be expected due to the controversial, morally-charged nature of the issues involved in questions of rights and principle. So it is likely to be the case that a particular outcome will be seen as "correct" or "just" by some, but "incorrect" or "unjust" by others.[157] There is also disagreement over which purported path to moral truth to take - as the plethora of realist epistemologies shows. Thus, taking a stance on either or both of these issues (what the truth is, or how to get there) - as instrumentalists must to put their approach into practice - will beg the question *from the perspective of those who take a different stance*: someone who believes same-sex marriage is morally unproblematic against someone who believes it is unacceptable (and vice versa); someone who believes in utilitarian ethics against a natural lawyer, or an evangelical Christian, and so on. It would be difficult for anyone to object to *this* part of Waldron's argument.

However, the same cannot be said of his further premise that this fact makes instrumentalism *unacceptably* question-begging. It is here that the realist/anti-realist issue becomes relevant once again. To a realist, this argument can be seen as putting a concern to avoid begging the question above the dangers of getting rights-issues "wrong", with all of the consequences this may have for the lives of those involved.

For example, Fabre, noting the existence of disagreement, simply replies that 'if one allows for the possibility that someone may be wrong' on these issues, then 'why not argue that in so far as he [or she] is wrong' their views 'should not prevail?'[158] It can be recognised that disagreements need to be settled to some extent, but for Fabre it is of vital importance that the co-ordinated action is 'one which can be said to constitute a *just* position'.[159] This should come as no surprise given that, as seen earlier, the goal of instrumentalism is to reach the *morally correct* outcomes, not merely *an* outcome for the sake of it. Given this goal, and the

[155] *Ibid* at 254.
[156] *Ibid*.
[157] Waldron, *supra* note 110 at 36.
[158] C Fabre, “The Dignity of Rights” (2000) 20:2 OJLS 271 at 273.
[159] *Ibid* at 274.

importance of the issues at stake in those political decisions with a "moral content", 'one has to bite the bullet, and stand, in the face of others' disagreeing with us, for what is just'.[160] Some, maybe many, will disagree on controversial matters - they *are controversial* after all - but to those who accept the existence of "moral truths", '[t]hose judgments may be wrong, in which case respecting them may entail allowing those whose judgments they are to impose immoral constraints and duties on other people'.[161] Raz makes this same response in dismissing Waldron's point about the controversial nature of epistemology as (somewhat ironically) 'true, but irrelevant'.[162] It is irrelevant because the fact that 'sound moral epistemology is controversial does not mean that we cannot know what it requires'; rather, it merely follows 'that avoiding moral controversy is not a goal to be pursued'.[163] Effectively, the basic reply here is that "truth" and "justice" should not be allowed to be held to ransom by those who disagree - there is simply too much at stake.

This criticism goes to the very heart of Waldron's constitutional intervention; all the way down to his fundamental premise that each individual is a 'potential moral agent, endowed with dignity and autonomy',[164] and that respecting this in circumstances of disagreement requires individuals to be given the opportunity to participate equally in collective decision-making.[165] As per his famous "rights-based" argument in favour of political equality, and against the strong judicial review of legislation, Waldron claims that this view of the individual as a dignified and autonomous moral agent is the one assumed by the very attribution of rights.[166]

The reply is again that this respect due to the individual, such as it may be, does not outweigh the importance of getting matters "right". As Raz puts it, '[r]especting people as rational self-directing agents does not require desisting from following true beliefs which those people dispute'.[167] Likewise, Arneson's reply is that respect for rational agency requires treating individuals according to 'the principles best supported by moral reasons'; after all, these are the principles that individuals would choose if they were 'fully rational'.[168] Even more strongly, Enoch reminds us that the respect that individuals merit, and on which the attribution of rights may be based, is 'perfectly consistent with our being stupid, morally

[160] *Ibid* at 282.
[161] Alexander, *supra* note 129 at 281.
[162] Raz, *supra* note 5 at 47.
[163] *Ibid*.
[164] Waldron, *supra* note 3 at 223.
[165] As the foundation of Waldron's constitutionalist position, this argument can be found throughout his work. But see, for example, *Ibid*, ch11.
[166] See Waldron, *supra* note 3, especially "The Right of Rights", and "A Rights-Based Critique".
[167] Raz, *supra* note 5 at 43. See also Alexander, *supra* note 118 at 281 ('respect cannot be demanded for erroneous moral judgments in the form of acceding to them').
[168] R Arneson, "Democracy is not Intrinsically Just" in K Dowding, RE Goodin & C Pateman, eds, *Justice and Democracy: Essays for Brian Barry* (Cambridge: Cambridge University Press, 2004) 40 at 52.

corrupt, almost bound to act wrongly'.[169] It is thus no "disrespect" to take this possibility seriously, and, if 'the evidence points to the conclusion' that this is generally the case, then it is doubtful whether either 'morality in general or the duty to treat people with respect' require us to behave as though it were otherwise.[170]

Of course, this response can only work - if indeed it works - if one accepts the idea of "moral truth" in the first place; only then does it make sense to say that disagreement cannot be allowed to get in the way of getting fundamental issues of rights and morality "right". But this is not something which Waldron can challenge in defence of his constitutionalist case, because this would directly contradict his irrelevance argument. Indeed, as above, the realist worldview is something which Waldron seems to actively *accept* at times. Even then it can be replied that this is a matter of balance; even for those who accept that there *is* "truth" to be had here, a relevant question might be what weight should respecting disagreement be given as compared to the value in reaching the truth of the matter? This is itself an evaluative, moral issue, open to disagreement and so the above may not, taken alone, necessarily be a knockdown argument against Waldron. That is not my suggestion here. But he is left open to it. And he is left open to it on the basis of his sometime realist leanings.

Furthermore, add to this another concession of Waldron's and seems to be in a rather difficult bind. The prioritising of "morally correct" outcomes could be seen as the logical result of the great importance Waldron *himself* attaches to the quality of decisions on rights. That is, the importance Waldron himself attaches to getting these matters "right". As already noted, this led him to praise as 'honourable' the approach which takes the possibility of reaching the 'wrong answers' and the harm that will result 'very seriously'.[171] What the above reply amounts to is the claim that, if one is to take the dangers of getting decisions wrong "very seriously" - as Waldron directs us to - then one should treat avoiding this outcome as of *fundamental* importance when choosing and justifying a decision-making institution that is to settle the issue of what outcomes are to be enforced in society. On this logic, it is very plausible to suggest that begging the question from the perspective of those who disagree about what rights do or should involve (but could be wrong - as a matter of independent truth - to so disagree), should not be an issue if one is taking the moral quality of the decisions to be enforced in society sufficiently seriously. The issues at stake are too important to risk getting things wrong. It is only plausible, perhaps, but again Waldron would find it difficult to downplay the importance of getting matters "right" because *he himself stresses it.*[172] Thus,

[169] Enoch, *supra* note 5 at 28.

[170] *Ibid*.

[171] Waldron, *Law and Disagreement, supra* note 3 at 252.

[172] In fact, the importance Waldron attaches to rights, and to getting matters "right" here does lead him to some perhaps surprising conclusion: causing him to abandon, or at the very least relax, his anti-judicial review and pro-majoritarian case at times. This is a plausible reading of the fact that his "core case" against judicial review is dependent on a number of assumptions, such as that there is a strong commitment to the idea of individual rights in society. The idea is that in places where this assumption does not hold, Waldron is willing to contemplate the tempering of democratic majoritarian decision-making. See Waldron, "Core of the Case", *supra* note 3, especially at 1364-1366, and 1401-1406.

Waldron himself can be seen as providing the tools for the dismantling of his own position. The spectre of realism continues to haunt Waldron, all the way down to the foundation of his prized constitutionalist theory.

That is where Waldron's tale ends. His approach to the philosophical realist/anti-realist issue - which on the narrative present here has led to some misguided (if Waldron is a realist), ill thought out, or at least underdeveloped comments and concessions (if he is not) - has left his constitutionalist approach open to some penetrating criticisms. Given these concessions and arguments it is difficult to see a safe way forward for Waldron. It is difficult for him to hold on to his supposedly philosophically neutral constitutionalist case, his "anti-realism" (whatever he may mean by that), sometime realism (and sometime *radical* realism), his prime concern for respecting disagreement, and also stressing of the importance of getting matters "right" and avoiding the problematic dangers of getting things "wrong", all at the same time.

5.3. *Breaking the Realist Spell: A Sceptical Rejection of Instrumentalist Approaches*

We are now in a position to set the scene for a new tale, however; that of a sceptical journey into constitutional theory, on a path openly grounded in anti-realist philosophy. It begins with some ground clearing where Waldron left off. While, as above Waldron appears to accept the idea of, and justification for, the instrumentalist approach in theory - the existence of "moral truth", and the importance of achieving it - the consequence of the sceptical anti-realist argument here is that the very *idea* of instrumentalism is misguided. With this, its theoretical justification falls away.

Once the idea of a "right" or "wrong" independent of the preferred descriptions of individuals is set aside, the instrumentalist approach is rendered meaningless. Contrary to its key justification, political decisions *cannot* be said to 'involve a choice between states of affairs or actions that *are morally right or wrong, better or worse, independently of what people prefer'*.[173] No sense can be made of the idea that 'one has to bite the bullet' and stand 'for what is just'[174] even in the face of disagreement, because no sense can be made of the idea that anything "is" just. Likewise, the idea that, disagreement notwithstanding, we can "know" how to 'reveal[]' or 'discover' the so-called 'correct content of rights'[175] goes because there is, on the anti-realist view, *nothing* to "discover". Contrary to Waldron's concessions, then, the instrumentalist approach, as popularly conceived, is not "honourable" or otherwise worthy of praise. Far from it. On a consistent anti-realist view, the instrumentalist condition becomes philosophically meaningless - a baffling non-starter. *This* is what it means to set aside the realist concepts of moral truth and objectivity - and to set them aside wholesale - as the anti-realist Waldron once claimed to.

[173] Kavanagh, *supra* note 1 at 460 (emphasis added).
[174] Fabre, *supra* note 158 at 282.
[175] Raz, *supra* note 5 at 46.

It will no doubt be noticed that this is a negative argument: having dismissed the instrumentalist approach as philosophically misguided, the question becomes, what *would* a sceptical approach to decision-making authority within a constitution look like? That is an important question, and answering it is no easy task. That is for another day however; doing so would lead us into a tale too long to tell here.

6. Conclusion: Lessons to be Learned

If the philosopher's stone is the key to fortune, immortality, and ultimately perfection, then in the tale told here, it is Waldron himself who stands in the way of his achievement of that prize. His travails stem from his engagement with core philosophy within his thought. His irrelevance case is, on each interpretation considered, unconvincing. Yet it may be behind the lack of any rigorous engagement with the philosophical issue throughout Waldron's work, something which leaves his substantive philosophical stance as, at best, in need of clarification, and at worst hopelessly riddled with inconsistencies. In light of the holistic exploration of Waldron's engagement with philosophy attempted in this piece, it can only be concluded that getting his various positions, comments and arguments across his thought to hang together coherently and convincingly is an unenviable task, at times resembling a frustrating game of "whack-a-mole"; interpret away one inconsistency or tension and another rears its head. Whether this task can be achieved, as things stand, Waldron's seemingly casual approach to the philosophical debate is problematic, if only because it makes it so difficult to pin down a coherent position. His philosophical comments also lead Waldron into some difficult waters regarding his anti-instrumentalist case; combined with other concessions flowing rather easily from his sometime entertaining of the concept of moral truth, Waldron gives his legal constitutionalist foes the tools they need to dismantle his prized constitutionalist theory.

Like all good tales, there are lessons to be learned from this, both for Waldron and more generally. For Waldron, the arguments above suggest a need to reassess or at the very least clarify his stance on and use of core philosophy - the stakes are too high not to. And with his irrelevance case out of the way, his own stance in the philosophical debate may take on an extra significance.

There is a more general lesson here too: the story told above regarding Waldron's constitutionalist path shows the dangers one may face; take a wrong turn and the consequences can be dire. The attempt to brush aside fundamental questions of moral philosophy can lead one to the dead end of incoherence, and, ultimately, place the constitutional theory in danger. It seems then that the path to the philosopher's stone must be the one paved with rigorous and considered philosophy.

Leaving Waldron's tale, the latter parts of this article have prepared some of the ground on which a sceptical path into the realm of constitutional theory can be built, having pulled the instrumentalist approach to constitutional theory out by its realist roots. However, the rest of this, undoubtedly long journey, must be left for a sequel.