

Response to overseas commentators

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I am extremely grateful to the four distinguished lawyers from South Africa, Italy, India, and Germany who have contributed to this issue and to the editors for soliciting their contributions. This journal is dedicated to improving global conversations about the central substantive and procedural issues of constitutional law, and the range and power of these articles is itself ample evidence of the soundness and importance of that project. In this response I cannot hope even to identify, let alone reply to, all the fascinating issues the commentators have raised. I therefore take up, principally, questions and objections about my own work in an attempt to continue the debate the comments begin. My comments in response to the different contributions vary in length for that reason alone.

1. Chaskalson

Arthur Chaskalson, who is the president of the Constitutional Court of South Africa, has written a subtle and moving account of the morally tense situation facing South African lawyers and judges during the apartheid years in that country.¹ He quotes a statement by the Truth and Reconciliation Commission commending those lawyers who worked throughout that appalling period to help victims of injustice by rescuing what they could from the base of decent South African law that lay beneath the apartheid legislation. Though he makes no mention of this, he was himself one of the best known and most effective of those lawyers. His description of the debate during those years about the right moral course for a judge or lawyer to take is intriguing. He is very generous to say that my ideas played a role in that debate and in the academic discussions that influenced some humane judges in that dark period. If so, there is nothing of which I am more proud.

Since apartheid's end, Chaskalson has rendered what is probably an even more important service to his country. Under his intellectual and administrative leadership, the Constitutional Court has already become one of the most influential such courts in the world. The quality of its craftsmanship and the disciplined imagination with which it has interpreted South Africa's admirable Constitution have helped to ensure a remarkably smooth transition from

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¹ Arthur Chaskalson, *From wickedness to equality: The moral transformation of South African law*, 1 INT'L J. CONST. L. (I.CON) 590 (2003.)

oppression to a democratic rule of both law and principle, and its opinions are studied with care by lawyers over the world. Chaskalson is, again, very generous in noting references to my work in the Court's opinions; I am proud of that, too.

The quality of Chaskalson's Court and his own role in leading that Court is evident in his discussions of some of its most important decisions, and, in particular, its decisions enforcing what are often called socioeconomic constitutional rights. People's moral rights against their government include not only what are called "negative" freedoms—the right to important liberties, like freedom of speech, religion, and conscience, and rights to a fair trial—but also "positive" rights to support for their basic needs of health, housing, and education that is consistent with the economic resources of their community. Traditional constitutions, including the American Constitution, provide guarantees of certain negative rights that are enforceable by courts. But they do not make explicit provision for positive rights because, according to the conventional argument, government cannot enforce positive rights except by making hard policy decisions about resource application, strategy, and timing, and these decisions are better made by officials who are directly responsible to the electorate than by judges.

Following World War II, however, many of the newer constitutions did include guarantees of positive rights, either as nonjusticiable aspirations or as judicially enforceable mandates. The framers of South Africa's new Constitution believed, understandably, that they could not deny positive constitutional assurance to the majority of citizens who had been deprived of the basic requisites of human dignity for so long, and so they chose to include carefully drafted and judicially enforceable positive rights in the form Chaskalson describes. His summary of the three cases that have so far arisen in his Court testing those positive rights makes plain the difficulties they present to judges.

Judges must choose between two strategies. The first strategy is substantive. It requires judges to review at least the major decisions that government has made in allocating resources to satisfy the basic needs specified in the Constitution, and to reject any such decisions they find unreasonable. This substantive strategy might require judges to declare that government policy is unreasonable because it spends much too much on health care and, therefore, not enough on housing, for example, or vice versa. The second strategy is egalitarian: it insists not that government must make any particular allocation of resources but that it must show equal concern for all in the allocations it does make. It cannot, for example, distribute what it does assign for health care in a way that ignores greater or more basic health needs in order to serve lesser or less basic ones, when there is no need for that allocation.

A literal reading of the language of the South African Constitution might seem to recommend the first, substantive strategy. The Constitution declares that "[t]he state must take reasonable legislative measures within its available resources to achieve the progressive realisation"² of the rights it recognizes,

² S. AFR. CONST. (1996) § 27(2).

and that would seem to mean that the state's major allocations of resources must themselves be reasonable. It would be open to the courts, on this view, to declare that money must be taken from the government's road building programs, for example, to provide renal dialysis for all patients whose life that would prolong, because it is unreasonable to devote monies to transportation that might be used to save lives. But the second, egalitarian, strategy is also a plausible reading; the Court may read "reasonable," in this context, to mean "consistent with equal concern for all."

Chaskalson's account of the three decisions he discusses suggests that the Court has adopted (properly, in my own view) the egalitarian strategy.³ Mr. Soobramoney was treated with equal concern; if the government cannot provide, out of its health care budget, dialysis for everyone in renal failure, then it does not deny equal concern to give priority to those who can benefit most from that technology.⁴ The homeless people in the *Grootboom* case were not treated with equal concern, however, because the government had adopted a comprehensive housing program that gave priority within the stipulated budget to those whose need was less, and it deferred help to those homeless and vulnerable people whose need was plainly greater.⁵ The Court's decision in the nevirapine case seems even more evidently egalitarian rather than substantive.⁶ The Court did not decide that the Constitution's guarantee of reasonable health care required the government to institute a program for providing that drug. But it insisted that any program the government did institute for some children must be available to all children unless there is some compelling reason for discrimination. That is the spirit of equality that shines out from every aspect of Arthur Chaskalson's wonderful career.

2. Zagrebelsky

I found Gustavo Zagrebelsky's sensitive and wide-ranging discussion of jurisprudential issues very instructive. I am particularly grateful for his deft comparison of common law and continental theory, and for his provocative distinction between values and principles. I shall comment, however, only on his discussion of certain philosophical assumptions of my own work.

³ See that strategy would be available, as a means of enforcing positive rights, even in the United States Constitution, which does not include positive rights but does require, in its Fourteenth Amendment, that states may not deny to anyone "the equal protection of the laws." Unfortunately, the United States Supreme Court has declined to accept this aim and strategy. See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

⁴ See *Soobramoney v. Minister of Health, KwaZulu-Natal*, 1998 (1) SALR 765 (CC).

⁵ See *Government of the Republic of South Africa v. Grootboom*, 2001 (1) SALR 46 (CC).

⁶ See *Minister of Health v. Treatment Action Campaign (No. 2)*, 2002 (5) SALR 721 (CC).

He says that it is a mistake to suppose that I am “a proponent of natural law or of ‘moral cognitivism,’” because I have in mind, as the moral component of legal reasoning, not “the nature of things created by God or in the universal reason of men,” but “something like natural rights as conceived by members of society,” which is “empirically assumed as an existing—or perceived—fact. . . .”⁷ I think I agree, but I am anxious to avoid any misunderstanding. I certainly agree that morality is not something “created by God.” If there is a god, and he (or she) is good, then he is good because he is moral—not because he has created the standards of morality, in which case he could not, except circularly, be good. Nor do I believe that morality can be somehow based in the “universal reason” of human beings. I can understand the idea of universal reason in certain senses: in the apparently inbuilt capacity of human beings to reason about mathematics, for instance. But I do not believe that when people disagree about morality—about the permissibility of abortion, for example—one of them, at least, must be defective in a human intellectual capacity.

It is a more complicated issue what moral cognitivism is and, therefore, whether my position can accurately be called cognitivist.⁸ I think that moral claims are, at least in principle, true or false, and that their truth or falsity is largely independent of whether people believe or want them to be true. But I do not think that philosophical propositions about whether moral claims can be true are distinctly metaphysical, that is, that they are anything other than more abstract substantive moral claims. In particular, I do not believe in what I have called “morons,” that is, moral particles that interact with the nervous systems of human beings to produce moral convictions of different sorts. Some philosophers use “moral cognitivism” to refer to such causal claims; in that sense I am not a moral cognitivist. But other philosophers use the term to refer to the thesis that moral claims can be true independently of belief and desire; in that sense, I am a moral cognitivist. I suspect that those critics against whom Zagrebelsky wishes to defend me have that second sense in mind. (Philosophical moral skepticism seems to have survived longer, at least in Europe, among lawyers than among philosophers.) In that case, I am guilty, but I hope that the critics will read the article I just cited before continuing to press their attack.

I must now distinguish two senses in which someone might understand Zagrebelsky’s observation that the moral rights I have in mind are those of “society.” The first reading is suggested by his use of “empirical” and “fact.”

⁷ Gustavo Zagrebelsky, *Ronald Dworkin’s doctrine on legal principles: An Italian point of view*, 1 INT’L J. CONST. L. (I·CON) 621 (2003).

⁸ I explore the issues, discussed in these paragraphs, at length in my article, Ronald Dworkin, *Objectivity and Truth: You’d Better Believe It*, 25 PHIL. & PUB. AFF. 87 (1996), reprinted in 19 THE PHILOSOPHER’S ANNUAL (Rowman & Littlefield 1997), available at www.nyu.edu/gsas/dept/philo/faculty/dworkin/papers/objectivity.html and <http://24.86.132.253/120100/feature/feature.htm> [hereinafter Dworkin, *Objectivity and Truth*].

On this view, the moral rights that properly figure in decisions about what the law of a particular jurisdiction permits or requires are only those that, as a matter of fact, are recognized by the citizens of that jurisdiction. That would not be a helpful recommendation in pluralistic societies in which people strongly disagree about such rights; in which they disagree, for instance, about abortion. In any case, however, this is not my view. On the second reading, the fact that the people hold a particular view, or a particular mix of different views, on some moral issue like abortion is a circumstance that itself figures in deciding what assumptions about moral rights provide the best interpretation of the law of that jurisdiction. I agree. But sometimes, particularly in cases in which the community is divided, judges must also take into account which view of moral rights actually is, as a matter of substantive morality, the better view. And, in any case, the manner and extent to which they take public opinion into account must be governed by their own convictions about political morality—their convictions about what democracy requires in that regard, for example. They cannot without circularity refer that decision itself to public opinion; they must decide the truth of that matter for themselves.

3. Baxi

I very much admire Upendra Baxi's erudition—his learning ranges from the intricacies of Lockean scholarship to the subtleties of contemporary and post-modern literary theory—but even more the skill with which he integrates this learning with a deep knowledge of the constitutional traditions of so many countries including his own. I can only accept his chastening suggestion that I have myself been insufficiently attentive to the constitutional theory, achievements, and problems of other nations. He makes it plain how much an American constitutional scholar may learn from the history of Indian constitutional jurisprudence and development, in particular. His own work shows not only how careful and detailed a useful comparative constitutional jurisprudence must be; but also how profitable it can be. This journal is dedicated to just that care and profit.

I have, therefore, no good response to Baxi's gentle suggestion that I may be guilty of "not taking the postcolonial liberalism of existing south democratic constitutionalisms seriously,"⁹ beyond the lame admission that I do not feel competent to discuss that postcolonial experience with any authority. I shall therefore take this opportunity only to respond to a difficulty in my own work that Baxi identifies. He finds some shift in my different discussions of the distinction between the semantic intentions of the authors of a constitution—what they meant actually to say—and their expectation intentions, that is, what they hoped or expected would be the impact on the law of their saying what they did.

⁹ Upendra Baxi, "A known but an indifferent judge": *Situating Ronald Dworkin in contemporary Indian jurisprudence*, 1 INT'L J. CONST. L. (I·CON) 557 (2003).

(I discuss the same issue in my comments on Bernhard Schlink's essay later in this comment.) Baxi does not elaborate the problem he sees, but he refers helpfully to an article that discusses that issue, among several other topics.¹⁰

Suppose we were now to discover new and powerful linguistic evidence that the authors of the United States Constitution's Fourteenth Amendment, which declares that government may not deny to anyone the "equal protection of the laws,"¹¹ meant to say only that laws must be enforced strictly according to their terms. It would not violate the instruction they meant to give, for example, for a state to enact a law stipulating that Jews may not sue Christians for breach of contract, provided that law was used to deny only Jews that legal remedy and not some Christians as well. The equal protection clause has not been interpreted in that way, of course; it has consistently been understood to forbid any such discrimination in the substance, and not just in the enforcement, of laws. Should we conclude from our new linguistic discovery that this consistent interpretation is wrong, that the clause does not have the power we thought it had, and that the Constitution does not, after all, protect minority groups against even blatant discrimination?

I have, in fact, tried to answer that question, and it might be helpful to repeat my answer here.

I must start with a distinction, however, between fidelity to the Constitution's text and fidelity to past constitutional practice, including past judicial decisions interpreting and applying the Constitution. Proper constitutional interpretation takes both text and past practice as its object: Lawyers and judges faced with a contemporary constitutional issue must try to construct a coherent, principled and persuasive interpretation of the text of particular clauses, the structure of the Constitution as a whole, and our history under the Constitution—an interpretation that both unifies these distinct sources, so far as this is possible, and directs future adjudication. They must seek, that is, constitutional *integrity*. So fidelity to the Constitution's text does not exhaust constitutional interpretation, and on some occasions overall constitutional integrity might require a result that could not be justified by, and might even contradict, the best interpretation of the constitutional text considered apart from the history of its enforcement. But textual interpretation is nevertheless an essential part of any broader program of constitutional interpretation, because what those who made the Constitution actually said is always at least an important ingredient in any genuinely interpretive constitutional argument.¹²

¹⁰ See Ara Lovitt, *Constitutional Confusion?* 50 STAN. L. REV. 565 (1998).

¹¹ U.S. CONST. amend. XIV.

¹² Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe and Nerve*, 65 FORDHAM L. REV. 1249, 1249–50 (1997).

The article Baxi cites seems to suggest that this answer is inconsistent with other arguments I have made: “Dworkin suggests that if fresh historical research revealed that the word ‘cruel’ meant ‘expensive’ in eighteenth-century parlance, then the Eighth Amendment today would only prohibit those punishments that are expensive and unusual.”¹³ But that is not what I said: I said only that we would then have to give up our assumption that “they intended the Constitution to say that cruel and unusual punishments are forbidden,”¹⁴ which is very different.

4. Schlink

Bernhard Schlink is a superb and famous novelist as well as a lawyer and judge, and I am intrigued by his comments about a literary analogy I used. I imagined a group of writers each adding a chapter, in turn, to a novel they were writing together and serially. He reports on actual examples of that odd genre in the German newspaper *Die Zeit* and is quite convincing in his low opinion of the product. He is modest as well as distinguished; he says that his equally skeptical comments about my own legal writings are limited to their applicability to German law and practice. In fact, his objections are much deeper than that. If they are right, then some of the most central themes of my work must be revised. His objections are detailed and extensive, and I must, therefore, devote a large part of this overall comment to identifying and examining them.

4.1. Semantic intentions and further expectations

Schlink begins by suggesting that several “dichotomies” I have constructed are too rigid.¹⁵ He may have misunderstood the logical force of these distinctions, however. The most important of these is a distinction between what the author of some rule or order meant to say, in laying down his rule or issuing his order, and what he hoped or expected or intended others would do in virtue of his saying what he did. We must make that distinction—and it is of necessity a dichotomous distinction—in order to make any sense of the idea of legislation or of any other speech act that creates or alters a normative structure. But, of course, it is a further and perhaps difficult question how one is to make the distinction in a particular case.

Our decision as to what someone has actually said must be sensitive, as J. L. Austin and other philosophers of language have emphasized, to all the features of the context in which his speech act occurs. Schlink discusses an example I used: suppose an owner tells his manager to choose the best candidate

¹³ Lovitt, *supra* note 10, at 578.

¹⁴ RONALD DWORKIN, *FREEDOM'S LAW* 291 (Harvard Univ. Press 1996).

¹⁵ See Bernhard Schlink, *Hercules in Germany?* 1 INT'L J. CONST. L. (I-CON) 610 (2003).

for some job and then adds that his son is a candidate. We may assume, perhaps, that the owner hopes that his son will be hired; perhaps we may also assume that he expects, in virtue of his power, that this hope will be respected. It is, however, a further question whether his order included a direction to hire his son: whether he *told* the manager to hire him. This is a matter of interpretation, and not, of course, just a matter of identifying the words someone has used. I suggested, in presenting the example, that if the manager winks when adding the news about this son, that would count strongly in favor of deciding that he *said* to hire his son, that that was, in other words, part of the content of his instruction, rather than just something he hoped or expected would happen. But if he did not wink, but added the information about his son with, as it were, a straight face, then the manager might be right to conclude that he had not been told to hire the owner's son.

The distinction is particularly important in cases in which, on one interpretation, the addressee of the instruction is required to exercise an independent judgment that, on another interpretation, he is not required to exercise. If the manager thinks that the owner's son is not the best candidate, then it matters whether, on the best interpretation, the order requires him to hire the best candidate, in which case, given his opinions of the candidates, he disobeys if he hires the owner's son, or whether it requires him to hire the owner's son, in which case he disobeys if he does not. The distinction is crucial for constitutional judges. Suppose a constitution contains a clause guaranteeing "the right to life." It makes an enormous difference whether that clause is best understood as enacting the principle that whatever violates the right to life, as that right is correctly construed, is unconstitutional, or as enacting the very different principle that whatever violates the right to life in the opinion of the constitution's authors is unconstitutional. In the first case, but not the second, judges must decide for themselves whether a government violates the constitutional guarantee by permitting abortion, for example.

Schlink says, correctly, that the distinction may be difficult to make in particular circumstances. It is still, however, necessary to make it. He also says that it would be wrong for a judge who decides that the constitution's authors intended to lay down an abstract principle simply to ignore their opinions as to whether, for example, permitting abortion violates the right to life. We need some care here. Judges should certainly, as he puts it, "take seriously" the opinions of the framers if that means that they should reflect very carefully before arriving at and enforcing an opinion contrary to that of historically important and presumably distinguished people. (They should also, we might think, study carefully before rejecting the opinion of contemporary moral leaders, or, indeed, of most citizens.) Humility alone would recommend that care. Schlink also says, however, that it would be wrong to enforce abstract provisions in a way that departs from the framers' own concrete opinions "as if" these opinions had never been held or expressed. If he means something more than that they must take contrary opinion "seriously" in the way I just described, then

he is wrong. If, after as careful study as time permits, a constitutional judge determines that the right-to-life clause is abstract, and also that the right to life is consistent with abortion, then he must so hold. If the framers held a contrary opinion, then the judge *must* decide “as if” they did not hold a contrary opinion, that is, in the way he would decide if they didn’t. What else can he do? If he did not rule that abortion is consistent with the right to life, he would be cheating people of what, on his carefully considered view, are their constitutional rights.

Schlink considers my views about the “cruel and unusual punishment” clause of the American Constitution’s Eighth Amendment by way of further example.¹⁶ He begins by pointing out, as I have myself, the various ways we might understand what the framers of that amendment meant to say in using the quoted language. In the end, however, lawyers, judges, and scholars must decide among these; they must decide what the Eighth Amendment actually says. My own interpretive opinion is that it enacts the abstract principle that forbids cruel and unusual punishments, and not one of the intermediate principles Schlink defines. I base that opinion on the language of the text, and on the fact that nothing appears in the historical record to contradict the most natural reading of that language. But I would certainly have to consider any evidence Schlink or another scholar might offer for one of his list of alternatives. I claim that my interpretation is true, but not certainly true.

Schlink is wrong, however, in his further claim about the “constitution as a logical whole free of contradictions.”¹⁷ There is surely no logical inconsistency in a document that stipulates, first, that government may take life only in conformity with an appropriate process and, second, that it is never in conformity with appropriate process to take life as a punishment (as distinguished, for example, from taking life in military action or for other reasons.) I agree, however, as I have several times said, that the text of the American Constitution, as a whole, strongly suggests that the original framers did not believe (any more than most of the Supreme Court justices now believe) that the death penalty is outlawed by the Eighth Amendment. That only means, however, that judges must decide whether the framers meant to lay down an abstract principle, or their own concrete convictions, or something else on Schlink’s list of possible interpretations. If the judges decide that the framers meant to enact the abstract moral standard I described, then the judges they must put to themselves, as a moral issue, the question whether the death penalty violates that abstract standard.

4.2. Rights, principles, and interpretation

I certainly agree with Schlink’s brief remarks about Elmer’s Case. My argument, throughout *Law’s Empire*, is that judges must seek integrity—that is

¹⁶ U.S. CONST. amend. VIII.

¹⁷ Schlink, *supra* note 15, at 613.

the point of the chain-novel analogy that Schlink begins by discussing—and that legal argument is therefore interpretive. An interpretive argument in Elmer's Case must take into account all the factors Schlink mentions and a good deal more. I also agree with most of his remarks in his section 3. In spite of his suggestion that German scholars and judges disagree with my "dichotomies," I see no difference between his idea of a "supportive juxtaposition" and the interpretive account of law that I defended in that book and, more generally, in my other philosophical writings. (Though Schlink, as we shall see, does not think that judges should imitate my imaginary judge Hercules, he is himself Herculean in his account of how judges should reason.)

I disagree, however, with his suggestion that integrity is coextensive with a plausible constitutional guarantee of equality. I cannot imagine that German judges would hold a legislative scheme unconstitutional that imposed strict liability for defective cars but not for defective washing machines. Integrity, which is a distinctly judicial virtue, is not a constitutional requirement of legislation. I do agree, however, as I argued in *Law's Empire*, that integrity is related to and drawn from the *political* virtue of equality.

4.3. One right answer?

The next section of Schlink's complex and interesting paper defends the lawyer's familiar claim that there are no right answers to hard cases at law, only different answers. His argument, I believe, reveals a certain conflation that has made that familiar idea so popular: a conflation of the proposition that lawyers cannot be certain which decision is right in a hard case and the very different proposition that no single decision is right in a hard case.¹⁸ Schlink seems to ignore the difference when he compares judicial decisions with "theories that deal with infinite reality."¹⁹ Most mathematicians think that they can indeed prove many propositions about infinite sets. But it is, in any case, a different question, and one of the deepest in the philosophy of mathematics, whether the law of the excluded middle holds about such sets, that is, whether we know in advance that a proposition about such sets is either true or false even though we do not know which it is.

I am not sure, however, that Schlink has mathematical infinity in mind. Karl Popper and other philosophers have defended a "falsification" theory about empirical science: that scientists can never conclusively verify, but can only conclusively falsify, any empirical claim. That view is controversial in the philosophy of science, but it does not follow, even if one accepts it, that scientific reality is itself indeterminate. A scientist who believes that the big bang theory of the origin of the universe can never be conclusively proved may

¹⁸ I explore the issues discussed in these paragraphs at length in the article I cited in my response to Zagrebelsky above. See Dworkin, *Objectivity and Truth*, *supra* note 8.

¹⁹ Schlink, *supra* note 15, at 615–16.

nevertheless think that the big bang either occurred or it did not. Schlink wants to apply something like the falsification theory to law: law, he says, is “a field of failure and of corroboration that makes legal progress possible, though it does not guarantee it.”²⁰ “Rarely is there one right decision” at law, he adds, “[g]enerally, there are more or less reliable, more or less defensible decisions.”²¹

Once again, this seems to ignore the crucial distinction between uncertainty and indeterminacy. If we really could completely order all legal “decisions” in their degree of reliability or defensibility, then we would not only know that there was a single right answer but we would know which answer it is. It would be the answer that comes top of the ordering. But Schlink presumably thinks the ordering is not only incomplete but incomplete at the top: he thinks, apparently, that lawyers and judges “rarely” know which answer is the most reliable or defensible. Let us assume, for a moment, that judges do often find themselves absolutely at a loss to find reasons to think that one decision in a case is more reliable or defensible than the other; that is, they simply cannot see any reason for thinking one decision is better, all things considered, than the other. Even then, it would not follow that one decision *is not* better than the other. On the contrary, the fact that judges were puzzled about which answer was better would mean that they assumed that one answer really *was* better, even though they did not know which it was. Otherwise they would not be puzzled. Of course, judges might think that there actually is no right answer, that neither decision is any better than the other. But this is a highly, indeed extravagantly, ambitious claim that no one actually holds. Some versions of legal positivism might be thought to support it, but these versions of positivism are logically inconsistent.²²

In fact, however, the supposition I just made is crazy. Lawyers and judges (I dare say Schlink included) rarely think there is no reason inclining to one decision in a particular case rather than another. They often disagree, but they disagree because they believe different decisions to be best, which means that each believes that one decision is the best. It is incoherent, however, to believe, at the same time, that one decision is best and that no decision is best. Lawyers like to say, because it seems appropriately modest and subtle, “I think that a particular decision is best, but that is only my opinion, and I cannot say that those who disagree with me have made a mistake or that they are wrong.”²³ That statement is, however, as I just said, not coherent. I agree with Schlink that it is an important feature of law and legal reasoning that answers

²⁰ *Id.* at 616.

²¹ *Id.*

²² See RONALD DWORKIN, *A MATTER OF PRINCIPLE* ch. 5, 119 (Harvard Univ. Press 1985). (chapter 5 “Is There Really No Right Answer in Hard Case?”).

²³ See Dworkin, *Objectivity and Truth*, *supra* note 8.

are rarely demonstrable. But it forfeits the interest of that fact, and buries important issues irreparably, to misstate that fact by saying that rarely is there one right decision.

One further aspect of Schlink's discussion calls for independent comment. He says that of the fact that one right answer is rarely available does not cause practical problems because "[l]aw has its own methods of settling these situations" through "presumptions, burdens of explanation, rules of justification and of proof."²⁴ He cannot be thinking, at this point, of evidential devices, because those cannot resolve uncertainty about the state of the law. He must mean devices for producing a decision about what the law on some matter is. But then these devices, whatever he has in mind, are part of law's resources for generating a right answer to that question, not resources for deciding cases when there is no such answer. I confess that I do not understand Schlink's final remarks in this section, about sexual freedom and affirmative action. I gave these only as cases in which the community is divided about values, and so as cases in which the pragmatist motto I was considering, that judges should decide so as to realize the community's values, is of no help.

4.4. Hercules

In his next section, Schlink argues that judges, like doctors and architects, should be more modest than Hercules, the ideal judge I invented to describe legal reasoning. "From the point of view of the German scholar and judge of constitutional law," he says, "the institutional interplay not only does not require a Herculean judge, it cannot tolerate one."²⁵ Judges should know when to defer to the knowledge and convictions of others, and not always to insist on their own opinions as best or final. But judges (and legal theorists) disagree about when and in what ways judges *should* defer to the opinions of others, including legislators, experts of various kinds, and public opinion at large. Each judge must therefore *necessarily* rely on his own convictions about political morality—about the best conception of democracy, for example—to decide when it is appropriate for him to defer to others.²⁶ Judges may not want the Herculean task, and they may not realize that they have it. But that task, in the nature of the case, is inescapable.

²⁴ Schlink, *supra* note 15, at 616–17.

²⁵ *Id.* at 618.

²⁶ I elaborate on this point in my upcoming article. See Ronald Dworkin, *The Judge's New Role: Should Personal Convictions Count?* 1 J. INT'L CRIM. JUST. 4 (2003). For further discussion of the point, see the report of an extended conversation among Robert Badinter, Stephen Breyer, Antonio Cassese, Dieter Grimm, Gil Carlos Rodriguez Iglesias, and myself, during which that article was presented, in *Les entretiens de Provence: Le juge dans la société contemporaine* (Publications de la Sorbonne 2003).