

If You Cannot Help Being Committed to It, then It Exists: A Defence of Robust Normative Realism[†]

Veronica Rodriguez-Blanco^{*}

Abstract—This review article examines David Enoch’s recent book *Taking Morality Seriously* and focuses on ‘the deliberative indispensability of irreducibly normative truths’ which is a central argument of the book. I will show that this important and original argument as it stands fails. I will also argue that if Enoch had embraced all the consequences of his argument, then he would have opened up a more promising line of argument via which to defend the robust realism of normative truths. I will, therefore, attempt to defend a modified version of robust realism of normative truths and, in so doing, I will show how all the implications of Enoch’s insight can fully be embraced. I will finally demonstrate how this modified version illuminates some Dworkinian insights on the nature of law, but also undermines Dworkin’s theory of constructive interpretation.

Keywords: Meta-ethics, Legal Philosophy, Dworkin, the deliberative point of view, practical reasoning, moral realism

1. *The Story of a Philosophical Problem: Putting Enoch’s Robust Realism in Context*

Imagine the following example. Jean is an 18-year-old law student who suffers from a heart condition that requires an immediate operation. A doctor operates on her but negligently overlooks an allergy report that mentions Jean’s sensitivity to a certain drug. After the operation, Jean suffers liver failure that will require treatment for an indeterminate period of time. Evidence shows that Jean had an allergic reaction to a drug administered during the operation and that this reaction caused the liver failure. The administered drug had not been mentioned in Jean’s allergy report, however a paper in the little-known

^{*} Senior Lecturer, Birmingham Law School, University of Birmingham. Email: v.rodriguez-blanco@bham.ac.uk. I am grateful to Julie Dickson for helpful comments on previous drafts.

[†] A review of David Enoch, *Taking Morality Seriously: A Defence of Robust Realism* (OUP 2011).

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academic journal, *Drugs*, had recently reported that the administered drug has a similar chemical composition to the drug identified in the allergy report. The doctor is taken to court and it is alleged that his action has been negligent. Some laymen, judges and legal practitioners might believe that Jean has a right to be compensated and furthermore, that this right is objective and absolute. This means, there is such a right independently of our legal decisions, legal conventions, legal and moral theories, conceptions or practices. Normative truths, such as 'good' and 'rights', exist in an absolute and robust manner. The appropriate metaphor for these normative truths is that they are part of the 'furniture of the universe' or that they exist in 'Plato's Heaven'. Some philosophers have, however, argued over the nature and existential status of rights and other normative truths. They assert that they do not exist in an absolute manner; that they do not exist independently of our agreements, beliefs, practices or conventions. Dworkin,¹ for example, has famously rejected the idea of robust and absolute normative truths since it entails an implausible worldview that conflicts with our scientific and empirical understanding of the world. Thus, normative truths cannot be verified or observed scientifically. Furthermore, Dworkin asserts, normative truths depend on our moral theories and morally substantive claims. Thus, if I assert that 'the killing of animals for consumption is morally wrong', this statement depends on the substantive moral claim that it is always wrong to kill a living being and to inflict pain on living creatures. But, one might ask, what makes these substantive moral claims true and objective? Apart from asserting that the truth of such statements is not independent of our moral theories and beliefs, Dworkin does not tell us *why* or in virtue of *what* they are objective moral truths. Dworkin² tells us that judges disagree genuinely over the nature of law and more specifically over what the law is. According to Dworkin, legal practitioners advance different conceptions of the point of the law. The task of the judge is to advance the best possible interpretation of the point of the law, which at the pre-interpretative stage emerges due to practice and at the interpretive stage is constructed and refined in light of the two criteria of moral appeal and fit with the bulk of the past legal material. Let us take the case of Jean: judges and legal practitioners might disagree about whether Jean has a right to be compensated. Some judges and legal practitioners might think that the doctor has not breached his duty of care (the standard of care) since a responsible body of medical opinion has stated that common medical practice is to rely on reports provided by laboratory tests. Furthermore, there was no knowledge at the time of the operation that the pharmaceutical drug that was administered belongs to the family of pharmaceutical drugs to which Jean is allergic as identified by the allergy report.³ The common practice of medical doctors is to learn about

¹ R Dworkin, 'Objectivity and Truth: You'd Better Believe It' (1996) *Phil Public Aff* 87 Vol. 25.

² R Dworkin, *Law's Empire* (Harvard University Press 1986).

³ *Bolam v Friern Hospital Management Committee* [1995] 1 WLR 582.

pharmaceutical drugs from prominent journals. Medical doctors are not pharmacologists or chemists and they should not be expected to know about recent and little heard of discoveries relating to pharmaceutical drugs. In contrast, some other judges and legal practitioners might disagree and consider that it is a matter of diligence and logic to learn about the most recent advancements in the field, particularly in light of the fact that the patient is known to be allergic to an identified drug. Furthermore, internet and electronic resources make available to medical doctors knowledge that in the past was only accessible to specialists in the field. It seems unjust to deny compensation for foreseeable damage just because a responsible body of medical opinion has established that medical doctors usually rely on reports from laboratory tests and learn about advancements in pharmaceutical drugs from well-known academic journals. Thus, they might argue, judges need to pay attention to what the practice *should be* rather than to what it *is*.⁴ According to Dworkin, in the case of Jean, the judge exercises what he calls ‘constructive interpretation’. As such he will decide according to what is morally appealing and fits the bulk of past legal material. The starting point of the judge will be the different conceptions of the legal practice and the point of such practice. Arguably, in this case, it is morally appealing to advocate the view that—despite the fact that it did not reflect the common practice of medical doctors—Jean has a right to be compensated because the medical doctor ought to have been aware of recent discoveries in the field of pharmaceutical drugs. This also fits the bulk of past decisions where the test of the standard of duty is tempered by the logic of what typical medical practice ought to be. It is apparent then that there is clear continuity between Dworkin’s rejection of robust normative truths and his legal philosophy. Jean’s right to be compensated does not exist independently of our morally substantive conceptions and rights are neither part of ‘the furniture of the universe’ nor are in Plato’s heaven. It is not the task of the judge, Dworkin tells us, to engage with the *nature or concept* of rights, duty, responsibility or obligation to determine their robust truth. On the contrary, the judge engages with different conceptions about the point of law that emerges in legal practice and aims to find the best possible interpretation in light of what seems to him or her morally sound and fits the bulk of past legal material. The judge does not need to ask the morally practical question: ‘What ought I to do?’, but rather look at the different conceptions that emerge from our views about the point of the practice. Consequently, Dworkin’s constructive interpretation is a theoretical exercise rather than a practical one. In the last section of this essay, I will explain further this distinction and use it to criticize Dworkin’s scepticism towards robust normative truths.

Contra Dworkin, many contemporary legal theorists have recognized the significance of showing that there are absolute and robust normative truths.

⁴ *Bolitho v City and Hackney Health Authority* [1997] 4 ALL ER 771.

If there are no normative truths, then a contradiction between our more abstract philosophical thinking and our practices and experiences seems inevitable. For example, if there are no normative truths, then how can we explain the phenomenology of our legal practices and adjudication, ie when we engage in trying to find the ‘right answer’ to a legal dispute, we seem genuinely to disagree as to what the law is. Furthermore, if there are no normative truths, then there is no right answer regarding whether the judge has decided correctly or incorrectly, and there is no point in engaging in doctrinal analyses to determine the sound principles that ground legal notions such as rights, obligations, negligence, duty of care, breach of duty of care, legal responsibility, sovereignty and so on. If there are no robust normative truths, then legal analyses and legal thinking fall prey to relativism, subjectivism and scepticism. Let us think about Jean’s case again. If there are no robust normative truths then, arguably, the disagreement over whether she has a right to be compensated is relative to the substantive moral claims of judges and legal practitioners and not to whether she truly and robustly has this right. We might say that in some sense all legal practitioners and judges are correct in their decision-making to the extent that their decisions are coherent with their moral substantive claims and perspectives. Let us imagine another example. Susan, who lives in England with her spouse Peter, is raped by him. Nowadays we say that Peter has committed a moral wrong and, under criminal law, he has committed a legal wrong. Pre-1991,⁵ however, Peter’s wrong would not have been a legal wrong. Furthermore, philosophers like Dworkin, who do not endorse the view that there are robust normative truths, might suggest that pre-19th century the rape of a spouse was not morally wrong because the wrongness of rape depends on the moral claims, theories and perspectives of the time. In contrast, some philosophers, laymen and legal participants believe that the rape of spouses is and has always been morally wrong, that Peter has committed a wrong, and that the law before 1991 was mistaken. So how can we explain this phenomenology without absolute and robust normative truths? The phenomenology of our legal practices becomes merely illusory and the only task left is to unmask the myth of ‘the truth in law’. Some have argued that literary and historical scholarships are better equipped than philosophical and doctrinal analyses to perform the task of unmasking this myth. For a less radical project concerning ‘truth in law’, and if Dworkin is correct in rejecting robust normative truths, then constructive interpretation seems compelling.

Contrary to Dworkin, who in the late 1970s wrote *Taking Rights Seriously* and rejected the view that there are absolute and robust normative truths, David Enoch aims to defend robust realism of normative truths, ie a full meta-ethical position. Such a position is, as we shall later see, the only way to ‘take morality seriously’ and as I will argue in the last section of this essay, this

⁵ *R v R* [1991] UKHL 12, [1992] AC 599.

approach is promising in the legal sphere since only robust realism enables us to take seriously the possibility of a 'right answer' in law. Enoch's book is divided into eight chapters, but the central chapters are the second and third. In these chapters Enoch adumbrates his two core arguments to defend robust realism of normative truths. The first argument is a refinement of an idea found in other ethical realists on the moral significance of moral disagreement.⁶ Enoch argues that in our daily life we disagree 'genuinely' on what should be done and only robust realism can provide a satisfactory explanation of our experiences. Furthermore, a neutral or impartial perspective on what ought to be done distorts the experience of 'genuine' disagreement that morality involves, ie that one party to the dispute *must* be wrong and the other *must* be right. The second argument is, in my view, where the originality of the book lies. Enoch calls this argument 'The Deliberative Indispensability of Irreducibly Normative Truths'. I will concentrate on the discussion of this important argument and will show that this argument fails as it stands.

2. Harman's Challenge

For Enoch, normative truths are universal, objective, absolute and independent of how we conceive them and of whether we desire them or not.⁷ In a metaphorical sense, we could say that they are in Plato's heaven, ie they are outside of our limited perspective and conceptions. We would say, in the examples above, Jean truly has a right to be compensated and Peter has committed a wrong independently of our moral substantive claims, moral theories, beliefs, desires, cultural and social practices or conventions. Thus, Enoch argues that these normative truths are not reducible to natural facts and therefore he aims to defend non-naturalist robust normative realism.⁸ Normative truths refer to what should be done or what is valuable.⁹ They are present in our everyday experiences. Gilbert Harman, however, has questioned the intelligibility of the idea that there are absolute and robust normative truths since they cannot exist in our empirical or scientific world.¹⁰

⁶ His argument is a refinement of views on the capacity of realism to explain the phenomenology of moral disagreement. (See D Brink, *Moral Realism and the Foundations of Ethics* (CUP 1989) 24). See also F Tersman, *Moral Disagreement* (CUP 2006) and my article 'Genuine Disagreements: A Realist Reinterpretation of Dworkin' (2001) Vol. 21 OJLS 649, where I argue that Dworkin cannot avoid being committed to a moral realist view if he wishes to make sense of his distinction between 'genuine' theoretical disagreements and semantic disagreements.

⁷ D Enoch, *Taking Morality Seriously: A Defence of Robust Realism* (OUP 2011) [Hereafter *TMS*], 3.

⁸ I doubt whether he succeeds in separating his view from non-reductivist naturalism regarding normative truths. His defence of strong supervenience, ie the idea that it is impossible for there to be two things that are indistinguishable in their natural properties but are distinguishable in their normative ones (136) might entail a commitment to some kind of naturalism. Enoch himself seems to recognize that this view entails non-reductive naturalism (101, footnote 2).

⁹ Enoch, *TMS* (n 7) 3.

¹⁰ G Harman, 'Moral Explanations of Natural Facts – Can Moral Claims Be Tested Against Moral Reality?' (1986) *Southern J Phil* 57 Vol. 24.

Harman asks: how do we know that things like stones, cats or electrons exist? Harman answers that they exist because either we can observe them or they play an explanatory role in our best scientific theories. In contrast, in response to the question about the explanatory role of objective and universal moral truths, Harman answers that there is no explanatory role. For example, if you saw a child burning a cat you would say, 'It is wrong to do that'. The best explanation of this judgment, according to Harman, is sociological, psychological and/or cultural. An apparently irreducible, objective and universal normative fact can be eliminated and is not needed to provide the best possible explanation of our moral experiences. Similarly, if electrons can be eliminated from explanations of our physical phenomena, then we are not justified in believing in them. However, our best physical theories need a commitment to 'electrons' to explain physical phenomena, hence we cannot eliminate them in the way we can eliminate irreducible moral facts. Therefore, according to Harman, we are justified in believing in electrons, but we are not justified in believing in irreducible moral facts. The latter are redundant for our explanations. Enoch aims to undermine views similar to the ones defended by Harman, because they only focus on explanation. According to Enoch, views like the one advocated by Harman give privilege to the explanatory enterprise, ie they give privilege to the idea that our task is to explain what the world is like, and that any other enterprise is justified to the extent that it is part of or contributes to explanations of what the world is like. This approach ignores other human enterprises, such as the need to make intelligible and meaningful our existence, the need to act according to what seems right, just or good. Thus in the examples above, there is nothing that gives Jean a right to be compensated, except for the fact that it is part of our moral beliefs and practices to give compensation in cases of physical harm caused by negligent wrongs. According to Harman, it is nonsense to postulate robust normative truths to show the wrongness of Peter's act of rape and Jean's right to be compensated as absolute and true. These normative truths do not help us to explain how the world is. We can eliminate them without losing sense of the world. Thus, the explanatory enterprise becomes omnipresent. We therefore only need social and biological facts to explain our behaviour and emotions regarding the wrongness of rape and the rightness of compensation for medical professional negligence. For example, one might explain the fact that we feel very strongly about Jean's right to be compensated because our evolutionary history has shown that harm and pain is avoided by our animal nature. Similarly, our feeling that there is genuine wrongness in Peter's act is due to the fact that the mutual trust and respectful caring that develops between two human beings who live together has been undermined. We do not need to talk about 'the wrongness of marital rape' or the 'right to be compensated' as these normative categories, ie right and wrongness, can be eliminated from our explanations. We only need to be engaged in an explanatory enterprise.

3. *The Deliberative Indispensability Argument: Can It Stand?*

Enoch asserts that those who, like Harman, advance the priority of explanation are really concerned with parsimony. In other words, they are concerned not to multiply entities without sufficient reason. Thus, in our examples, the key concern is with not multiplying categories such as 'right' or 'wrongness' without sufficient reason. They might ask, 'Why do we need these concepts if they do not refer to anything in the world?'

Contra Harman, Enoch points out that being explanatorily useful is not the only good and sufficient reason and that we can multiply entities when they are *indispensable*.¹¹ Enoch's first strategy is then 'a separatist strategy' concerned with severing the connection between the view that explanation has priority over any other enterprise, eg the need to make intelligible and meaningful our actions and the actions of others, the need to decide what we ought to do or how we ought to act. Thus, according to Enoch, the existence of some entities seems indispensable for the purposes of our activities and different enterprises in the world. For example, it seems indispensable to be committed to making intelligible the actions of others. It is equally indispensable to believe that something makes things and acts right, good and just to make sense of our moral decisions.

How does a judge decide how he ought to decide in Jean's case or Peter's case if the answer is already predetermined by the explanatory enterprise, ie our biological, sociological or cultural natures? Furthermore, how can we attribute legal and moral responsibility?

Enoch relies on recent views advanced in the philosophy of mathematics and particularly on the view of Colyvan who defends a Platonist or robust realist position in mathematics on the basis of the indispensability argument.¹² However, as I will show below the indispensability argument for mathematical realists is anchored in the priority of explanation due to its commitment to naturalism and confirmational holism. Naturalism means that we abandon the idea that the philosophical method occupies a privileged position: we do not rely on anything that is beyond experience and can be known by the merely hypothetical-experimental method of science to determine the truth of our propositions. This means that merely theoretical or conceptual ideas that cannot be assessed empirically cannot be part of our theories. Confirmational holism entails that we cannot test our propositions individually and that we can only test whole sets of propositions. Thus, let us suppose that we have the following scientific propositions: 'sunlight is composed of seven different wavelengths which can be detected by looking through a prism' and 'light has a dual existence: as a wave and as a particular'. These propositions need to be

¹¹ Enoch, *TMS* (n 7) 52–54.

¹² M Colyvan, *The Indispensability of Mathematics* (OUP 2001) and 'In Defence of Indispensability' (1998) *Phil Math* 39 Vol. 6.

confirmed holistically and not individually. If an experiment shows that the first proposition is false, this is not sufficient to reject it. To reject the proposition it is also necessary to show the falsehood of other interrelated propositions.

Colyvan does not separate the indispensability and the explanatory arguments. On the contrary, for mathematical realists explanatory priority and indispensability cannot and *should not* be separated, they are inevitably interconnected.¹³ Let us call this position the ‘inseparability’ thesis and the mathematical realists and philosophers who advocate this view ‘inseparatists’. According to Enoch, a philosopher who advocates the view that explanation is an indispensable activity is unable to show that other kinds of indispensability are not equally respectable.¹⁴ They cannot discriminate between respectable and non-respectable types of indispensability. Thus, for Enoch, if the existence of normative truths is indispensable for making sense of our moral decisions, and the existence of prime numbers is indispensable for making sense of our mathematical theories, then normative truths and prime numbers are equally indispensable. Thus, the existence of normative truths such as ‘rights’ or ‘wrongness’ are indispensable to our engagement with legal deliberation and decision. According to Enoch, one cannot argue that normative truths can be eliminated because they play no explanatory role in how our empirical world is. Moreover, Enoch tells us that philosophers who advocate the ‘explanatory indispensability’ thesis cannot advance a principle to demarcate explanatory indispensability from other types of indispensability. Therefore, as long as no one has advanced such a principle, or because such principle cannot be advanced (I am not sure which view Enoch takes on this) explanatory indispensability and other kinds of indispensability have equal status.¹⁵

I believe that Enoch is mistaken on this. It is true that the defenders of explanatory indispensability cannot show that explanatory indispensability *qua* indispensability is privileged over other kinds of indispensability, but they have shown that explanatory indispensability *qua* explanation is privileged.¹⁶ In consequence, the additional principles advanced by mathematical realists that enable them to separate the wheat from the chaff, ie to differentiate between different types of indispensability, are naturalism and confirmational holism. Mathematical realists rely on the works of Quine¹⁷ and Putnam’s work.¹⁸ According to Quine and Putnam, if our *best* scientific theories need to be

¹³ Colyvan establishes that naturalism and confirmational holism ought to be compatible with the indispensability argument: ‘In particular, I will be defending the Quine/Putnam version of the argument against Maddy’s claim that there are internal tensions between the doctrines of naturalism and confirmational holism. As we shall see, both these doctrines are crucial to the indispensability argument, so it is important that they be mutually consistent’ (‘In Defence of Indispensability’, *ibid* 39).

¹⁴ Enoch, *TMS* (n 7) 55.

¹⁵ *ibid* 11, 50, 56.

¹⁶ Colyvan (n 12).

¹⁷ WO Quine, ‘On What There Is’ in *From a Logical Point of View* (2nd edn, Harvard University Press 1980) 1.

¹⁸ H Putnam, ‘Philosophy of Logic’ in *Mathematics, Matter and Methods: Philosophical Papers. Volume I* (CUP 1979) 323.

committed to the existence of certain entities to make sense of the empirical world, for example, our best biological theories are committed to DNA and our best physical theories are committed to ‘electrons’, and if they cannot be eliminated without losing intelligibility, then, by inference from the best explanation, such entities exist. For example, if we attempt to reduce electrons to non-theoretical or empirical entities or to eliminate them, the physical data will not be coherent and our physical theories will be unrecognizable and probably unintelligible. Similarly, if we attempt to eliminate differential equations from our mathematical and physical theories, the physical and mathematical data will be incoherent. What we call our ‘best scientific theories’ are the *best* because they have proved themselves to be successful and have passed holistically the tribunal of experience (confirmational holism). Therefore, contrary to Enoch’s view, mathematical realists can discriminate among different indispensabilities.

Enoch, however, advances a refinement of the indispensability argument. According to Enoch there is an additional type of indispensability called ‘deliberative indispensability’. Enoch distinguishes between instrumental indispensability and essential indispensability. Thus, something is instrumentally indispensable if it cannot be eliminated without undermining whatever reason we have to engage in that project.¹⁹ For example, if I engage in a religious project then I cannot eliminate the entity of God, or some kind of deity or some kind of perfect state. To eliminate these things undermines the reasons for engaging in that project, eg to reach unity with God or some kind of deity or reach a state of perfection. However, Enoch tells us that something being instrumentally indispensable cannot guarantee justifiably ontological commitments. A further essential indispensability is also necessary. *According to Enoch, a project is essentially indispensable if it is rationally non-optional. This means that we cannot rationally disengage from such projects.*²⁰ Enoch advocates the view that we are essentially deliberative creatures, ie we cannot help but ask ourselves what we should do, believe, act, reason or care about.²¹ This deliberative stance is from the first-person perspective.²² We are engaging in deliberation that presupposes ‘good’, ‘valuable’, ‘duty’ and ‘obligation’. Arguably, Enoch tells us, these are rationally non-optional activities because of the kind of creatures that we are. *Contra* Enoch, my interpretative point is that mathematical realists argue that explanatory indispensability is privileged over other types of indispensability and, furthermore, that these other types of

¹⁹ Enoch, *TMS* (n 7) 69.

²⁰ *ibid* 70.

²¹ *ibid*.

²² Enoch says the following, *a propos* of an example about choices between doing philosophy or law: ‘Even with answers to most - even all - of these questions, there remains the ultimate question. “All things considered”, you ask yourself, “what makes best sense for me to do? When all is said and done, what should I do? What *shall* I do?”’ (Enoch, *TMS* (n 7) 72).

indispensability cannot show the ontological existence of the entities to which they are committed *unless* they are anchored in naturalism and confirmational holism. But Enoch cannot avail himself of this strategy because he aims to be a non-naturalist realist.²³ Enoch completely ignores this important point which has equally been raised by mathematical realists and ‘inseparatists’. A philosopher who advocates the ‘inseparability thesis’ will claim that it is fallacious to say that if deliberation is a rational non-optional project for creatures like us and if normative entities are indispensable for the success of deliberation, then by inference to the best explanation, such normative entities—values and oughts—do exist. But where, exactly, does the fallacy lie? The ‘inseparatist’ philosopher will say that the fallacy lies in thinking that because the project is ‘rationally non-optional’ we are ‘necessarily committed to its existence’ in the same way that we are committed to ‘electrons’, ‘DNA’ or ‘differential equations’, and therefore the project or activity must ‘exist’. Therefore, for Enoch, if the activity is committed to normative entities, these entities also exist. This is a mistaken conclusion, the ‘inseparatist’ might argue, and he might also insist that that the existence of mathematical and physical entities is not due just to theorists who are committed to them, but due also to theories that have proved themselves to be the best available theories. They have passed holistically the tribunal of experience. There is coherence and systematicity between our mathematical theories and scientific theories. The ‘inseparatist’ could continue with his argument by saying that Enoch’s view of ‘deliberation’ as rationally non-optional is not the best available theory to explain our deliberative experiences, ie our first-person experience when faced with questions such as ‘what I ought to do’, and that this view does not cohere holistically with our other beliefs about science and the natural world. Thus, the ‘inseparatist’ might argue that ‘deliberation’ is an evolutionarily adaptive behaviour and this explanation is the best possible explanation that coheres (confirmational holism) with our other beliefs in science (naturalism). The objection could take the following formal reasoning:

Premise 1: Normative truths are indispensable for the success of deliberation.

Premise 2: Deliberation is rationally non-optional. This means that every human being, as long he or she is rational, ‘ought’ to deliberate.

Premise 3: By inference to the best explanation, normative truths exist.

Premise 4: Only if an experience, theory or entity coheres with our best scientific truths are we committed to it and only then does it exist.

²³ Arguably, there are aspects of Enoch’s view that gesture towards non-reductive naturalism, though he rejects that he is a non-reductive naturalist since he gives a different interpretation of naturalism to the one advanced by the Cornell Realists, for example.

- Premise 5: The experience of ‘deliberation’ from the first-person perspective does not cohere with our best scientific theories; therefore we need not be committed to it.
- Premise 6: The experience of ‘deliberation’ from the first-person perspective does not exist (from premises 4 and 5).
- Premise 7: Normative truths are indispensable for the success of ‘deliberation’, but ‘deliberation’ does not exist (from premises 6 and 1).
- Premise 8: If we need to be committed to normative truths for the success of deliberation, by inference to the best explanation, then normative truths exist.

Conclusion: ‘Normative truths’ do not exist since we do not need to be committed to deliberation (from premises 5 to 8).

There is something peculiar about this reasoning. Enoch could argue that the key premise is premise 2. It is a ‘normative’ premise and therefore it cannot be the subject of empirical refutation in terms of coherence with our best scientific theories. Therefore, Enoch might argue, premise 5 is false. Is Enoch begging the question? In order to show that there are ‘normative truths’ he argues that we need a ‘normative proposition’.²⁴ But perhaps his argument is concerned not with ‘indispensability’ but with the difference between the two domains: the normative and the empirical *or the first-person and third-person perspectives*. Faced with this argument, the ‘inseparatist’ will remain unconvinced. He or she will demand an explanation in terms of coherence with our other beliefs, including our scientific beliefs. The ‘inseparatist’ will affirm that the indispensability argument cannot be separated from confirmational holism and naturalism. It seems, therefore, that we have come full circle and find ourselves back again at Harman’s challenge, ie normative entities are dispensable because we do not need them to explain our normative judgments.

But perhaps Enoch is saying something more sophisticated, though full of ambiguities. Enoch asserts that deliberation is from the first-person perspective and therefore the deliberative indispensability of normative entities is for the concern of the deliberator, and not of the bystander, observer or theoretician who aims to explain moral or normative judgments.²⁵ In other words, one might say, Harman and the ‘inseparatist’ mathematical realists take the third-person perspective and fail to grasp the first-person perspective of the deliberator.

Thus, let us suppose that I am a judge in an appellate court in 1990 facing the decision as to whether Peter has committed a wrong by raping his spouse. I am faced with two choices: either I follow the case law and decide that Peter has committed no wrong or I decide that Peter has committed a wrong since he had no right to violate the physical integrity and autonomy of his spouse.

²⁴ Enoch, *TMS* (n 7) 62, footnote 33.

²⁵ *ibid* 76, footnote 62, 79.

I assert that the law has been mistaken and I change the law on this matter. There must be something, from my deliberative point of view, of value in not violating others (preserving physical integrity and being autonomous).

Let us suppose that a number of scientists engage in a super experiment in the cosmos and successfully demonstrate that there are no entities such as 'values', 'oughts' or any kind of normative truths. They discover that there is a set of particles in the universe that are activated every time a human being thinks or pronounces the words 'value' or 'ought to be done'. Because of this set of particles, we experience the feeling that something ought to be done or that there is genuine value in something, and at the same time this mere feeling (or intuition) is linked to the stronger thoughts that we actually happen to have. The particles are called Kalons and because of this crucial experiment we discover that there are not really values or normative truths. Books, thoughts and articles are replaced by the word 'Kalon-value', and 'Kalon-ought' refers to the particles and their effect on us. Because of this justified belief—it coheres with our best scientific theories— it does not matter any more whether or not, as a judge, I decide that Peter has committed a wrong. From the theoretical or third-person perspective deliberation is meaningless. We live in this new world where Kalons exist, but nothing else has changed, and we still have the 'feeling' or 'experience' of choice and freedom from the *first-person perspective*. However, the discovery has not changed our deliberative phenomenology. I, as a judge in an appellate court need to engage in deliberation from the *first-person perspective* and assess whether I ought to preserve physical integrity and autonomy of all human beings or preserve the value of legality and continuity with preceding cases. I need to assess what gives a legal decision worth, and what is valuable. I need to *direct* my actions towards the chosen value and persist over time towards achieving my goals, eg changing the law according to what I think is just and right, even if I know that—in my theoretical moments of reflection—Kalons are always there, working away in the background. My deliberation is intelligible to me because there are things that are of 'value' and are 'just', and that represent 'duty' and 'obligation'. However, from the third-person perspective I know that 'Kalon-value' and 'Kalon-ought to be done' is doing the work. My theoretical knowledge does not change how I 'naively' operate in the world of my actions and values.

Science has not, however, succeeded in discovering Kalons and therefore *the challenge for scientific theories is to explain the deliberative experience as lived and experienced in the first-person perspective*. Scientists could design a simulated world that eliminates our first-person deliberative experiences and where Kalons will do all the work, but we still need to 'choose' to live in the simulated world and deliberation concerning 'why?' and 'who?' will begin again. My point is not that science cannot possibly *refute* our deliberative and moral experiences at the theoretical level or third-person perspective, but rather that the theoretical point of view cannot undermine the phenomenology of the

deliberative point of view and agency *as lived and experienced by the deliberator*. This is the point, in my view, that Enoch needs to emphasize for his argument on ‘deliberative indispensability’ to succeed. He needs to emphasize that there is an asymmetry between the first-person perspective and the bystander, third-person or theoretical perspective, and that this asymmetry is pervasive in the sense that the third-person perspective is unable to grasp the first-person perspective of the deliberator who is engaged in the question of what he or she should do. Furthermore, because Kalons have not yet been discovered, at the theoretical level we leave open the hypothesis that these values and what ought to be done ‘really’ exist. The result is *Hypothetical Robust Realism for normative truths*. This means, so far, that *the best possible explanation* of the phenomenology of the first-person deliberative stance entails a commitment to the existence of normative entities. Furthermore, the phenomenology of the first-person deliberative perspective is ‘lost’ by the theoretical or third-person explanation. Normative entities seem persistently to appear in the best story of the phenomenology of our deliberation. I will call this argument ‘*the best possible explanation of the phenomenology of the deliberative stance*’. This explanation is, moreover, the best possible to explain the phenomenology of the deliberative experience, because it grasps the ‘first-person perspective’. Consequently, *contra* Enoch, I advocate the view that explanatory indispensability has priority over other kinds of indispensability, including deliberative indispensability. However, *contra* reductive naturalists, I argue that explanations cannot be reductive and need to preserve the distinctiveness of different domains, eg deliberative/practical and theoretical. This view finds its basis in the distinction between theoretical and practical reason and the relative autonomy of the latter. We transcend our empirical constitution and material world to transform it as we plan and intend it. Thus, as sculptor, I can plan and buy a piece of marble, draw up a plan, take a hammer, chisel and mallet and carve the stone to make a sculpture as I imagined and sketched it. This process requires the engagement of my will and the continuous effort of my intentional action. Before starting the task, I ask myself the following question: ‘Why do I want to carve something? Should I carve a ‘David’ or a ‘Hercules’?, and ‘Why should I carve this?’ In answer I might say ‘Because I am a sculptor’ and if I am asked why I am a sculptor I might say ‘Because it is fulfilling and beautiful’ or ‘Because it makes life worth living’. It seems, then, that to engage successfully in deliberation and acting, I need to be committed to normative truths, ie to ‘the beautiful’ and ‘the worth living’.

In the example of Peter, the appellate judge needs to decide whether it is wrong for a husband to force sex upon his wife. The judge faces the moral challenge of determining the truth of the matter and this entails weighing up normative truths. This exercise is undertaken from the deliberative or first-person perspective; it is not an explanatory exercise of describing what the law is from the theoretical or third-person point of view and nor is it an

exercise in identifying the different conceptions of the point of law advanced by legal participants, ie what legal participants have in their heads or consciousness. It is an engagement with the normative furniture of the world and with 'Plato's heaven', and is aimed at transcending our legal practices, cultural, social and moral beliefs. Normative truths are indispensable to our understanding of what judges do and we need to think about these normative truths as absolute and independent of our moral theories, social and cultural beliefs, convictions or conceptions of legal practices. At the same time, however, *these normative truths are the best possible explanation of our deliberative phenomenology*. We truly believe, engage and act as if there were normative truths and we disagree with others about whether, for example, Peter has violated his wife's autonomy and integrity by raping her. When we talk about 'integrity' and 'autonomy' we believe that we are referring to things that are independent of our cultural or social beliefs and we argue, theorize and philosophize in an attempt to grasp the nature of these things. Similarly, we debate whether Jean has the right to be compensated for a doctor's negligence. In the same way as we create cathedrals, sculptures, novels and pieces of music, judges change our world with their decisions and they do so in accordance with what they believe to be 'right', 'good', 'dutiful' or 'obligatory'. Of course, as the history of slavery, exploitation and despotic laws shows, judges can completely fail to grasp the nature of normative truths. But the fact that we scrutinize and criticize the legal regimes of other times and cultures is possible precisely because of the existence of normative truths. How do we explain this phenomenon? *Contra* Enoch, I have argued that explanation is still privileged, but that *what* we need to explain is the phenomenology of the first-person or deliberative point of view.

The contrast between Enoch's argument and my argument as I have outlined it is now apparent. Enoch rejects the partial autonomy of the practical or deliberative domain and argues that we should blur the distinction between practical/deliberative and theoretical reason.²⁶ Consequently, he is left vulnerable to the attacks of Harman and the mathematical realists who advocate the 'inseparability' thesis. Enoch complains that he does not understand the distinction between the practical/deliberative and theoretical reason, and the role that the latter plays in forming and revising the relevant normative beliefs. We discover normative beliefs, Enoch tells us, by using our theoretical reason. According to Enoch we do not need the notion of practical reason and it is unclear what it amounts to. If Enoch's view on practical reason is correct, what should we make of Enoch's claims about the first-person deliberative stance? If we decide to blur the distinction between practical and theoretical reason, why not also blur the distinction between the first-person deliberative and the third-person theoretical stances? Why not collapse the first-person deliberative

²⁶ *ibid* 241.

stance into the third-person theoretical stance? According to Enoch we use theoretical reason to form and revise our normative beliefs, and thus it appears that intentional action is a matter of 'being responsive to the relevant normative truths'.²⁷ Contrast this view, for example, with the views of Aristotle or Aquinas on the need to have 'an operative' principle or an *arkhé* for an agent to be engaged in intentional action. For Aristotle and Aquinas, the reason is *in the action* and *when* the agent acts. Like Aristotle and Aquinas, Enoch considers that we are the kind of creatures who respond to relevant normative reasons. Unlike Aristotle and Aquinas, however, he does not consider that we respond on the basis of our practical capacities, ie practical reasoning. According to Enoch, my actions have been caused by my belief in the normative reasons involved in my action.²⁸ It is mysterious, however, how actions are caused in the *right way* by my beliefs about normative truths without the participation of the *agent's* practical capacities and practical point of view.

Let us suppose that I am a sculptor and that I decide to carve a 'David' from a piece of marble. One might conclude that, for Enoch, the movements of my hand on the marble are caused in the right way by my belief in the beauty (normative truth) of my planned sculpture, but I am not the one who controls the movements. Enoch cannot explain how mere beliefs can control the movements of my hands and the persistence over time of my actions. Consider the following example: I lose my chisel and look for it in all the cabinets of my workshop, I go to the store to try to buy a chisel and realize that I have no money or card to pay for the chisel. I return home to get some money, go back to the store and pay for the chisel. I return to my workshop and continue carving the sculpture. Arguably, for Enoch, this series of actions is *caused in the right way* by a mental state, ie my belief in the beauty of the planned sculpture.²⁹ This is an implausible view that does not answer the questions of how I have achieved the planned sculpture or of how I have obtained what I have intended, ie a sculpture of a particular size and with particular features.

In the context of legal decision-making in the case of Peter, Enoch will say that the belief (as a mental state) in the integrity and autonomy of Peter's wife caused the judge to decide that Peter has committed a wrong in raping her. It is not that Peter's wife possessed integrity and autonomy as any other human being, but rather that the judge was in the mental state of believing in these normative truths and that this mental state caused his decision. Why, then, does Enoch need to argue that normative truths are indispensable for engaging in the activity of judging? Would it not be sufficient to explain the judge's decision in terms of an explanation of the judge's mental state (ie a psychological or social explanation)?

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ For sceptical view on the possibility of 'beliefs' causing actions see L Wittgenstein, *Philosophical Investigations* (translated by E Anscombe, Blackwell 1953) para 645.

In my view, Enoch's extremely theoretical view entails the dissolution of our first-person deliberative experiences, ie the idea that I am the agent who moves (not that I am moved by my beliefs and therefore by some 'part' of me) and who causes changes in the world according to what I intend and understand. Enoch seems too impatient with the practical/theoretical distinction and succumbs too quickly to the dominance of the theoretical domain, where Harman's argument predominates. I have argued that Enoch's insight concerning the importance of deliberative indispensability could undermine Harman's challenge, but only if the most powerful underlying view of Harman's argument is also weakened, ie Harman's belief that practical reason can collapse into theoretical reason, or rather that the first-person deliberative stance should be reduced to the third-person perspective. *Contra* Harman and Enoch, I have argued that we should resist the colonization of the theoretical domain over the practical one.

4. *The Fall of Quietism and the Impossibility of Constructive Interpretation*

At the beginning of this essay I stated that Dworkin has given great importance to understanding the 'point' of legal practices and has argued that judges should act as theoreticians to dissolve 'genuine' theoretical disagreements. According to Dworkin, different legal practitioners have different conceptions or interpretations of the point of legal practice. Judges need to engage in constructive interpretation to give the best possible interpretation of the practice according to the two criteria of moral appeal and fitness with the bulk of past legal materials.³⁰ I have also pointed to Dworkin's weak notion of 'objectivity' in which he defends the view that our moral judgments about the 'objectivity' of normative truths presuppose substantive moral claims. In other words that the truth of statements such as 'marital rape is *objectively and robustly* morally wrong' presupposes the substantive moral claim that it is wrong to harm one's spouse or it is wrong to undermine the autonomy of one's spouse. He denies that the truth of such a statement depends on the truth of something robustly normative such as 'autonomy' or 'wrongness' that exists independently of our convictions or moral beliefs at a certain time. Dworkin's view might seem attractive as a means of reconciling Harman's empirical challenge and Enoch's robust normative realism. We need, however, to resist this temptation.³¹ Despite Dworkin's insistence on the 'practical', his constructive interpretive exercise is a purely theoretically interpretative one, where practical reason and the deliberative point of view play no role. Similarly

³⁰ See Dworkin (n 2).

³¹ A similar criticism is advanced by J Finnis, 'On 'reason' and 'authority' in Law's Empire' (1987) 6 L. Phil 357.

because, for Dworkin, there is no deliberative point of view, robustly normative truths—unsurprisingly—play no key role in his legal philosophy. Can we delineate further this crucial distinction between practical and theoretical reasoning to illuminate the deficiency of Dworkin’s constructive interpretation? Let us examine the following question: ‘What is the colour of snow?’ This is a theoretical question that requires an engagement with theoretical reasoning. Theoretical reasoning involves the idea that to assess the truth of theoretical statements I need to see whether there is any correspondence between the proposition and the world. This means that if I say ‘The snow is black’ I need to look at how the world *is* to determine whether the snow really is black. If, after observation, I determine that this statement is false, then I need to *change* my beliefs. My beliefs track how the world is. In contrast, in practical or deliberative reasoning the world changes according to what I intend, plan or desire. For example, the question ‘What should I give to the Queen on her Diamond Jubilee?’ is determined by my intention in action and by my understanding of the matter. If I intend to buy a silver feeding bowl for the Queen’s dog and by mistake buy a cat’s feeding bowl, I do not need to change my intentions and beliefs about what I should buy for the Queen, I need to *change* my actions and exchange the bowls. Contrary to theoretical reasoning, *I made* the world change according to my intentions and understanding of the matter. The bowls have been exchanged and I now have in my house a dog’s silver feeding bowl wrapped up as a present for the Queen. The practical question, ‘What is the “point” of law from my deliberative point of view?’, requires that I *make up my mind* about what should I do, what is the best principle, value, duty or obligation to be followed. If after deliberation I make up my mind regarding the best underlying principle, value, duty or obligation and I discover that the principle, value, duty or obligation does not fit with what others practise then I do not change my principles, values, duties or obligations. On the contrary, as a judge of an appellate court, I shape the law according to how I see the matter, ie according to the principles, values, duties or obligations that should govern the law. If this does not happen then dissenting judgments in appellate courts can neither be intelligible nor explained. Of course, as a judge of an appellate court, I might consider other judges’ conceptions and views on the point of legal practice and if they strongly contradict my views on the underlying values, duties, obligations or rights of the law, then I might change my mind, but not because there were different conceptions as such, but because these conceptions forced me to look again at the subject-matter and forced me to form different intentions. Arguably the question ‘What is the point of law from the best possible interpretation?’ as formulated by Dworkin is misleading. This is an invitation to theoretical reasoning as opposed to practical or deliberative reasoning. If as a judge or legislator, I need to decide what the ‘point’ of law is, as Dworkin correctly argues, so that it may guide the actions of citizens and other

addressees, then I need to answer the question why as a judge I ought to follow this or that precedent, and why I ought to change it on the basis of this or that 'principle', 'value', 'duty' or 'obligation' *simpliciter*. The answer to the question about the 'point of law' from my deliberative point of view will serve as guide for all addressees. If as a judge I fail to answer the question about the 'point of law', then I fail to guide the citizens in their actions. If the question is formulated from the theoretical point of view, as Dworkin seems to imply it should be, as 'What is the *best possible conception* of the point of law?', then the robust truth of normative entities is not necessary. I do not need to look at what is of value and 'ought to be done', I only need to look at the different 'conceptions' as representations or 'mirrors of what reality is' or, in the most extreme case, 'inside' the consciousness of the judges and then decide as to the best possible interpretation of such conceptions. There is no genuine engagement with what is of value or right, or what is duty or obligation. To give greater argumentative force to Dworkin's insight regarding the importance and significance of 'the point of law' we need to accept the arguments that Dworkin's constructive interpretation cannot grasp the true 'point' of the law because this 'point' can only be grasped from the first-person deliberative stance. The question 'what should I do?' is continuous with the question 'what should I do as a judge?'. I do not take a theoretical stance on my role as a judge and observe myself judging in abstract from what I think is 'right', 'valuable' and 'what ought to be done'. As a judge and human being, I want to 'get it right' and find the 'right answer' and for this I need to be committed to the ontological existence of normative truths. If as a judge I am asked whether Jean should be compensated for her physical injury, I need to engage with the rights that Jean ought to have and the legal rights that are given to her. It is not *sufficient* to engage with the different conceptions or interpretive stances of the legal practice and my morally substantive claims on the matter. Similarly, if I am asked in 1990 to decide whether Peter has committed a wrong by raping his spouse, I need to engage with the question about whether it is wrong to undermine one's spouse's autonomy and why this is so. If a similar issue arises in 2012, I need to ask myself, 'is Peter's act wrong and why?', 'is the current law *mistaken* and *why*?'. I do not *only* resort to past legal decisions, the different conceptions of the legal practice and my moral substantive claims, as a judge I engage with what is dutiful, obligatory, right or wrong. Of course, in Peter's example, the judge in 1990 might have considered that the law is mistaken; however she might still insist that she should follow the law since it is not her task to change the law. If you ask her *why* she has decided so, *she will* not answer that 'this is the best possible interpretation' according to the two criteria of moral appeal and fit with past legal decisions. On the contrary, she will say that the value of legality is more important than any other value, eg justice in judging legal cases. Alternatively, she might decide to change the law because *from her deliberative point of view* the value of justice is more important

than any other value. In this second scenario, she will assert that previous cases on the matter were mistaken and that Peter has committed a wrong. If you ask her *why* she has decided so, she would not say that 'it is the best possible interpretation of the different conceptions of the point of law at this time'. On the contrary, she will assert that Peter *really did (robustly) and objectively* commit a wrong and that previous cases were *really (robustly) and objectively wrong*.

5. Conclusion

The core argument of Enoch's book is important as it establishes an original and interesting argumentative path to defend robust realism for normative truths in ethics and law. However, the weakness of his argument lies in rejecting the full implications of the deliberative stance. If we follow Enoch's suggestion and blur the distinction between the theoretical and practical points of view, why should we not (also) embrace a full theoretical stance committed to naturalism and confirmational holism as inseparatist mathematical realists have proposed? It is not clear, therefore, how under this hegemonic theoretical view the deliberative indispensability argument can stand if there is no 'deliberative' stance as such.

In the legal domain, lawyers can learn much from Enoch's criticism of Dworkin's quietism and will hopefully consider it important to engage in meta-ethical debates about how what matters to them, ie rights, values, principles, obligations and duties, refer to something independent of our social and cultural belief or our substantive moral claims.