

Is Law Determined by Morality?

THE IDEA THAT the law consists of authoritative directives has been met with considerable skepticism over the last few decades. Many legal philosophers have argued that the overall content of the law is much more diverse than content that is communicated by legal authorities. In particular, it has been argued that moral considerations can sometimes determine what the law is. The content of the law, according to these views, is partly deduced by moral (and perhaps other types of evaluative) reasoning. So this is the challenge I want to consider in this chapter. We will take a closer look at some of the main arguments purporting to demonstrate that law cannot be separated from morality. I will try to show that there are several important insights that these arguments illuminate, but that eventually they fail to prove that legal content depends on moral truths.

JUDICIAL DISCRETION AND LEGAL PRINCIPLES

H.L.A. Hart clearly recognized that his views about the nature of law entail that the law is bound to run out. It is inevitable, he argued, that cases would come before courts of law that are not settled by the existing law. Law is a finite set of rules and directives, and those rules cannot possibly determine an outcome about every possible case that would need some legal resolution. Since judges rarely have the option of not deciding a legal case they adjudicate, it is inevitable that some cases that they have to decide would require them to create, or at least modify, the law that would settle the case. Therefore, when such an unsettled case comes before a court of law, the decision judges reach cannot be

described as one that *applies* the law, because there is no relevant law to apply. In such unsettled cases, the court's ruling amounts to a modification of the law; it is an act of creating new law, akin to other familiar ways in which law is created or modified by legislatures and other legal authorities. This idea, that law is bound to run out—and therefore that judges would need to participate in the creation of new law by way of judicial legislation—has been labeled the doctrine of *judicial discretion*.

In a famous article criticizing Hart's theory of law, Ronald Dworkin has argued that the doctrine of judicial discretion is fundamentally flawed.¹ The gist of Dworkin's argument is simple: Hart wrongly assumed, Dworkin claimed, that the law consists only of rules. But in addition to legal rules, which are typically enacted by legal authorities (as Hart assumed), there is another type of legal norms, which Dworkin called *legal principles*, which do not derive their legal validity from any particular enactment. Legal principles gain their legal validity by a process of reasoning, including moral reasoning, and not by decree.

In order to understand Dworkin's argument, it is essential to realize that there are two main conclusions he wanted to draw from the idea that there are legal principles: first, that the law does not run out, and therefore judges do not have the kind of discretion Hart envisaged; and second, that there is a distinct class of legal norms that cannot derive its legal validity from Hart's rules of recognition. Underlying both of these conclusions is the idea that the legal validity of principles partly, but necessarily, depends on some truths about morality; it is partly a matter of moral truths that some norms are legally valid and form part of the law. Let me briefly explain these points.

Dworkin begins the argument by suggesting that the distinction between legal rules and legal principles is a categorical one: Rules operate in a kind of "all or nothing" fashion; if a rule applies to the circumstances, it determines a legal outcome. If an outcome is not determined by a rule, then it must be because the rule does not really apply to the case at hand. Contrary to this, principles do not necessarily determine an outcome; if a principle applies

¹ Dworkin, "The Model of Rules I," in *Taking Rights Seriously*, chap. 1.

to the circumstances, it only provides a reason to decide the case one way or the other. Principles have a dimension of weight: The reasons they constitute may weigh more or less under the relevant circumstances, depending on various considerations.² To illustrate, consider, for example, a rule that determines the maximum speed limit on a given highway and the accompanying traffic offense if one exceeds the limit. If I drive on that highway, the rule clearly applies to me, and therefore the outcome is determined: If I exceed the speed limit, I have committed the offense. Now compare such a rule with the legal principle judges sometimes employ in their decisions (to take one of Dworkin's favorite examples): that a person should not be allowed to profit from his own wrong. As every lawyer knows, however, such a general principle does not quite determine legal outcomes. The law sometimes allows people to profit from a wrong they have committed.³ The role of such principles is subtler: to provide judges and other legal agents with reasons to make certain decisions in doubtful or borderline cases. If there is a choice to be made, as it were, and one of the options would allow a person to profit from his own wrong, then the principle counts against allowing such an outcome. But, by itself, the principle does not dictate the outcome—certainly not in every case in which a person may profit from his wrongs.

Some philosophers have doubted, however, that the distinction Dworkin had in mind is really a categorical one, that is, between two different types of legal norms. It may be much more natural to think of it in terms of a distinction in degree, one that is on a continuum between, at one end, legal norms that are very specific and, at the other end, norms that are very general and/or particularly vague.⁴ Naturally, the more general a legal rule is, the more exceptions and modifications to it one should expect. Thus, according to this line of thought the relevant difference between the rule that determines the speed limit on the highway and the rule that stipulates that people should not be allowed to profit from

² Dworkin noted several other differences (*ibid.*), but they are all entailed by the underlying distinction between rules that determine a legal outcome and principles that only provide reasons for an outcome.

³ Gaining property rights by adverse possession is a good example.

⁴ In the legal literature, this distinction is between "rules" and "standards."

their own wrongs, is one of degree of generality: The former applies to a very specific set of circumstances; the latter applies to a very wide range of possible circumstances. Given the latter's generality, it should come as no surprise that the law would have to recognize many exceptions and modifications to the general rule.

I think this criticism of Dworkin's distinction is in the right direction, but the truth is that, by itself, it does not quite undermine his main argument. The main argument depends on Dworkin's additional thesis pertaining to the ways in which rules and principles gain their legal validity. Legal rules, Dworkin claims, typically gain their validity by an act of enactment, more or less along the lines presumed by Hart and other legal positivists. Legal principles, however, are not enacted. They are deduced by reasoning from certain facts and, crucially, moral considerations. How is that? Suppose, for example, that a court is faced with a problematic case that would seem to be unsettled by the existing legal rules; as far as we can tell, no previously recognized law would settle the case. In such cases judges can, as they often do, reason in the following way: They would look at the legal history of the settled law in the relevant legal area (such as previous precedents, statutes, and regulations) and then try to figure out what are the best moral principles that would justify the bulk of those settled cases. The general principle that forms *the best moral justification* of the relevant body of law is the legal principle that would bear on the case at hand. In other words, we conclude that a legal principle forms part of the law by a process of reasoning. We start by observing the relevant legal facts that are established by previous law and then try to reason to the principle that forms the best moral justification of this body of law. The conclusion of this reasoning—which is partly, but essentially, a moral one—is a legal principle, one that forms part of the law.

So now we can see why Dworkin concludes both that the law never quite runs out and that legal principles are such that they cannot derive their legal validity from anything like the rules of recognition. The law never quite runs out simply because the kind of reasoning that leads to legal principles is one that is always available. Whenever judges might think that existing law does not settle the case they face, the judges can reason their way to

the solution by the same process; they can always ask themselves what would be the best moral justification of the relevant body of law and apply the principle that forms the answer to this question to the case at hand.⁵ At the very least, it should give the court a reason, a legal reason, to decide the case one way or another. So there is always some law that applies, namely, the general principle that constitutes the best moral justification of previous decisions in the relevant area.

The idea that legal principles are partly deduced by reasoning also shows why these norms cannot gain their legal validity by reference to the rules of recognition in the way Hart had envisaged. Principles do not become part of the law because an authority has decided that they do; their legal validity is partly, but necessarily, a matter of moral truths. A given principle, say *P*, is part of the law if and only if *P* actually constitutes the best moral justification of previous legal decisions. *P*'s legal validity, therefore, depends on some truths about what constitutes the best moral justification of previous decisions. Legal validity is thus partly a matter of moral truth.

Dworkin's thesis about legal principles has attracted an enormous amount of attention over the years. Many objections and modifications have been offered, but it has been generally conceded that Dworkin succeeded in showing something of great importance, both about the ways in which judges, especially in the common law tradition, reason to resolve hard cases, and about the diversity of norms that form part of our legal landscape. Legal philosophers who were more sympathetic to Hart's legal positivism, however, resisted both of the conclusions that Dworkin wanted to draw from the existence of legal principles. Some have argued that law may run out even if there are legal principles, while others argued that legal principles, though perhaps distinct from legal rules, are nevertheless such that their validity can be accounted for on the basis of Hart's rules of recognition.⁶

⁵ To complete the argument, one would have to assume that morality does not run out. But that would not be a question-begging assumption.

⁶ See, e.g., Raz, "Legal Principles and the Limits of Law"; and Coleman, *The Practice of Principle*, 103–7.

I have some doubts about both of these reactions to Dworkin's argument. If Dworkin is right about the fact that norms can gain their legal validity by the type of reasoning he suggests, then the conclusions he draws would seem to be perfectly sound.⁷ The main question, therefore, is whether there are legal principles or not. To be more precise, the question is whether what Dworkin describes is really a way in which judges *identify what the law is*; or is it better to describe it as a form of judicial reasoning leading judges to *create new law* or at least to modify the existing law, in order to settle new cases?

Think about it this way: Suppose it is true that whenever judges face a case that would seem to be unsettled by the existing body of law, they reason to the solution in the way Dworkin describes, namely, they look at the relevant body of previous decisions and try to figure out the best moral justification of those decisions. And once they come up with such a justifying principle, they apply it to resolve the case at hand. So far, none of this would show that the principle the judges have settled on is one that had been part of the law prior to their decision. This story is equally compatible with the view that the identified principle becomes part of the law because, and only because, of the judicial decision that applies it. In other words, the story is compatible with the view that Dworkin simply described one main way in which judges modify the law or create new law; the relevant principle becomes part of the law only due to the authority judges have to modify the law by their judicial decisions (if, and to the extent, of course, that they have such an authority). Prior to the judicial decision that identifies a certain principle as a legal one, the principle had not actually formed part of the law. It only becomes law when judges say that it is, and only because they say so. And this interpretation would be perfectly in line with the general idea that the law consists of authoritative directives.

⁷ To be historically more accurate, it is fair to say that some of the confusion was due to the fact that, in his original article on legal principles, "The Model of Rules I," Dworkin was not entirely clear about the ways in which legal principles become part of the law. His argument was clarified years later, particularly in *Law's Empire*.

In order to rebut this objection, Dworkin would have had to show that the judicial reasoning that leads to the identification of a certain principle as a legal one is reasoning about what the law had been prior to the decision—that it is a form of reasoning purporting to discover, as it were, what the law is, and not, as I suggest, reasoning about ways in which the law needs to be changed. As far as I can tell, however, the only argument Dworkin presents to support his interpretation is an appeal to judicial rhetoric.⁸ When judges apply a legal principle to bear on the cases they adjudicate, they tend to say that they just apply a principle that had always been the law, not that they invent a new principle that they favor (morally or otherwise). But this appeal to rhetoric is problematic, at best. First, it is a double-edged sword: Judges sometimes state very clearly that they see their role as one of creating new law, not applying existing law, since they think that there is no law to apply. If you take judicial rhetoric seriously, you cannot pick and choose the rhetoric that favors your interpretation; the rhetoric goes both ways. More importantly, however, the problem is that even when judges say that they simply apply the law as they find it—no matter how circuitous the road that leads there might have been—one would often have very good reasons to doubt that judges actually believe what they say. This is a political problem. The institutional role of judges in making law is a politically contentious issue. People normally expect the legislatures to make the law and the judges to apply it. Recognizing the fact that judges often have to make the law that they apply to the case at hand is not something that sits easily with the popular conception of division of power between legislatures and the courts. I am not claiming that it is a secret that judges often make new law—far from it. But it has the status of an inconvenient truth, so to speak, widely recognized as it is. And this inconvenience puts judges under considerable pressure to coat the making of new law in the rhetoric of law application. Caveat emptor is the legal principle that should be applied to judicial rhetoric.

Still, you may wonder, is there any consideration that supports the alternative interpretation, whereby principles become part of

the law only because judges make it the case, by their authoritative decisions, that they are legal norms? Consider this possibility: Suppose a court—and let us take the U.S. Supreme Court as our example here—faces a difficult case that would seem to be unsettled by existing law. And suppose the justices on the court reason exactly in the way Dworkin suggests they do. However, let us assume that different justices on the court come up with different results. Suppose that five justices conclude that the relevant principle that would bear on the case is *M*, and four justices conclude that the principle is actually *N*. And let us assume that *M* and *N* are mutually exclusive under the circumstances, namely, that if principle *M* applies, then it entails that not-*N*, and vice versa. As it happens, principle *M* gains majority support and therefore the ruling is according to *M*. Let us further assume that the majority has made a *moral* mistake; principle *N* is the one that, all things considered, morally speaking, should have been applied. What is the law now? Every lawyer would tell you that, at least until the ruling is overturned by a subsequent decision, the law is *M*. It may not be a good law, certainly not the best, but it is the law. And it is the law because in the U.S. legal system, the Supreme Court has the authority to determine what the law is in such cases, and it is also the law that the court's legally binding decision is the one that is supported by the majority of its members.

Such examples cannot prove that Dworkin's thesis is mistaken. According to his thesis, the conclusion would have to be that the majority has made a legal error in this case. That, of course, is possible; any reasonable theory about the nature of law should allow for the possibility that a court would render a ruling that is legally mistaken. Let us suppose, however, that the case I described here is not a singular occurrence, but the general pattern. In other words, it is certainly possible to envisage a legal system, not unlike the ones we are familiar with, in which the Supreme Court systematically errs on the moral considerations it relies upon and ends up endorsing principles that are not, morally speaking, the best or the most appropriate—they do not form the morally best interpretation of the relevant body of law. If you endorse Dworkin's thesis, you will end up with the conclusion that a great deal of the law—or, at least, of what people take to be the

law—in a given legal system is legally mistaken. Surely, at some point one would have to doubt whether a theory that renders a great part of the law to be a legal error is really a theory that tells us what the law is.

I am not trying to replicate the age-old argument that even a morally wicked legal system is still law. The examples I have in mind need not go that far; they do not have to assume that the legal system in question is morally iniquitous—far from it. The argument works even if we assume that the courts tend to get the moral considerations underlying the legal principles they adopt just slightly off, so to speak. According to Dworkin's thesis, they would have still made a legal error; and then again, the result we get is that a substantial part of the law is legally mistaken. At the very least, such a result should count against the kind of theory that entails it.

INCLUSIVE LEGAL POSITIVISM

The general idea that the content of the law cannot be detached from moral truths has gained considerable support even within the legal positivist tradition. Many contemporary legal positivists tend to deny the thesis that law only consists of authoritative decisions. It is quite possible, they argue, that moral considerations would also bear on what counts as valid legal content, or legally valid norms, in a given legal system. It is not necessary that this be the case, they argue, but it is certainly possible. This new version of legal positivism has been labeled *inclusive legal positivism*, and it has several variants. The underlying thesis is that it is possible for a given legal system to have norms that incorporate various moral considerations judges and other officials would have to rely on in determining what the law is. And, in such cases, the argument is, the law partly is what the true moral considerations entail. Thus, it is at least possible for some truths about morality to determine what the law is.

Different versions of inclusive legal positivism have different views about the kinds of norms that could incorporate morality into law. I think that there are two main versions of this view.

One maintains that law can incorporate moral conditions on legal validity explicitly—simply by decreeing so. Some familiar provisions of written constitutional documents might provide good examples. The U.S. Constitution, for instance, contains references to such moral concepts as equality, cruelty, and due process. The German Basic Law contains an important provision that all laws must respect human dignity. Etcetera. Etcetera. So it seems that there are cases in which the law, typically in a constitutional document, explicitly makes the legal validity of other parts of the law conditional on some moral truths.

The second, and I think more prevalent, version of inclusive legal positivism maintains that morality can be incorporated into law in a more profound way, that is, by the content of *the rules of recognition* that happens to prevail in a given legal system. It is possible to have a legal system in which the rules of recognition that are practiced by the relevant legal community are such that they make the legal validity of some subset of the law depend on certain moral requirements or moral conditions, or such.⁹

It seems that the first version, though much more simple and straightforward, does not gain much support among philosophers, and for good reasons. An explicit statutory or constitutional reference to moral considerations does not make it the case that it is really moral truths that determine what counts as law. It only means that judges and other legal officials have to take moral considerations into account when they make an authoritative decision about what the law is. Joseph Raz explained how this works by introducing the notion of *directed power*. Legal officials have powers to determine various legal outcomes and, more often than not, this power is directed by considerations they need to take into account in the exercise of their legal powers. An authority may have the legal power, for example, to grant building permits; typically, this is a very circumscribed power, and it is legally directed. The relevant official is instructed to rely on certain types of considerations, while excluding other types, in granting or refusing to grant the permits. She may consider, for instance,

⁹ This is the version of inclusive positivism suggested by Coleman, "Negative and Positive Positivism," and Waluchow, *Inclusive Legal Positivism*.

environmental considerations, but not, say, religious ones. And, of course, there is nothing to prevent the law from directing the power of its officials, judges included, by reference to certain moral considerations.

None of this would show, however, that morality becomes part of the law. Consider, for example, a case in which an official—say, the city architect—is granted the legal power to refuse certain building permits on aesthetic grounds—say, if the proposed building would be “aesthetically incongruous” with the buildings in its vicinity. Surely, we would not want to say that in this case aesthetics becomes part of the law, or that truths about what is “pretty” form part of what counts as law. It is true that the official’s decision can be legally challenged, *inter alia*, on aesthetic grounds. A dissatisfied party might file an appeal, for instance, challenging the architect’s official decision on grounds that it was aesthetically mistaken, and such an appeal might win the day. There is nothing unique about this. Official decisions can be challenged legally on numerous grounds, such as economics, justice, morality, bureaucratic efficiency, or whatever, but only if the challenge succeeds, that is, if a higher legal authority decides that it succeeds, then it is law.

The suggestion that the rules of recognition can incorporate morality as a condition of legal validity is much more interesting and at least initially plausible. The idea is this: We can envisage a certain community in which the rules of recognition establish certain recognized ways of making law but only on the condition that the enacted law is not grossly immoral, or that it does not violate basic human rights, or such. Now, if such a rule of recognition is possible, then it would seem that moral constraints form an essential part of the conditions of legal validity. Law would be valid only if it meets certain moral constraints. And this would be the case because, and only because, this is the rule of recognition that happens to be practiced in the relevant population. Inclusive legal positivists argue that there is nothing that precludes such a possibility. It is, they say, at least conceptually possible. And if it is conceptually possible, then it is possible for truths about morality or justice to form part of what the law is.

There is a very clear sense in which the inclusive version of legal positivism aims to have the cake and eat it at the same time.

It purports to remain faithful to the basic tenet of legal positivism that what the law in any given society is, is basically determined by social rules; yet it also purports to incorporate some of Dworkin’s insights about the nature of legal reasoning, whereby the content of law is sometimes determined by moral truths. Whether this combination is possible turned out to generate a huge debate in contemporary legal philosophy,¹⁰ but one that may have given contemporary analytical jurisprudence a bad name. It is difficult to avoid the impression that the debate degenerated to hair-splitting arguments about something that makes very little difference to begin with. Since I participated in this debate, I am not sure that I can share this view. But it might be best to avoid a summary here of the hair-splitting arguments that have emerged for and against inclusive legal positivism, and focus on some of the main questions instead.

First, it may be worth noting that inclusive legal positivism must discard the idea that the rules of recognition are social conventions. A conventionalist account of these rules does not sit easily with the idea that they can incorporate morality as part of what the rules prescribe. To illustrate the problem, consider a very different setting: We have certain conventions about appropriate modes of conduct at various social events, such as, for example, a dinner party. So there is a convention that you need to bring something, such as flowers or a bottle of wine, to the dinner party you attend. Or that you need to eat with silverware (and not, say, with your hands), or such. But it would be very odd to suggest that there is a convention that you have to behave well, morally speaking, during the dinner party. Reasons to behave morally well are there independently of any conventions. Conventions do not establish moral reasons for action. Conventions are norms that evolve to resolve cases in which the relevant social norms are underdetermined by reasons. If reasons completely determine the content of their corresponding norms, the norm is not a convention. And the same idea applies to the rules of recognition. If such rules are social conventions, it is odd to suggest that they also incorporate moral norms. But this is not a conclusive argument

¹⁰ See, e.g., Coleman, *The Practice of Principle*, part 2; Himma, “Inclusive Legal Positivism,” 105; and my contribution on “Exclusive Legal Positivism,” 104.

against inclusive positivism, since the latter can simply deny that the rules of recognition are conventional in nature.

Another issue, more widely recognized in the literature, is the problem of reconciling the inclusive version of positivism with the view—shared by many of its adherents—that law is, by and large, an authoritative institution. Joseph Raz famously argued that it would make no sense to maintain that a directive is authoritative if the subjects of the authority would have to rely on moral considerations in order to determine what the content of the authoritative directive is. The whole point of having an authoritative resolution is that the subjects are presumed to better act on the reasons that apply to them by following the authority's directive than by trying to figure out (or act on) those reasons by themselves. If the subjects have to employ the same kinds of reasons that the authority was meant to rely on when issuing its directive in order to figure out what the directive is, then the whole point of having an authority would seem to be missed. From this argument, Raz concluded that both inclusive legal positivism and Dworkin's legal theory cannot be true, because they both fail to realize that it makes no sense to have a practical authority if one can only identify what the authority decrees by relying on the same kinds of reasons that the authority was meant to replace.¹¹

Inclusive legal positivism has two kinds of possible answers to Raz's argument: One line of thought challenges the general idea that each and every legal norm must be understood as an authoritative directive. The other rejoinder concedes that legal norms have to be understood as authoritative, but argues that Raz is wrong to assume that the authoritative nature of law is somehow undermined by the idea that sometimes we may need a moral argument to determine what the law is. Both types of rejoinders have been defended in the literature, sometimes with great ingenuity (or perhaps even a bit too much of it). I will not try to summarize these complicated arguments here, partly because I think that the main difficulty with inclusive legal positivism is the same difficulty we encountered with respect to Dworkin's thesis about legal principles. Both views, and for the same reason, entail the

possibility that a substantial part of the law in a given legal system amounts to a legal error. And this makes very little sense. In fact, it makes even less sense on the basis of the inclusive version of legal positivism than on Dworkin's account. Dworkin, after all, denies that legality ultimately depends on some social rules. In fact, as we shall see in the next section, Dworkin came to deny that an intelligible distinction exists between what the law is and what morality would require the law to be. So at least in the context of Dworkin's theory, the idea that a whole legal community might be mistaken about the true content of its laws would make some theoretical sense. But if you subscribe to the positivist tenet that legality is, ultimately, a matter of social rules, then the idea that an entire community might get its laws wrong becomes mysterious, at best.

LAW AS INTERPRETATION

We have so far tried to examine whether the content of the law may sometimes depend on certain considerations about what that content ought to be, as a matter of moral truth. Whatever the answer, we assumed that there is, at least in principle, a general distinction between what the law *is* and what it *ought* to be; or that it would make perfect sense to say that the law on issue *X* is *P*, but from a moral perspective, it ought to have been *Q*, and *Q* entails not-*P*. In his more recent writings on the nature of law, Dworkin began to challenge the soundness of this basic distinction. In fact, his elaborate arguments, based on the interpretative nature of law, aim to show why the distinction between what the law is and what it ought to be is much less clear than we have assumed all along. What the law is, Dworkin claims, is *always* a matter of evaluative considerations, moral ones included. Dworkin's argument is very complex, partly because it is not only an argument about the nature of law, but is also an argument about the nature of legal theory. As we shall see in the next chapter, Dworkin quite clearly rejects the possibility of any descriptive jurisprudence, that is, of any general philosophical theory that purports to describe the nature of law. Jurisprudence, in Dworkin's

view, is partly, but essentially, normative political philosophy. A moral-political justification of the legitimacy of law is a necessary part of any attempt to explain what law is.

Underlying both of these major challenges to traditional analytical jurisprudence is the concept of interpretation. Law is thoroughly interpretative in its nature, and any attempt to explicate this interpretative enterprise is also an interpretation. Although these two levels of interpretation are, according to Dworkin, inextricably linked, I think that we must proceed in stages. In this chapter I will briefly explain how Dworkin concludes that the content of the law is always a matter of evaluative/moral judgments. The methodological challenges will be taken up in the next chapter.

Although Dworkin's arguments are very complex, the basic idea is enchantingly simple. And it can be summed up in the following framework argument:

- (1) Every conclusion about what the law requires, in any given case, is necessarily a result of interpretation.
- (2) Interpretation is, essentially, an attempt to present its object as the best possible example of the kind or genre it belongs to.
- (3) Therefore, interpretation necessarily involves evaluative considerations, and of two main kinds: considerations about the values inherent in the relevant genre, and evaluative considerations about the elements of the object of interpretation that best exhibit those values.
- (4) From (1) and (3) it follows that every conclusion about what the law is necessarily involves evaluative considerations. What we deem the law to be always depends on our views about the values we associate with the relevant legal domain and ways in which those values are best exemplified in the norms under consideration.

Clearly if (4) is correct, then the traditional distinction between questions about what the content of the law actually is and what that content ought to be cannot be separated. The only way to understand what the content of the law is, is by reference to the kinds of content it ought to have under the circumstances. And

if this general idea is true, then legal positivism, in all its forms, is patently false.

There are two crucial premises in this framework argument: first, that every conclusion about the content of the law is a result of interpretation; and, second, that the very nature of an interpretation is such that it necessarily involves evaluative considerations. If both of these premises are true, then conclusion (4) would certainly follow. Let me state from the outset that I think there is a great deal of truth in the second premise, but the first premise is false, and thus the argument as a whole, fails. But we need to see how the arguments play out. So let us start with some of Dworkin's views about the nature of interpretation in general and then see how they apply to the nature of law.

What is interpretation? A fairly safe starting point is to assume that we interpret a certain utterance or a text, and so forth, when we try to figure out its meaning. Interpretation is typically an attempt to understand what something means. At least in some contexts, such as in an ordinary conversation, the relevant meaning we are interested in consists in what *the speaker* (or the author of the text) meant by saying or expressing this or that. And certainly this might be the case in the legal context as well. On the Pacific Coast Highway running through Malibu, there are a few signposts with the following inscription: DRUNK DRIVER CALL 911. When you stop laughing, you realize that the people who put up the signpost must have meant that, if you observe a driver who might be drunk, you should call 911 and inform the police. It is very unlikely, you tell yourself, that the authorities expected drunken drivers to call 911. It is just not what they meant.

However, it is widely assumed that in many contexts, particularly in the realm of the arts, and perhaps in the context of interpretation of social practices, interpretation is not necessarily an attempt to understand what the author/speaker actually meant by the relevant expression or text. Even if we know what the author meant, some interpretative questions may remain open. Or we might not be particularly interested in the author's intention; or there might not even be an author. But then the difficult question to answer is what is it that we are interested in instead? If interpretation does not strive to grasp what the author meant,

what other meaning might be in play? Dworkin proposed a very interesting answer to this question, which he called constructive interpretation:

Interpretation of works of art and social practices, I shall argue, is indeed essentially concerned with purpose not cause. But the purposes in play are not (fundamentally) those of some author but of the interpreter. Roughly, *constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong.*

And, as Dworkin immediately clarifies: “It does not follow . . . that an interpreter can make of a practice or a work of art anything he would have wanted it to be . . . the history or shape of a practice or object constrains the available interpretation of it.”¹²

There are three main insights about the nature of interpretation that are present here: first, that interpretation strives to present its object in its best possible light, as the best possible example of the genre to which it is taken to belong; second, that interpretation is essentially genre dependent and in ways that explain why interpretation is necessarily an evaluative form of reasoning; and finally, that there are certain constraints that determine the limits of possible interpretations of a given object. I will not have much to say here on this last point, since it raises many complicated issues that would take us too far from our concerns. My main aim is to explain the first two theses. So let us begin with the obvious question: Why *the best*? Why should interpretation of an object or text strive to present it in its *best possible* light? One who expects a detailed, argumentative answer to this crucial question is bound to be disappointed. Dworkin only offers two clues to his answer. The first clue is in a footnote: An interpreter is bound to strive for the best possible presentation of the object of interpretation, Dworkin claims, because “otherwise we are left with no sense of why he claims the reading he does.”¹³ The other line of thought is less direct, deriving from Dworkin’s assumption that

¹² Dworkin, *Law’s Empire*, 52 (my emphasis).

¹³ *Ibid.*, 421n12.

the only alternative to this constructive model is the traditional author’s-intention model, which he rejects for various reasons. So let us take up these two points in turn.

Perhaps Dworkin’s intuition is clear enough: If two interpretations of, say, a novel, can be put forward and, according to one of them, the novel emerges in a better light—that is, as a better novel—it would seem to be rather pointless if we insisted on rejecting that interpretation in favor of the one that presents the novel in a worse light. This is the kind of intuition we are familiar with from a philosophical argument as well. If you want to criticize someone’s thesis, you are not going to convince anyone of the cogency of your critique unless you have tried to present the object of your critique in its best possible light. It does not mean, of course, that anything you try to interpret must be presented as something valuable or particularly successful. But unless you try to make the best of it first, there is little hope in convincing anyone that it is a failure.

The only possible alternative Dworkin sees to this heuristic assumption is the author’s-intention model. According to this model, interpretation is nothing but an attempt to retrieve the actual intention, purpose, and such, that the author of the relevant text had with respect to various aspects of its meaning. Therefore, if the assumption is that what the text means is only what its author intended it to mean, then, of course, the question of presenting the text in its best light does not arise. For better or worse, the interpretation of the text would only consist in whatever it is that we can find out about the author’s intention. If a better reading of the text is available, that would be an interesting critique, perhaps, but not an interpretation of it. So it seems that in order to substantiate the central thesis of the constructive model of interpretation, Dworkin must refute its obvious rival, the author’s-intention model. Or, at least, this is what Dworkin’s assumes.

Dworkin has two main arguments against the author’s-intention model of interpretation. The first argument—which draws most of its intuitive support from examples in the realm of works of art—relies on the fact that artists typically intend their works to become cultural entities, detached from their original intentions and purposes. Once a work of art had been created,

the artist would rather have it stand on its own and speak for itself, as it were. Thus, at least in the realm of the arts, it will often happen that the attempt to apply the author's-intention model of interpretation would turn out to be self-defeating. You think that the text means what the author intended it to mean, so you seek out the author's intention only to find out that she had intended her intention to be ignored. Perhaps it is not accurate to say that this just may happen. Perhaps it is something deeper about the nature of art or, at least, art in the modern world, that works of art are typically created with such an intention to become cultural entities, detached, at least to some extent, from the artists' particular intentions. But there are two serious problems with this argument. First, even in the realm of works of art, there is nothing necessary or essential to Dworkin's characterization. Some artists may simply not share the kind of vision it involves. So this self-defeating argument might defeat itself. If you argue that the author's intention should be ignored because it is the intention of the author that it should, you may find out that the intention you rely upon does not exist; perhaps the author of your text actually wanted his particular intention to be relevant for the interpretation of his work. Why would you ignore that intention now?

More importantly, the argument is based on the ways in which artists tend to view their creative activities and on certain aspects of the nature of art. But then it is questionable that the argument can be extended to other cases. In particular, it is doubtful that the argument can be extended to the realm of law without begging the question against its factual assumptions. Is it safe to assume that those who create legal texts, such as legislators and judges, also tend to share this intention that their intentions not be taken into account? It is very doubtful that they do.¹⁴ Thus, if there is a general argument against the author's-intention model, it must be a different kind of argument. Trying to refute the

¹⁴ There is an ongoing debate in U.S. constitutional law, for example, about the potential relevance of the framers' intentions about the constitutional provisions they drafted. Many American jurists share Dworkin's view that the answer to this question depends on the intentions of the framers about their intentions. Therefore, a great deal of historical research is brought to bear on this debate, and it remains inconclusive, at best.

author's-intention model on the basis of assumptions about authors' intentions is just too precarious and unstable.

Dworkin does have another argument against the author's-intention model that is more nuanced and insightful. In order to understand it, however, we need to get a better sense of the ways in which interpretation is genre dependent. An interpretation, according to Dworkin, strives to present its object as the best possible example of its kind, that is, of the genre to which it is taken to belong. This assumes that it is impossible to interpret anything without first having a sense of what kind of thing it is—what is the genre to which it belongs. On the face of it, this may sound too rigid; after all, sometimes we do seem to be engaged in an interpretation of a text or object even if we are not quite sure what the appropriate generic affiliation of the text is. And sometimes the appropriate generic affiliation is precisely what is at dispute between rival interpretations of an object. An interpreter may argue, for instance, that Samuel Beckett's *Mercier and Camier* is best read as a play, and another may think that it is actually a novel. Dworkin, however, need not deny any of this. Even when the generic affiliation is the issue, one would still have to decide which affiliation presents the work as a better work of literature, for example. In other words, when the specific generic affiliation is not clear, we need to ascend in a level of abstraction and try to decide which generic affiliation of the text would present it as a better example of the higher-level affiliation, say, as a piece of literature or, if that is in doubt, as a work of art, and so forth. In any case, we must have a sense of what kind of thing it is that we strive to interpret, even if the classification is tentative or rather abstract.

There is a deeper insight here. We can only interpret a text if we have a sense of what kind of text it is, because we must also have a view about the values that are inherent in that kind or genre. Unless we know what makes texts in that genre better or worse, we cannot even begin to interpret the text. You cannot begin to think about the interpretation of a novel without having some views about what it is that makes novels good (or bad), and you cannot interpret a poem without having a sense of the values we find in poetry (or, in poetry of that kind), and so on. If you propose a

certain interpretation of a novel, for example, you must rely on some views you have about the kinds of values that make novels good and worthy of our appreciation. Otherwise you could not explain why we should pay attention to the kind of interpretation you propose—why pay attention to the aspects of the work you point out and not to any other? So I think that Dworkin is quite right to maintain that, without having some views about the values inherent in the genre to which the text is taken to belong, no interpretation can get off the ground. The values we associate with the genre partly, but crucially, determine what would make sense to say about the text—what are the kinds of meaning we could ascribe to it.

This insight also explains, however, the real nature of the debate about author's intention in interpretation. As Dworkin explains,

the academic argument about author's intention should be seen as a particularly abstract and theoretical argument about where value lies in art. . . . I am not arguing that the author's intention theory of artistic interpretation is wrong (or right), but that whether it is wrong or right and what it means . . . must turn on the plausibility of some more fundamental assumption about why works of art have the value their presentation presupposes.¹⁵

This is very important. Those who maintain that the particular intention of, say, a novelist, has a bearing on what the novel means, must also maintain certain views about what makes novels valuable and worthy of our appreciation. They must think that understanding what the author strove to achieve, or the message the author wanted to convey, are the kinds of considerations that bear on the novel's meaning, which also assumes that they are the kinds of considerations that are related to what makes novels valuable, and vice versa, of course. If you deny the relevance of the novelist's intention, that is only because you have certain views about what makes novels valuable—views that are detached from the values we associate with the communication aspects of literature, or perhaps art in general. Needless to say, art is just

an example here. A very similar line of reasoning applies to the possible roles of the intentions of legislatures in the interpretation of statutes and the possible role of the framers' intentions in the context of constitutional interpretation. Whether it makes sense to defer to such intentions must also depend on a theoretical argument about where value lies in the relevant genre, namely, the authority of legislation or the authority and legitimacy of a constitution.¹⁶

Thus the conclusion so far is that the author's-intention model of interpretation only makes sense as an instance or an application of the constructive model. It does not compete with it. Whether it makes sense to defer to the intention of the author or not is a local issue, specific to the genre in question, and depending on the values we associate with the latter. Does it prove Dworkin's point that interpretation must always strive to present its object as *the best* possible example of the genre to which it is taken to belong? It would prove the point only if we agreed with Dworkin that the only alternative to the traditional author's-intention model is the constructive model. But this is a questionable assumption. Interpretations need not strive to present the text in its best possible light; they could simply strive to present it in a certain light, perhaps better than some, worse than others, but in a way that highlights an aspect of the meaning of the text that may be worth paying attention to for some reason or other. Let us recall that Dworkin's insistence on "the best" derives from the assumption that, unless one strives to present the text in its best light, "we are left with no sense of why he claims the reading he does."¹⁷ But this simply need not be the case. And sometimes it just cannot be the case. Let me clarify. There are two points here: one about the motivation and interest in various interpretations, and the other about the limited possibilities of an all-things-considered judgment about what is the best.

First let us address motivations. Dworkin's assumption that, unless one strives to present the text in its best light, we would

¹⁶ I have explained this in much greater detail in my *Interpretation and Legal Theory*, chaps. 8 and 9.

¹⁷ See note 13, above.

have no reason to pay attention to the interpretation offered, is just not true. We are familiar with many interpretations, in the realm of works of art, and others, where we have a very good sense of why the interpretation is interesting and worth paying attention to, even if it does not purport to present the text in its best light. For example, a psychoanalytical interpretation of *Hamlet* would be very interesting and certainly worth paying attention to, even if it does not necessarily render the play better than other, more traditional interpretations of it. It simply brings out a certain aspect of the play that is interesting on its own right. Perhaps it contributes to a better understanding of Shakespeare's work, highlighting aspects of it hitherto unnoticed, enriching our understanding of the subtleties and richness of the work, and so forth. It can do all this without assuming that the particular interpretation offered presents *Hamlet* in its best possible light. And the same thing can be said about, say, a modern adaptation of *Hamlet* set in a contemporary setting, or perhaps even a parody of it. Thus the general assumption that, without striving to present the text in its best light, we would have no sense of why the interpretation is worth paying attention to, is simply groundless.

Regardless of the question of motivation, however, there is also a question about possibilities. As several commentators have pointed out,¹⁸ Dworkin's insistence on the best possible light rests on the assumption that in each and every case there is the possibility of an all-things-considered judgment about what makes a given work valuable—what makes it the best possible example of the genre to which it is taken to belong. But this assumption, it is rightly claimed, ignores the problem of incommensurability. It is a rather prevalent aspect of the evaluative dimensions of works of art, and many other possible objects of interpretation, that often there is no possibility of rendering an all-things-considered judgment about their relative merits. There is simply no such thing as *the best*. Some interpretations may be better, or worse, than others, but none could be claimed to be the best. That is so, at least in part, because some of the evaluative comparisons are incommensurable. The incommensurability of values

consists in the fact that there are certain evaluative comparisons in which it is not true that *A* is better than *B*, and not true that *A* is worse than *B*, and not true that *A* is equal to or on par with *B*. That is typically so because *A* and *B* are mixed goods, composed of numerous evaluative dimensions, and they just do not have a sufficiently robust common denominator that makes an all-things-considered judgment possible. Numerous things make novels valuable, for instance, and one interpretation may render the novel more valuable on a certain dimension, while another interpretation may make it more valuable on other dimensions. Often it would be simply impossible to say which one of them, all things considered, is better (or worse), and not because there is something we do not know, but because the relevant comparisons are essentially incommensurable.

If this is so obvious, why does Dworkin deny it (as he does)? What is it in Dworkin's theory that makes him insist on the possibility of presenting an object of interpretation in its *best possible light*, that is, all things considered? I think that the answer to this puzzle is to be found in Dworkin's jurisprudence, not in his general theory of interpretation. The latter makes perfect sense without this problematic element. As we saw in the previous section, Dworkin's earlier thesis about legal principles assumes the same basic idea: A principle forms part of the law, he argued, if it constitutes the best possible justification of the relevant body of law. If there is no "best, all things considered," the whole idea becomes extremely problematic because we might end up with the conclusion that different, even contradictory, principles would be best under certain assumptions, which would entail the conclusion that, even on Dworkin's account, law is profoundly indeterminate. Thus, unless Dworkin assumes that there is the best, all things considered, we would have come a long way only to see that Hart was right after all, and judicial discretion is inevitable.

Be this as it may, I think that Dworkin is right about one important issue: He is certainly correct to point out that interpretation is, essentially, a kind of reasoning or understanding that depends on various evaluative considerations. You cannot propose an interpretation of a text or an object without making certain assumptions about what makes texts of that kind better or worse;

a certain evaluative conception about the kinds of interests we have in the text under consideration and the kinds of values we associate with texts of that kind, is part of what makes interpretations possible. But this does not yet prove Dworkin's main point about the nature of law and its necessary relation to morality. The latter depends on the first premise of his framework argument—that every conclusion about what the law is, or what it requires, is a result of some interpretation or other. In other words, it is a crucial assumption of Dworkin's interpretative theory of law that it is never the case that a legal instruction can simply be understood, and applied, without any interpretative process involved. And this is a problematic assumption, to say the least. It calls into question a great deal of what philosophy of language teaches us about meaning and language use, in general. As I will try to show in chapter 6, Dworkin's assumptions about the nature of language and the ubiquity of interpretation are not sustainable. But before we get to this, we need to consider the methodological challenges to Hart's theory of law, and this is the topic of the next chapter.

SUGGESTED FURTHER READINGS

Cohen, *Ronald Dworkin and Contemporary Jurisprudence*.

Coleman, *The Practice of Principle*.

Dworkin, *Law's Empire*.

Marmor, *Interpretation and Legal Theory*.

Marmor, ed., *Law and Interpretation: Essays in Legal Philosophy*.

Raz, *Ethics in the Public Domain*.

Is Legal Philosophy Normative?

H.L.A. HART famously characterized his theory about the nature of law as “descriptive and morally neutral.”¹ Hart, like previous legal positivists such as John Austin and Hans Kelsen,² thought that a philosophical account of the nature of law should strive to avoid moralizing of any kind, and should aim at an explanation of the nature of law that is quite general in its application—one that explains what law, in general, is. Clearly there are at least two assumptions here. First, it is assumed that, in spite of variations between different legal systems across time and place, law is a fairly universal phenomenon in human societies, and that it has certain features that are essential or characteristic of law, as such. Second, it is assumed that we can identify and articulate those essential features of law without forming any moral or political judgment about the merits of law or any particular legal institution. Understanding what law is, is one thing; judging its merits is quite another.

Many contemporary legal philosophers have come to doubt this theoretical aspiration. They claim that a theory about the nature of law, such as Hart's legal positivism, cannot be detached from moral and political views about law's merits. We cannot understand what law is, they claim, without relying on some views about what makes law good and worthy of our appreciation. The clearest example of such a methodological view is Ronald Dworkin's recent interpretative theory of law. Dworkin

¹ This chapter is based on my article “Legal Positivism: Still Descriptive and Morally Neutral,” 683, and appears here in a revised form.

² Although not Bentham. As Gerald Postema demonstrated convincingly, Bentham did not share this view. See his *Bentham and the Common Law Tradition*.