Chapter Seven

Ronald Dworkin's Interpretive Approach

Ronald Dworkin (1931–2013) was probably the most influential English-language legal theorist of his generation. Over the course of over 40 years of scholarly writing he developed a sophisticated alternative to legal positivism. Though his theory has little resemblance to the traditional natural law theories of Aquinas and his followers, Dworkin occasionally referred to his approach as a natural law theory, and it is on the natural law side of the theoretical divide set by the Hart-Fuller debate.[1] At the same time, it may sometimes be helpful to see Dworkin's work as establishing a third alternative to legal positivism and natural law theory: an interpretive theory of law. **7–01**

EARLIER WRITINGS

In Dworkin's early writings,[2] he challenged a particular version of legal positivism, a view which saw law as being comprised entirely of rules, and judges as having discretion in their decision-making where the dispute before them was not covered by any existing rule. Dworkin offered an alternative vision of law, in which the resources for resolving disputes "according to law" were more numerous and varied, and the process of determining what the law required in a particular case more subtle. **7–02**

Dworkin argued that, along with rules, legal systems also contain principles. Legal principles are moral propositions that are stated in or implied by past official acts (e.g. statutes, judicial decisions, and constitutional provisions). While rules act in an "all or nothing" way (if a rule applies, it is conclusive, it decides the case), principles can apply to a case without being dispositive. Principles (e.g. "one should not be able to profit from one's own wrong" and "one is held to intend all the foresee-

[1] On Dworkin's debt to Fuller, see Robert S. Summers, *Lon L. Fuller* (Stanford University Press, Stanford, 1984), p. 14.

[2] Collected in Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, Cambridge, Mass., 1977).

able consequences of one's actions") have "weight" favouring one result; there can be—and often are—principles favouring contrary results on a single legal question. (There is still a legal positivist-like separation of law and morality in this view of law, in that judges are told to decide cases based not on whatever principles (critical) morality might require, but rather based on a different set of principles: those relied upon, or implicit in, past official actions.[3])

Dworkin argued for the existence of legal principles (principles which are part of the legal system, which judges are bound to consider where appropriate) by reference to legal practice (in the United States and England).[4] Particularly telling for Dworkin's argument are those "landmark" judicial decisions where the outcome appears to be contrary to the relevant precedents, but the court still held that it was following the "real meaning" or "true spirit" of the law; and also more mundane cases where judges have cited principles as the justification for modifying, creating exceptions in, or overturning legal rules.

Because there are (numerous) principles as well as rules, there will be few, if any, occasions where the law "runs out" and judges must decide the case without legal guidance; but, at first glance, legal determinacy might seem to be undermined by the abundance of sometimes contrary material. However, Dworkin had a response to that problem. Under his approach, judges consider a variety of theories regarding what the law requires in the area in question, rejecting those that do not adequately "fit" past official actions. Among the theories that adequately "fit", the judge chooses the one which best combines "fit" and moral value, making the law the best it can be. Two tenets of Dworkin's early writings were thus indirectly related: that law contains principles as well as rules; and that for all (or nearly all) legal questions, there will be a unique right answer.

While there are reasons to conclude that Dworkin had overstated the differences between his view of the law and that of H. L. A. Hart, and also that he made out the line between rules and principles to be clearer than it (sometimes) is in practice,[5] what remains is the insight that a

[3] In his later work, Dworkin noted and criticised this aspect of his early work. Ronald Dworkin, *Justice in Robes* (Harvard University Press, Cambridge, Mass., 2006), p. 4 and 264 n. 6.

[4] Other legal theorists (most prominently, Robert Alexy) also have theories of legal principles. For an overview and critique of the different theories, see, e.g., Ralf Poscher, "The Principles Theory", in Matthias Klatt ed., *Institutionalized Reason* (Oxford University Press, Oxford, 2012), pp. 218–247; Mitchell N. Berman, "For Legal Principles", in Heidi Hurd ed., *Moral Puzzles and Legal Perplexities* (Cambridge University Press, Cambridge, 2019), pp. 241–259.

[5] See, e.g. Hart, "Postscript", in *The Concept of Law* (3rd ed., Clarendon Press, Oxford, 2012), pp. 238–276, at pp. 259–263; Joseph Raz, "Legal Principles and the Limits of Law", in M. Cohen ed., *Ronald Dworkin and Contemporary Jurisprudence* (Duckworth, London, 1984), pp. 73–87.

purely rule-based approach to the nature of law or the nature of judicial reasoning (whether such a view could ever fairly have been attributed to Hart or not) would be problematic. There is always the sense of moral standards qualifying the rules (e.g. that a rule should not apply as written if it would lead to an absurd result, or if one of the parties had acted inequitably, and so on), as somehow already present in the law, even before the standards are articulated or decisions based upon them are announced.

CONSTRUCTIVE INTERPRETATION

7–03 In his later works, Dworkin offered what he called "an interpretive approach" to law.[6] (Dworkin never had much to say about the relationship between his earlier writings and his later work; the later work is probably best seen as a reworking of earlier themes within a philosophically more sophisticated framework.[7])

In *Law's Empire*, Dworkin argued that "legal claims are interpretive judgments and therefore combine backward and forward-looking elements; they interpret contemporary legal practice as an unfolding narrative".[8] According to Dworkin, every time a judge is confronted with a legal problem, he or she should construct a theory of what the law is. That theory must adequately fit the relevant past governmental actions (e.g. legislative enactments and judicial decisions),[9] while making the law the best it can be.[10]

According to Dworkin, both law (as a practice) and legal theory are best understood as processes of "constructive interpretation", interpretation that makes its object the best it can be (in Dworkin's words, an interpretation which makes it "the best possible example of the form or genre to which it is taken to belong"[11]). Constructive interpretation is both an imposition of form upon an object being interpreted (in the sense that the form is not immediately apparent in the object) and a derivation of form from it (in the sense that the interpreter is constrained by the object of interpretation, and not free to impose any form the interpreter might

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[6] Ronald Dworkin, *Law's Empire* (Harvard University Press, Cambridge, Mass., 1986), pp. 46–48; see also Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, Cambridge, Mass., 2011), pp. 123–156. Dworkin sometimes referred to his own approach as "interpretivism." Dworkin, *Justice in Robes*, p. 249.

[7] Jules Coleman argued that the political philosophy of the earlier writings was "rights-based liberalism", while the political philosophy of the later writings was that of "liberal community". Jules L. Coleman, "Truth and Objectivity in Law", 1 *Legal Theory* 33 at 48–54 (1995).

[8] Dworkin, *Law's Empire*, p. 225.

[9] Dworkin, *Law's Empire*, pp. 227–228, 245–258.

[10] Dworkin, *Law's Empire*, pp. 52, 143.

[11] Dworkin, *Law's Empire*, p. 52.

choose).[12] One can think of constructive interpretation as being similar to the way people have looked at collections of stars and seen there pictures of mythic figures, or the way modern statistical methods can analyse points on a graph (representing data), and determine what line (representing a mathematical equation, and thus a correlation of some form between variables) best explains that data.

Dworkin asserted that constructive interpretation is also the proper approach to artistic and literary interpretation, and his writings frequently compare the role of a judge with that of a literary critic. Both the applicability of constructive interpretation to artistic interpretation and the treatment of legal interpretation and artistic interpretation as analogous, are controversial claims.[13]

Constructive interpretation depends upon being able to assign a distinctive value or purpose to the object of interpretation, whether that object is a work of art or a social practice. It is that value or purpose which serves as the criterion for determining whether one interpretation of the object is better or worse than an alternative. For the constructive interpretation of law, Dworkin stated that the purpose of law is to constrain or justify the exercise of government power.[14]

The past actions of officials, whether judges deciding cases and giving reasons for their decisions or legislators passing statutes, are the data to be interpreted constructively. In making the law, or an area of the law, the best it can be, the criteria Dworkin mentioned most often are, as before, "fit" and moral value.[15] For some legal questions, the answer may seem easy, because only one theory shows adequate "fit". However, where the law is unsettled or inconsistent, or where the legal question is novel, there will be alternative theories with adequate "fit". Among these, some will do better on "fit", others better on moral value. In making comparisons among alternative theories, the relative weights of "fit" and moral value will itself be an interpretive question, and will vary from one legal area to another (e.g. protecting expectations may be more

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[12] See also Ronald Dworkin, "Law as Interpretation", 60 *Texas Law Review* 527 at 528 (1982) ("propositions of law . . . are interpretive of legal history, which combines elements of both description and evaluation but is different from both").

[13] For contrary views, see, e.g. Andrei Marmor, *Interpretation and Legal Theory* (Clarendon Press, Oxford, 1992), pp. 35–60; Richard A. Posner, *Law and Literature* (Harvard University Press, Cambridge, Mass., 1988), pp. 209–268 (a revised edition of this book appeared in 1998, and a 3rd edition in 2009; in those later editions some of the relevant discussion was excised or modified).

The relationship of law and literature will be discussed at greater length in Ch. 20.

[14] Dworkin, *Law's Empire*, pp. 93, 109, 127.

[15] In a later work, Dworkin suggested that "fit" might be understood as procedural justice, and the other value ("moral value" or "political justification") as substantive justice. Ronald Dworkin, *Justice in Robes* (Harvard University Press, Cambridge, Mass., 2006), p. 171.

important regarding estate or property law, while moral value may be more important for civil liberties questions).[16]

Dworkin also wrote of "(political) integrity": the view that judges should decide cases in a way which makes the law more coherent, preferring interpretations which make the law more like the product of a single moral vision. (In some of his works, "integrity" appeared to be an additional criterion in the adjudicative process, beyond fit and moral value. In other works, however, he stated that "integrity" is simply the outcome of the proper balance of fit and moral value.[17]) Dworkin wrote: "Judges who accept the interpretive ideal of integrity decide hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community."[18] The interpretation of the law should, to the extent possible (given the relevant interpretive constraints), "express [ ] a coherent conception of justice and fairness."[19] In some ways, the development of an interpretive theory around the concept of "integrity" can be seen as a somewhat grander and more sophisticated version of the spirit underlying common law reasoning: a form of decision-making based in part on consistency, though a consistency sensitive to principle, and in part on a belief that past decisions were rough approximations or intuitions about justice and fairness.[20]

Dworkin's writings (both earlier and later) can be seen as attempts to come to terms with aspects of legal practice that are not easily explained within the context of legal positivism. For example: (1) the fact that participants in the legal system argue over even the most basic aspects of the way the system works (for example, arguments over the correct way to interpret ambiguous statutes, and over how one should apply constitutional provisions to new legal questions), not just over peripheral matters or the application of rules to borderline cases[21]; (2) even in the hardest

[16] Ronald Dworkin, *Justice in Robes*, pp. 228–258. In a later work, Dworkin re-characterised his test in terms of the truth conditions for propositions of law: "A proposition of law is true . . . if it flows from principles of personal or political morality that provide the best interpretation of the other propositions of law generally treated as true in contemporary legal practice." Ronald Dworkin, *Justice in Robes* (Harvard University Press, Cambridge, Mass., 2006), p. 14.

[17] Dworkin, *Law's Empire*, pp. 12–18.

[18] Dworkin, *Law's Empire*, p. 255.

[19] Dworkin, *Law's Empire*, p. 255.

[20] On common law reasoning, see Ch. 13.

[21] For contrasting views on the cogency of this critique, compare Scott J. Shapiro, "The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed", in Arthur Ripstein ed., *Ronald Dworkin* (Cambridge University Press, Cambridge, 2007), pp. 22–55, and Scott Shapiro, *Legality* (Harvard University Press, Cambridge, Mass., 2011), pp. 282–306 (agreeing that it is an important critique of conventional legal positivism); with Brian Leiter, "Explaining Theoretical Disagreement", 76 *University of Chicago Law Review* 1215 (2009) (arguing that legal positivism has adequate responses). Recent attempts to limit the critical force of Dworkin's argument from substantial disagreement include David

of hard cases, the lawyers and judges in the case speak as if there were unique correct answers which the judge has a duty to discover; and (3) in landmark cases, where the law seems on the surface to have changed radically, both the judges and commentators often speak of the new rule having "already been present" or the way law "works itself pure."[22]

Dworkin, throughout his work, pressed the question of meaning in law:

> "What does the claim that 'the law' requires something mean? What in the world makes that claim true when it is true, and false when it is false? . . . Lawyers often disagree about whether some claim of law . . . is true, even when they know all the facts about what institutions have decided in the past. What in the world are they then disagreeing about?"[23]

These are deceptively difficult questions, and Dworkin, along with the American and Scandinavian legal realists before him, deserve credit for pressing them.[24] For many of the American legal realists, the ultimate "truth-makers" of law were the actual and predicted actions of officials; for some Scandinavian legal realists, legal propositions may not even have had truth value. For Dworkin, the answer (at least in his later works) was the constructive interpretation of the actions of legal officials.

A standard response to Dworkin's work (both to his early writings and to the later interpretive approach) is that judges and legal theorists should not look at law through "rose-coloured glasses", making it "the best it can be"; rather, they should describe law "as it is". The key to understanding Dworkin, in particular his later work, is to understand his response to this kind of comment: that there is no simple description of law "as it is"; or, more precisely, that describing law "as it is" necessarily involves an interpretive process, which, in turn, requires determining what is the best interpretation of past official actions.[25] Law "as it is", law as objective or non-controversial, is only the collection of past official decisions by judges and legislators (which Dworkin referred to as the "pre-interpretive

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Plunkett and Timothy Sundell, "Dworkin's Interpretivism and the Pragmatics of Legal Disputes," 19 *Legal Theory* 242 (2013); Andrea Dolcetti and Giovanni Battista Ratti, "Legal Disagreements and the Dual Nature of Law", in Wil Waluchow and Stefan Sciaraffa eds., *Philosophical Foundations of the Nature of Law* (Oxford University Press, Oxford, 2013), pp. 301–321; and Dennis Patterson, "Theoretical Disagreement, Legal Positivism, and Interpretation", 31 *Ratio Juris* 260 (2018).

[22] *Omychund v Barker* (Ch. 1744) 1 Atk. 21 at 33, 26 ER. 15 at 22–23 (from Solicitor-General William Murray, later Lord Mansfield: "All occasions do not arise at once; . . . a statute very seldom can take in all cases, therefore the common law, *that works itself pure* by rules drawn from the fountain of justice, is for this reason superior to an act of parliament").

[23] Dworkin, *Justice in Robes*, pp. 162–163.

[24] American legal realism is discussed in Ch. 17; Scandinavian legal realism is discussed in Ch. 22.

[25] The first three chapters of *Law's Empire* contain the arguments underlying this conclusion. See Dworkin, *Law's Empire*, pp. 1–113.

data", that which is subject to the process of constructive interpretation). However, even collectively, these individual decisions and actions cannot offer an answer to a current legal question until some order is imposed upon them. That order is the choice, the moral-political choice, between tenable interpretations of those past decisions and actions.

If asked, say, "what is the law regarding economic recovery for nervous distress in tort law", it is quite possible that the lawyer will not be able to offer any authoritative legal source that speaks directly to the specific problem posed; that is, the question may be unsettled in the laws of that jurisdiction. It may be that the lawyer can point to certain statutes that have been passed that are relevant, and to certain decisions that have been made by courts at various levels on related matters, and perhaps even to the writings of commentators suggesting that future decisions on this question come out one way rather than another. However, it may be that none of these items directly and conclusively answers the question posed. To get that answer, the lawyer must go through a certain kind of reasoning process, deriving an answer from the various materials. For Dworkin, this is an act of "interpretation".

What of the situations where there *do* seem to be authoritative legal sources directly on point? For example, the lawyer might triumphantly announce that the appellate court had rendered a decision on the very issue just a few weeks earlier. Is that the end of the matter? Is there then no need for "interpretation"? Even putting aside possible questions of whether the appellate court decision might be subject to a different interpretation (its language perhaps having been ambiguous), Dworkin might point out that a skilled advocate could still argue, looking at all the relevant past legal decisions, that the appellate court decision was mistaken, and should be revised or overturned, or that the decision was too broad and it will probably later be limited to a few situations.

Mark Greenberg has pointed out the way in which Dworkin's approach (and Greenberg's own) rejects a central aspect of the "standard picture" underlying most approaches to law.[26] The conventional view is that legal officials directly add content to the legal system—that when (e.g.) legislatures enact a statute, the content of that statute becomes part

[26] Mark Greenberg, "The Standard Picture and Its Discontents", in Leslie Green and Brian Leiter eds., *Oxford Studies in Philosophy of Law*, vol. 1 (Oxford, Oxford University Press, 2011), pp. 39–106; Mark Greenberg, "The Moral Impact Theory of Law", 123 *Yale Law Journal* 1288 (2014); Mark Greenberg, "The Moral Impact Theory, the Dependence View, and Natural Law", in George P. Duke and Robert P. George eds., *The Cambridge Companion to Natural Law and Jurisprudence* (Cambridge University P- Cambridge, 2017), pp. 275–313. Greenberg's own view goes further, argui- law is the moral impact of the relevant actions of legal institutions." ' Moral Impact Theory of Law", p. 1290 (citation omitted).

of the legal system.[27] For Dworkin (and Greenberg), legislation does not directly add content to the legal system; the effect of legislation is more indirect: it creates "pre-interpretive data", and law exists only at a later stage, as the product of interpretation.

The interpretive approach has the advantage of reflecting, and being able to account for, the way that law (or at least certain areas of the law) is regularly subject to change and re-characterisation. This strength may also be the approach's weakness: that it emphasises the possibility of revision too much and the likelihood of settledness too little; and that it celebrates the notion of the great individual judge rethinking whole areas of law, thereby deflecting attention from the important roles of consensus and shared understandings.[28]

A related kind of challenge has been offered to Dworkin's approach to law: that it is legal theory for (or from the perspective of) judges, rather than the full theory of law it purports to be.[29] Making the best theory of law one can from the relevant past legal decisions may be the appropriate prescription if one is a judge within a legal system.[30] However, why would one take the same perspective if one were merely a citizen in the society?

For many citizens, the perspective wanted on the law is similar to that of Justice Oliver Wendell Holmes' "bad man"[31]: people want to know what they have to do to avoid legal sanctions, or, to put the matter differently, what they can get away with without facing sanctions. From the perspective of the ordinary citizen, there are a number of reasons to think of law in terms of a prediction of how judges (and police officers) will interpret the rules. Not only is there the desire to avoid legal sanctions, but if law is going to succeed in co-ordinating behaviour, then it is important that different citizens view what the law requires in roughly the same way (for example, if they all have comparable ideas about what

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[27] Though if the statute conflicts with the legal system's constitution, it may be void, and not add any content to the legal system.

[28] For a more detailed discussion of some of these themes, see Gerald Postema, "'Protestant' Interpretation and Social Practices", 6 *Law and Philosophy* 283 (1987) (Dworkin himself endorsed the "Protestant" description in Dworkin, *Law's Empire*, p. 413; and Dworkin, *Justice in Robes*, p. 219); see also Brian H. Bix, *Law, Language and Legal Determinacy* (Clarendon Press, Oxford, 1993), pp. 111–116, 125–129.

[29] See, e.g. Joseph Raz, *Ethics in the Public Domain* (Clarendon Press, Oxford 1994), pp. 186–187; Bix, *Law, Language and Legal Determinacy*, pp. 118–120.

[30] Though Dworkin recommended that if the legal system is sufficiently wicked, the judge should not try to make the legal system "the best it can be"; he or she should just lie about what the law requires. Ronald Dworkin, "A Reply by Ronald Dworkin", in M. Cohen ed., *Ronald Dworkin and Contemporary Jurisprudence* (Duckworth, London, 1984), pp. 247–300 at p. 258.

[31] Oliver Wendell Holmes, "The Path of the Law", 10 *Harvard Law Review* 457 at 460–461 (1897); see generally William Twining, "The Bad Man Revisited", 58 *Cornell Law Review* 275 (1973).

traffic laws or anti-pollution laws require). Arguably, this kind of consensus is unlikely to come about—or at least less likely to come about—if citizens were to take up Dworkin's interpretive approach to the law.

What is distinctive to Dworkin's approach, and part of what makes it seem suspicious to many theorists, is the continuity between what would usually be thought to be jurisprudential questions (the nature of law in general or the basic nature of a particular legal system) and what would usually be considered practical or doctrinal legal questions (what the law in this jurisdiction requires on some issue). Constructive interpretation was Dworkin's response to both kinds of queries, and he expressly offered that "no firm line divides jurisprudence from adjudication or any other aspect of legal practice."[32] Most theorists discussing the nature of law would be more hesitant to find implications of their general theories for more particular questions of legal doctrine, finding such implications, if at all, only on occasional, and highly unusual cases. By contrast, Dworkin argued that one's jurisprudential stance is implied in every legal dispute settled.[33]

RIGHT ANSWERS

7–04 For a long time, the idea most closely associated with Dworkin's work in legal theory was the "right answer thesis", the claim that all (or almost all) legal decisions have a unique right answer. It is interesting to note some of the ways that the presentation of this view, and attacks on it, have changed over time.

There are three themes that persisted throughout Dworkin's many discussions of his "right answer thesis". The first is that this claim reflects our practice: that even in difficult decisions, judges and lawyers discussing, arguing, and deciding cases act as if, and talk as if, there were right answers to be found. This reference to practice often elicits responses along the lines that judicial "right answer" rhetoric is just a matter of show or a matter of convention, and that judges in more reflective moments endorse a contrary position.[34]

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[32] Ronald Dworkin, "Legal Theory and the Problem of Sense", in Ruth Gavison ed., *Issues in Contemporary Legal Philosophy* (Clarendon Press, Oxford, 1987), pp. 9–20 at p. 14.

[33] Dworkin wrote: "Jurisprudence is the general part of adjudication." Dworkin, "Legal Theory and the Problem of Sense", p. 15. See also Dworkin, *Justice in Robes*, pp. 1–35, 140–186. Other theorists who argue that one's theory of the nature of law generally has implications for mundane legal disputes include Scott Shapiro, *Legality* (Harvard University Press, Cambridge, Mass., 2011), pp. 353–387, and Mark Greenberg, "What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants", 130 *Harvard Law Review Forum* 105 (2017).

[34] See, e.g. Hart, "Postscript", pp. 273–275. For a response to this kind of argument, see Dworkin, "Legal Theory and the Problem of Sense", pp. 11–13.

A second theme, which became more prominent in Dworkin's later writings, is that there are right answers to legal questions for the simple reason that judges must reach a result in the questions placed before them, and some answers are better than others.[35] Every other argument Dworkin raised, and he raised quite a few, could be considered just a variation on this point.

While a theorist like Joseph Raz is concerned with distinguishing among judicial decisions, differentiating those that are based on legal standards and those that are based on extra-legal standards, and between those which apply prior decisions ("apply existing law") and those that make fresh decisions ("make new law"),[36] Dworkin found such distinctions to be beside the point. He saw no reason not to view every standard a judge is required to apply as a "legal" standard.[37] Arguments about which aspects of judicial decisions are based on "legal" factors and which on "extra-legal" factors seemed to him to be of little interest.

A third theme is that the best way—and perhaps the only way—to prove or disprove the existence of unique right answers in (all) legal cases is to consider individual, difficult cases, and construct an argument that a particular result is the unique, correct one, or, to the contrary, to argue that, in this case, no one answer is better than the alternatives.[38] Dworkin believed that there is unlikely to be a global argument establishing or refuting legal determinacy.

General challenges have been raised to the possibility of right answers under Dworkin's approach based on problems of incommensurability (whether one can meaningfully state that one theory is better than another, when one alternative is better on one value, e.g. "fit", and the other alternative is better on a different value, e.g. "moral worth")[39] and demonstrability (that given Dworkin's other premises, he cannot conclude both that there are unique right answers to all legal questions and that these right answers will not be demonstrable, at least in principle, under optimal conditions).[40] These are interesting and difficult topics,[41] but there is no time to deal with them adequately in the present text.

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[35] See, e.g. Dworkin, "A Reply by Ronald Dworkin", pp. 275–278.

[36] See, e.g. Raz, *Ethics in the Public Domain*, pp. 187–192.

[37] Dworkin, "A Reply by Ronald Dworkin", pp. 261–262.

[38] See, e.g. Dworkin, *Justice in Robes*, pp. 41–43.

[39] The debate between Dworkin and various critics on the issue of incommensurability is summarised in Bix, *Law, Language and Legal Determinacy*, pp. 96–106.

[40] See Michael S. Moore, "Metaphysics, Epistemology and Legal Theory", 60 *Southern California Law Review* 453 at 480–483 (1987).

[41] On incommensurability generally, see Ruth Chang ed., *Incommensurability, Incomparability, and Practical Reason* (Harvard University Press, Cambridge, Mass., 1997); Nien-hê Hsieh, "Incommensurable Values", in Edward N. Zalta ed., *Stanford Encyclopedia of Philosophy*, *http://plato.stanford.edu/entries/value-incommensurable/* (2016); on the implications of incommensurability for law, see "Symposium: Law and Incommensurability", 146 *University of Pennsylvania Law Review* 1169–1731 (1998).

Some of Dworkin's later interpretive discussions treated the issue of "right answers" only in passing or by implication. One work seemed to go even further, treating the issue as an irritating distraction:

> "We should now set aside, as a waste of important energy and resource, grand debates about . . . whether there are right or best or true or soundest answers or only useful or powerful or popular ones. We could then take up instead how the decisions that in any case will be made should be made, and which of the answers that will in any case be thought right or best or true or soundest really are."[42]

On the other hand, while the tone of this quotation is dismissive, it continues a theme mentioned earlier: there are at least "best answers" to legal questions, even if for some reason one hesitates about calling them "right answers".

Why might the discussion of the "right answer thesis" be worth the effort? One point is a psychological/sociological one, directed at judges and advocates. If they believed that in difficult cases there were likely to be unique correct answers, however difficult they might be to discover, and however much competent lawyers might disagree about which answers were the correct ones, the efforts and arguments would be directed at the legal materials: trying to construct an argument for one answer being the right one. On the other hand, if it were thought that because of the law running out, or incommensurability problems, or the indeterminacy of language, or whatever, that there were usually no unique right answers for the more difficult legal questions, then the attention of advocates and judges in such cases might turn too quickly (whatever "too quickly" might mean here) to legislative questions of which proposed legal rule would be best. Dworkin would argue that it is better (and that it is the better interpretation of our own practices) that courts remain, to the extent possible, "forums of principle", attempting to discover the answer to legal disputes within the existing legal materials.

Dworkin's point: when a judge decides a case that may affect liberty or property based on (what is claimed to be) an existing right answer, then the decision is (in principle) in accord with what legal officials had previously decided. However, if the judge decides to legislate anew, because there is no existing right answer, then a citizen's liberty or property will be taken away based on retroactive lawmaking, and that would be, he argues, a great injustice.[43]

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[42] Ronald Dworkin, "Pragmatism, Right Answers and True Banality", in Michael Brint and William Weaver eds., *Pragmatism in Law and Society* (Westview Press, Boulder, Colo., 1991), pp. 359–388 at p. 360.

[43] See, e.g. Dworkin, *Taking Rights Seriously*, pp. 44, 123.

DWORKIN VERSUS HART

7–05 Dworkin's early work gained prominence for its attacks on legal positivism, in particular H. L. A. Hart's version of legal positivism. What little direct response there was from Hart came late in his life, and a good portion of it was only published posthumously.[44]

The "debate" between Dworkin and Hart, like the "debate" between Hart and Fuller, may be perhaps best understood as not really having been a debate at all, as the term is normally used. The differences between the two theorists are not so much contrary views on particular issues, but both more and less than that: Hart and Dworkin had differing ideas about which questions and which concerns in legal theory are the most pressing.[45] This is not to say that there are not some overlapping issues about which one could accurately state that the theorists have contrary positions, only that to focus on these direct disagreements would tend to underestimate the extent to which the theorists were actually talking past one another.

In one of his responses to Dworkin, Hart began by contrasting theories about law in general versus theories about a particular legal system (or, as he read Dworkin's theory, theories about how judges in a particular legal system should decide cases).[46] This claim brings up, among other things, the question about the possibility of general jurisprudence (an issue considered in Ch. 2) and the proper characterisation of Dworkin's theory.

Elsewhere in the same article, Hart offered a contrast among possible types of legal theory, a contrast based on images. One type of theory is to be used "within" the legal system: for example, in telling a judge how to decide disputes. Another type of theory involves looking at the system "from the outside". Basing the argument on the images, one would say that a theory cannot be simultaneously part of the legal system and a description of the system from the outside.[47] In some ways, this last argument is a strange one for Hart to have put forward, for one of the most

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[44] I am thinking in particular of H. L. A. Hart, "Comment", in Ruth Gavison ed., *Issues in Contemporary Legal Philosophy* (Clarendon Press, Oxford, 1987), pp. 35–42, published in 1987; and Hart, "Postscript", published posthumously in 1994. For completeness one should also note H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press, Oxford, 1983), pp. 137–141 (reproducing material first published in 1977), which discussed aspects of Dworkin's work, but more by way of reporting than critique. See generally Ronald Dworkin, "Hart's Posthumous Reply", 130 *Harvard Law Review* 2096 (2017); Nicos Stavropolous, "The Debate That Never Was", 130 *Harvard Law Review* 2082 (2017).

[45] This is a point Hart himself noted. See Hart, "Comment", pp. 36–40.

[46] Hart, "Comment", pp. 36–38.

[47] Hart, "Comment", p. 40. Dworkin criticised this effort to separate theories of law from particular decisions of what the law requires as Hart's "Archimedianism". See Dworkin, *Justice in Robes*, pp. 140–186.

significant aspects of Hart's approach to law (as discussed in Ch. 3) was that it demanded that we take into account the perspectives of citizens within a legal system, the "internal point of view", in constructing a theory of law.

The main question for this exchange between Dworkin and Hart is how much we can rely on the images, on the metaphors alone, in evaluating or creating arguments. It does sound strange to say that a theory is simultaneously part of the system and the best explanation of the system. However, arguments of this kind, with all their hints of circularity, are actually relatively common in modern philosophy; examples include the hermeneutic circle in literary theory, and John Rawls' use of reflective equilibrium in moral and political theory.

To the extent that there is a true conflict between Dworkin and Hart, it is at those places where Dworkin states or implies that there is no room for a substantive, detailed and interesting descriptive or conceptual theory of law (that is not interpretive). This struggle can be seen not only in Hart's insistence of the space for and need for a (non-interpretive) descriptive or conceptual theory of law in general, but also in his disagreement with any attempt to recast legal positivism as being about justifying present/future coercion,[48] and his claim that even if the "sense" of legal propositions in most or all legal systems is interpretive/evaluative, it does not follow that descriptive or conceptual theory of such matters need similarly be interpretive/evaluative.[49]

DEBUNKING QUESTIONS

7–06 Commentators will sometimes query "the real reason" for or "the real motivation" behind some line of analysis. In legal philosophy, this type of challenge often has its roots in American legal realism[50] and the critical legal studies movement (topics to be discussed in Chs. 17 and 19); the topic is raised here, because while the claim is rarely considered from the perspective of the theorist being "debunked", this is a perspective from which such claims may lose some of their force.

Critics sometimes claim that the terms used by practitioners or theorists are labels without content, which only serve to mislead. If we look at the actual practice, the argument goes, we would find only an attempt to rationalise particular results. Additionally (as conclusion if not as premise), these arguments usually hold that it is all but nonsensical to say that one theory is better than another at explaining law. All that is

[48] Hart, "Postscript", pp. 241–242.
[49] Hart, "Postscript", p. 244.
[50] See, e.g. Felix Cohen, "Transcendental Nonsense and the Functional Response", 35 *Columbia Law Review* 809 (1935).

going on in descriptive legal theory, this approach states, is an attempt to legitimate particular judicial decisions or methods.

Such analyses can be provocative, though there are times when one is concerned with how easily they seem to be produced. There are many such arguments around: for example, that the early American theorists, like Christopher Columbus Langdell, who tried to portray legal reasoning and the judicial process as scientific, were merely trying to defend unpopular conservative judicial decisions as "objective", as required by deductive reasoning that the judges could not legitimately side-step. The American legal realists who purported to debunk this formalistic approach could themselves be debunked: their positive program might be said to have legitimised legal reform and justified the use of policy arguments in the courts.[51] Similarly, H. L. A. Hart, with his arguments based on the "open texture" of language, could be seen as justifying limited judicial legislation in difficult cases. In the same line of analysis, Ronald Dworkin's approach, in terms, first, of the "right answer thesis", and, later, with his "interpretive approach", could be seen as offering a way of legitimising the apparently political nature of the Warren Court's jurisprudence in the United States, at a time when the decisions of that court were attacked as "anti-democratic".[52]

The critics seem to be arguing that theories of interpretation merely decorate and legitimate the choices made by judges, while hiding the real reasons (motivations) for the decisions, and that few decisions are actually determined (or precluded) by the theoretical prescriptions (for example, "neutral principles",[53] "the Grand Style of Judging",[54] or "the judicial virtues"[55]) judges are told to follow.

Dworkin responded to attempted "debunkings" of this type by claiming that they are irrelevant to his project. Why does it matter, he asks, that there might be historical, psychological or sociological explanations for why a particular theory was put forward or was well-received?[56] Even if it can be proven that a theory serves the interests of a certain class or group at the expense of others, or that the theory expresses the *Zeitgeist* of its era of origin, why should this matter? In the end, the question is whether the theory is right, or whether it is at least better than alternative theories. Historical, psychological and sociological explanations are marginal to investigations into a theory's correctness.

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[51] See Morton Horwitz, *The Transformation of American Law 1870–1960* (Oxford University Press, Oxford, 1992), pp. 185–212.

[52] See Peter Gabel, Book Review, 91 *Harvard Law Review* 302 (1977).

[53] Herbert Wechsler, "Toward Neutral Principles in Constitutional Law", 73 *Harvard Law Review* 15 (1959).

[54] Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown & Co., Boston, 1960).

[55] Hart, *The Concept of Law*, pp. 204–205.

[56] See, e.g. Dworkin, *Law's Empire*, pp. 271–274 (discussing critical legal studies).

Debunking explanations may not be completely irrelevant, in that we can rightly be suspicious of philosophical positions—whether these be ethical theories, social theories, or legal theories—that match the theorist's self-interest or that theorist's particular prejudices regarding how the world should be. However, suspicion is not proof, and as long as argument about the merits of a theory can be conducted on neutral grounds (according to criteria accepted by the participants in the field regarding what makes for stronger and weaker arguments and for better and worse theories[57]), then the "debunking" arguments can work only to justify beginning a debate about the theory in question; the eventual judgment about its merits will be based on other grounds.

Suggested Further Reading

7–07

Justine Burley ed., *Dworkin and His Critics* (Blackwell, Oxford, 2004).

Marshall Cohen ed., *Ronald Dworkin and Contemporary Jurisprudence* (Duckworth, London, 1984).

Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, Cambridge, Mass., 2011).

—, *Justice in Robes* (Harvard University Press, Cambridge, Mass., 2006).

—, *Law's Empire* (Harvard University Press, Cambridge, Mass., 1986).

—, *A Matter of Principle* (Harvard University Press, Cambridge, Mass., 1985).

—, *Taking Rights Seriously* (revised ed., Duckworth, London, 1977) (the revised edition contains a "Reply to Critics").

Stephen Guest, *Ronald Dworkin* (3rd ed., Stanford University Press, Stanford, 2012).

Scott Hershovitz ed., *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (Oxford University Press, Oxford, 2006).

Jurisprudence Symposium, 11 *Georgia Law Review* 969–1424 (1977) (includes discussions of Dworkin's early work by H. L. A. Hart, Kent Greenawalt, Stephen Munzer, and David Richards, and a reply by Dworkin).

Brian Leiter, "The End of Empire: Dworkin and Jurisprudence in the 21st Century", 36 *Rutgers Law Journal* 165 (2004).

Andrei Marmor, *Interpretation and Legal Theory* (Clarendon Press, Oxford, 1992).

Arthur Ripstein ed., *Ronald Dworkin* (Cambridge University Press, Cambridge, 2007).

Scott J. Shapiro, "The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed", in Arthur Ripstein ed., *Ronald Dworkin* (Cambridge University Press, Cambridge, 2007), pp. 22–55.

Nicos Stavropoulos, "Legal Interpretivism", in Edward N. Zalta ed., *The Stanford Encyclopedia of Philosophy*, *http://plato.stanford.edu/entries/law-interpretivist/* (2014).

—, *Objectivity in Law* (Clarendon Press, Oxford, 1996).

Symposium on *Law's Empire*, 6 *Law and Philosophy* 281–438 (1987).

Wil Waluchow and Stefan Sciaraffa (eds.), *The Legacy of Ronald Dworkin* (Oxford University Press, Oxford, 2016).

[57] Of course, the sceptic might argue that there are no "neutral grounds": all criteria already express the interests or the pre-conceptions of certain groups.