JUDGING INTERPRETATIONS

Scott Hershovitz

Submitted for the degree of D.PHIL., University of Oxford

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ABSTRACT

Interpretation is fashionable, and not just in jurisprudence. Yet for all the attention interpretation has received in the past few decades, we have a poor understanding of what it is and what counts as doing it well. This thesis begins with the question, 'What is interpretation?' I argue that the reigning orthodoxy which holds that interpretation seeks meaning is misguided. A more illuminating account of interpretation is developed on which interpretation seeks understandings. After explaining what interpretation is and how it works, I explore the norms which govern it. As part of this exploration, I expose a number of mistakes in Stanley Fish's account of the nature of interpretive constraints. I then develop an alternative account of what it means to say that objects (including texts) constrain their own interpretation, and I show that they often do so. I outline a view of interpretation I call *almost pragmatism* according to which the appropriate standards for judging an interpretation vary with the purpose for making the interpretation. I also argue that legal theorists have misunderstood and misapplied Ludwig Wittgenstein's remarks on rules and interpretation in a variety of ways. I conclude that there is nothing useful we can learn about law from Wittgenstein's remarks on rules.

The second part of this thesis uses the improved understanding of interpretation developed in the first part to shed light on problems which have long perplexed students of jurisprudence. I begin by considering what standards should be used to assess judicial interpretation. I argue that the appropriate standards to use will properly vary among different legal systems, and thus general jurisprudence can contribute little to the debate. Two general suggestions for norms which might govern legal interpretation—fidelity to legislative intent and Ronald Dworkin's best light requirement—are taken up in the final chapters. In preparation for the final chapters, I summarize Joseph Raz's account of authority, which forms the basis of many of the arguments to be considered. I suggest that Raz's account of legitimacy is inadequate for understanding the legitimacy of political authorities. I then turn to arguments Raz offers suggesting that, in a limited sense, judicial interpretations ought to be judged according to their fidelity to legislative intent. I contend that Raz is wrong in thinking that we must interpret in accord with the intention of law-makers in order to make sense of their authority. The final chapter examines Dworkin's best light requirement. I present an understanding of its content and scope consistent with what we learned about interpretation in the opening chapters and consider important objections to it. I conclude that Dworkin's interpretive method is not inconsistent with law's authority, as Raz and others have maintained.

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CONTENTS

INTRODUCTION 1

1. SEEKING UNDERSTANDING 9

2. CONSTRAINING INTERPRETATION 39

3. JUDGING INTERPRETATIONS 80

4. WITTGENSTEIN ON RULES: THE PHANTOM MENACE 104

5. RAZIAN AUTHORITY AND LEGITIMACY 135

6. AUTHORITY, INTENTION AND INTERPRETATION 162

7. CONSTRUCTIVE IDENTIFICATION AND DWORKIN'S BEST LIGHT 193

CONCLUSION 229

BIBLIOGRAPHY 235

INTRODUCTION

Amidst the great political and legal drama which played out in the aftermath of the 2000 US presidential election, a smaller drama unfolded. This smaller drama shared the same stage as the others—late-night talk shows, hastily-arranged press conferences, scathing editorials and meticulous legal briefs—but it was even stranger than its brethren. It was a distinctly *philosophical* drama, and its main characters were not would-be presidents, aggrieved voters or even argumentative attorneys, but simply ideas. At the centre of this drama, battered and bruised, was the concept of interpretation.

Two acts in the play stand out. In forum after forum, advocates for then Governor George W. Bush insisted that the Florida Supreme Court had erred so grievously in interpreting that state's election law that it had not offered an interpretation at all. Rather, Bush's forces claimed, the court had rewritten the Florida election code, and this was no mere rhetorical flourish. The United States Constitution vests sole authority to appoint presidential electors in state legislatures. This alleged judicial usurpation of legislative authority had consequences.

When the United States Supreme Court considered Bush's claim, the rhetoric was toned down. Theodore Olson, who argued on behalf of Bush, still claimed that the Florida court had rewritten the law, but he argued simply that the interpretation they offered was not reasonable enough to deserve the deference of the Supreme Court; gone was the claim that it was no interpretation at all.[1] To its credit, the Court avoided the philosophical thicket Bush pushed them towards. The *per curiam* decision bypasses entirely the question of whether or not the Florida court's interpretation amounted to a rewriting of the state's law.[2] To the Court's discredit, the

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[1] *Bush v. Gore*, U.S. Oral Arg., 2000 WL 1804429
[2] *Bush v. Gore*, 121 S. Ct. 525

grounds upon which it did decide the case—equal protection violations—were perhaps even more suspect. That, however, is an issue for another day.

Though the Court wisely avoided the contentious issues surrounding interpretation, we can indulge. One wonders, for example, whether the lawyers and judges in this drama were familiar with the work of Stanley Fish. Fish, the *enfant terrible* of literary and sometimes legal theory, argues forcefully that *all* interpretation rewrites the text being interpreted. In Fish's view, the claim that Bush's advocates were pushing was a conceptual truth—the Florida court could have done nothing but rewrite the statute, and if the Supreme Court set out to interpret it, the Supreme Court would rewrite it as well. How then could the claim that the statute had been rewritten make a difference? Well, Fish might be wrong. In fact, I think he is. Of course, if the Supreme Court had waded into these issues, it is very unlikely that it would have taken on Fish, and for good reason. Nevertheless, it would have been weighing in on one of the most divisive debates in academia. It would have staked out a position, if only by implication, on the nature of interpretation.

The other part of the election drama which stands out involves those darn chads, the bits of paper which a voter who successfully manipulates the punch card machinery dislodges from her ballot. Many chads, it turns out, are not fully dislodged; these are the nefarious hanging or dangling chads. Even worse, some chads are merely dimpled. All this came to the fore as the various counters and recounters were charged with determining the intent of the voter, deciding whether a two-corner hanging chad reflected an intent to vote for Al Gore or nothing more than a half-hearted display of support. With characteristic Texas drawl, former Secretary of State James Baker led the Bush team in a largely successful attempt to discredit the process. The counters, we were told, were attempting to 'divine' the intent of the voter, as if only God could interpret successfully where a machine had failed already. Over and over again, Bush advocates questioned the objectivity of the process. Baker complained that 'individual subjectivity and decisions to "determine the voter's intent" would replace precision machinery... Machines are neither Republicans or Democrats—and therefore can be neither consciously nor unconsciously biassed.'[3] If there were no rules to govern the counters' interpretations of the ballots, Bush supporters claimed, anything might count as a vote. Moreover, even if there were

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[3]Quoted in W McCormack 'Deconstructing the Election' *The Nation* March 26, 2001

rules, different interpreters would apply them differently. Lurking beneath their attacks on the possibility that the counters could objectively assess the ballots were two ideas much derided by conservative intellectuals.[4] First is the notion that texts or historical events do not constrain their own interpretation, and the second, often a corollary to the first, is that interpreters are free to assign whatever meaning they wish to whatever they interpret. I should be clear: I am not endorsing these ideas—I shall argue that they are misguided—but they are worth taking seriously. The irony of conservative politicians embracing and deploying ideas conservative intellectuals have spent decades railing against was lost on all but a few.[5]

This thesis is about the ideas in this drama. It is about interpretation, what it is and how it works. It is about whether or not statutes, ballots, novels, and poems constrain their own interpretation. It is about whether or not we rewrite texts when we interpret them. It is about what, if anything, makes one interpretation better than another. It is about the relationship between interpretation and authority, the relationship between interpretation and law. As the rhetoric of the election demonstrates, these topics are not the stuff of idle academic debate. Our understanding of interpretation has consequences.

The motivation for this investigation is not, however, the aftermath of the presidential election. While those events poignantly illustrate much of the controversy over the nature of interpretation, there is plenty good reason to investigate interpretation apart from shedding light on the election controversy. Interpretation has stood at the centre of jurisprudence for quite some time, put there largely by the work of Ronald Dworkin. Dworkin argues that law is an interpretive enterprise, and his theory of law is a theory of how judges ought to interpret. In Dworkin's view the job of a judge is to develop an interpretation of the legal history of her community (including statutes, precedents, customs, and so on) which fits and justifies that

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[4]Conservative, of course, in the sense used to partition the political spectrum in America.

[5]Win McCormack wrote an excellent article in *The Nation* exploring just how eerily the Republican strategy during the recount resonated with the work of Michel Foucault and Jacques Derrida, among others. Particularly ironic is his survey of the writings of Lynne Cheney, wife of Vice-president Dick Cheney, who thinks Foucault's ideas are 'nothing less than an assault on Western Civilization.' Prophetically, she once wrote, 'Michel Foucault would have been fascinated by late-twentieth-century presidential campaigns.' Quoted in McCormack *above* note 1.

history to the extent possible and then to apply that interpretation to the case at hand. Dworkin's work on interpretation has enmeshed him in a number of debates with those who object to his account, perhaps most famously with Stanley Fish. Fish objects to Dworkin's distinction between interpreting and inventing. Dworkin thinks a judge invents law when she fails to pay sufficient attention to the legal history of her community. Fish thinks there is no distinction to be drawn, because as noted above, he thinks all interpretation invents. Fish is by no means the only theorist who objects to Dworkin's account of interpretation. Dworkin believes interpreters are required to show whatever they are interpreting in its best light, to make the best of it they can. This requirement has been the subject of endless debate, as many believe that it leads to interpreters showing laws not as they are, but as they wish they were.

Another dominant strand of jurisprudential thought, exemplified in the work of Joseph Raz, aims to understand law through its role as an authority. Interpretation plays a smaller role in this strand of jurisprudence, but an important one nonetheless. Raz argues that interpreters of statutes are required to show some deference to the intentions of the authors of the statutes, deference to the intentions of legislators. He believes so because he thinks the only way to make sense of the authority of legislatures is to allow them to make the law they intend to make. Moreover, Raz argues that Dworkin's method of interpretation is incompatible with law's authority, placing interpretation at the centre of the debate between legal positivism and Dworkin.

Yet another school of jurisprudence holds that interpretation leads to radical indeterminacy in law. Like Bush's advocates, theorists of this ilk think that interpretation is hopelessly subjective. Since judges have to interpret, they argue, the content of law is hopelessly subjective as well. Law, they argue, is not a system of rules which can be applied disinterestedly. Rather, it is a competition for power to impose one's favoured interpretation, which holds no more claim to truth or validity than any other.

In addition to the jurisprudential debates over interpretation, debates are also carried out at a more retail level among lawyers engaged in the practice of law. They debate the proper way for judges to interpret texts. They argue over whether or not judges ought to seek the intention of authors when interpreting statutes, constitutions, and contracts. They argue over canons of interpretation, rules that judges use to interpret. They debate what the canons are or ought to be and whether or not they are

applied consistently. They also, of course, debate specific interpretations. They debate whether or not the Supreme Court erred in interpreting the 14th Amendment as guaranteeing a right to privacy or whether or not the placement of a comma in a particular statute is meaningful. They debate the interpretation of ambiguous or contestable words which appear in statutes, like 'reasonable' or 'commercial interest' or 'after dark'.

The impetus for this project is an inadequacy in the foundations of the debates lawyers have over interpretation. For all that has been written about interpretation over the past decades, we still know very little about what it is and how it works. Throughout this thesis, I shall show that debates over interpretation are beset by a variety of metaphysical confusions. In an attempt to avoid such confusion, this thesis does what so many investigations of interpretation have failed to—it begins at the very beginning with the question, 'What is interpretation?' Only by beginning with the most basic questions we can ask can we hope to avoid the metaphysical confusion which permeates the debate.

So in Chapter One, I take up the question of what interpretation is. I begin by considering the suggestion that interpretation seeks meaning, and I argue that this common view encounters great difficulty. Unless we can pin down one or more senses of meaning which are sought by interpretation, the suggestion is unhelpful, if not misleading. I argue that it is better to conceive of interpretation as seeking understanding, and moreover, I argue that we can build an account which shows all instances of interpretation, whether they occur in law, literature, science, or art, as part of the same phenomenon. The main project of Chapter One is developing such an account.

Chapter One analyses the structure of interpretation—what we are doing when we interpret—but says nothing about how we interpret well. Chapter Two is about the norms which govern interpretation, about what makes one interpretation better than another. Stanley Fish's work is discussed extensively at the start. Fish holds that communities of interpreters rather than the objects of interpretation themselves are what constrain interpretation. We interpret well, on Fish's view, when our community says we do, not in virtue of any facts about what we interpret. This view, popular among modern literary theorists and some lawyers, is explored in detail. Along the way, I argue against Fish's claim that interpretation invents or creates its own objects. In the most important part of the chapter, I develop a positive account of

what it means to say that an object constrains its own interpretation, and I argue that texts (as well as other objects of interpretation) often do so. Chapter Two also discusses the sensitivity of interpretation to the purposes one brings to it; I argue that what counts as interpreting well varies with the reasons one has for interpreting.

Chapter Three concludes the first half of the thesis, tying up some loose ends about interpretation and beginning the work of applying what we have learned up to that point to law. I compare my account of interpretation to the work of prominent interpretive theorists, including Richard Rorty, Richard Posner and Ronald Dworkin. Afterwards follows an inquiry into what standards are appropriate for judging legal interpretations. I argue that jurisprudence can make very little headway in answering this question; the answer is too dependent on features which vary from legal system to legal system. Instead of resolving what standards should be used to assess judicial interpretation, I present a broad outline of the types of considerations which are relevant. Two common suggestions for how judges ought to interpret are taken up in detail in Chapters Six and Seven. Chapter Three ends with a defence of one version of the claim that legal theory and legal practice are continuous, that questions of legal theory impact in a systematic way the right answer to questions of legal practice. This claim is vindicated by the theory of interpretation developed over the first portion of the thesis.

The remaining chapters all concern problems which have long perplexed students of jurisprudence. Chapter Four explores the relevance for law of Ludwig Wittgenstein's work on rules. Two waves of theorists have thought that lawyers could learn much from Wittgenstein's work. The first, following Saul Kripke's influential interpretation of Wittgenstein, argue that law is radically indeterminate, because it is always possible to reinterpret a rule to show an action as falling inside or outside its ambit, as the interpreter may desire. I argue against this form of scepticism. The second wave of theorists have thought much the opposite. They think that the key to understanding law's determinacy lies in understanding what Wittgenstein teaches us about the nature of rules and interpretation. I argue that they also misapply Wittgenstein's remarks, though in ways more modest than the theorists of the first wave. In the end, I suggest, we can learn nothing useful about law from Wittgenstein's remarks on rules.

Chapter Five does preliminary work for the arguments in the concluding chapters of the thesis. It takes a detour from interpretation to explore Raz's analysis

of authority. The main part of the chapter is purely expository, as a clear understanding of Raz's analysis is necessary for evaluating the arguments in the final chapters. The latter portion of the chapter, however, contains an important challenge to Raz's understanding of legitimacy. I argue that Raz's test for the legitimacy of authority, the normal justification thesis, is a substantive test which does not take account of procedural aspects of legitimacy. I suggest that this makes the normal justification thesis inadequate for understanding the legitimacy of political authorities.

Chapter Six brings us to perhaps the most discussed issue about interpretation and law, the question of legislative intent. I consider new and powerful arguments Raz offers aimed at showing that we cannot make sense of the authority of legislatures unless we interpret law in accord with their intentions. I explore a number of problems with Raz's arguments and his recommendations. I conclude that there are other ways of making sense of the authority of legislatures; their authority to control the development of the law does not demand that we interpret in accord with their intentions. I leave open the possibility that there might be other good reasons for interpreting in accord with legislative intent, though I call into question whether we ought to think of legislatures as having intentions at all.

The final chapter examines Dworkin's method of interpretation, focussing on the requirement that interpreters show the object of interpretation best light. I present a new way of understanding the scope of Dworkin's requirement consistent with what we have learned about interpretation from the earlier chapters. In the latter half of Chapter Seven, I consider arguments which purport to show that Dworkin's method of interpretation undermines law's authority. This debate is one of the most lively and important in contemporary legal theory, as well as one of the most complex. I argue that Dworkin's interpretive method, and others relevantly like it, are compatible with law's authority.

The tone of this thesis is deflationary. Throughout, I argue that debates about interpretation are complicated by much metaphysical confusion. Yet clearing away the confusion does not move us far forward. Attending to the nature of interpretation teaches us next to nothing about the interpretive debates people actually have, like debates over the 14th amendment or the Voting Rights Act. The main payoff of thinking deeply about the nature of interpretation is that we can see more clearly the character of our disagreements and we can reject certain types of arguments outright—arguments based on flawed understandings of what interpretation is. So I

will disappoint readers looking for arguments which might make a difference in the interpretation of this or that law. I hope not to disappoint entirely, however. For all that has been written about interpretation, we have a very poor grasp of what it is, how it works, and when we are doing it well. Much progress can be made towards understanding that, and as the aftermath of the presidential election shows, our understanding has consequences.

CHAPTER ONE

SEEKING UNDERSTANDING

Interpretation is fashionable, and not just in jurisprudence. Literary theorists, art critics, scientists, psychoanalysts, theologians, and meteorologists, to name just a few, consider interpretation a more or less integral part of what they do. This presents a challenge if we want to study the nature and role of interpretation in law. We need to know what interpretation is. We must know what the literary theorist, art critic, scientist, psychoanalyst, theologian, and meteorologist do when they interpret, or we must know that there is not one activity that they all do, but rather a variety which for one reason or another are all called interpretation. Only when we know what interpretation is can we begin to ask what role it plays in law.

If there is one activity which everyone who interprets engages in, interpretation is univocal. If not, interpretation is multivocal. If interpretation is univocal, if all of its instances share something in common, we will be able to form a general theory of what interpretation is. How comprehensive such a general theory is will be limited by what different instances of interpretation share in common. Given the diversity of uses of interpretation, a general theory may be quite modest in scope.

Interpretation might turn out to be multivocal; its instances might refer to a variety of distinct activities with no universal features. If interpretation is multivocal, we will need to explain carefully the different senses of interpretation and place interpretation in law within one or more of them. We should not concede, however, that interpretation is multivocal until we have made an attempt to find a general theory of interpretation and failed. A theory of interpretation that applies to as many instances of interpretation as possible will help us to take advantage of insights into the nature of interpretation from disciplines other than law and to avoid errors that might be caused by mistaking what is true of interpretation only in a narrow context to be true of interpretation generally.

Most attempts to explain what interpretation is regard it as univocal, at least in a limited sense. They suppose that all instances of interpretation bear a close relationship to meaning, that interpretation provides access to meaning. This widely held assumption provides a useful starting point for our inquiry into what interpretation is.

1. INTERPRETATION AND MEANING

Interpretation appears closely related to meaning. We often say we interpret to find meaning, perhaps in a novel or a painting. Some say interpretation characteristically aims to find hidden meanings, meanings that are not out in the open or instantly accessible. Many believe interpretation discovers meaning or imposes it.

Meaning is an amorphous concept. We consider an amazing variety of objects and phenomena capable of bearing meanings. If all we know about interpretation is that it seeks meaning, we may not know very much about what it is or what it does. If the suggestion is to be helpful, at the very least, we need a grasp of the meaning of meaning! Let us illustrate the problem. A sociologist might interpret cultural trends of the 1980s. She might seek meaning in the popularity of Madonna or perhaps in the celebration of Wall Street personalities like Michael Milken. A literary critic, on the other hand, might interpret William Blake's 'The Tyger'. She might be interested in discovering the meaning of the poem and believe that this turns on the oft-asked question, 'Who made the tyger?' Further still, in the course of everyday conversation, we might interpret the meaning of an ambiguous instance of 'bank', trying to determine whether we are supposed to meet our friend by a financial institution or along the river. All three interpretations can be described as seeking meaning, but it is not clear that the meanings they seek share anything in common. Is the meaning of Madonna's popularity the same type of thing as the meaning of 'bank'? Is the meaning of 'bank' the same type of thing as the meaning of 'The Tyger'? 'Meaning', it seems, means something different in each of these contexts, and thus these instances of interpretation cannot be united simply by saying that interpretation seeks meaning.

Meaning is multivocal, so an account of interpretation on which interpretation seeks meaning is likely to be multivocal as well. That is, of course, unless we can find one sense of meaning which is sought by interpretation in all its instances. Many have supposed that there is one sense of meaning which is sought by all instances of interpretation, that interpretation is univocal even though meaning is not. In the

following sections, we shall investigate some of these suggestions. Unless we pin down one or more senses of meaning which interpretation seeks, the assertion that interpretation seeks meaning is entirely unenlightening.

Linguistic meaning

We can begin our search for the sense of 'meaning' sought by interpretation by immediately eliminating an entire class of senses of 'meaning' as inadequate—any technical linguistic sense which is designed to explain how language works. This class includes such candidate senses of meaning as 'meaning is sense and reference' or 'meaning is use.' We can rule this entire class out as the basis for a general theory of interpretation because many objects[1] of interpretation (eg paintings, compositions, data sets) are not the types of things that bear linguistic meaning. Interpretation often seeks linguistic meaning, but this is not the only type of meaning that it seeks. A general theory of interpretation should account for interpretation aimed at linguistic meaning, but it must account for much more as well. We shall have to look further if we are to unify an account of interpretation.

Gerrymandering interpretation, Part 1: Marmor

Andrei Marmor explores a promising alternative, pragmatic meaning, in considering what type of meaning is sought by interpretation.[2] Pragmatic meaning encompasses the communication intentions of a speaker (or artist, composer, etc). Marmor arrives at the conclusion that interpretation seeks pragmatic meaning by considering distinctions between three different locutions in which 'meaning' is used. They are

- Talking about the *meaning of* something.
- Talking about somebody's *meaning that* by something.
- Talking about an object's *meaning for* somebody.

Marmor equates *meaning of* with semantics (what I just called linguistic meaning) and dismisses it as a possible basis for a general theory of interpretation as we did above.

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[1]I shall use the word 'object' broadly to refer to whatever we interpret, physical or not. See *below* 22-23 for more extensive discussion of the objects of interpretation.

[2]A Marmor *Interpretation and Legal Theory* (Clarendon Oxford 1994)

He dismisses *meaning for* as a possible basis for a general theory of interpretation because he sees it as closely aligned with our emotional reactions to objects and thus not related to our interpretations of them.[3] He concludes that interpretation must be concerned with meaning in the *meaning that* locution, which is the pragmatic sense of meaning. He writes

> ... interpretation is essentially a matter of attributing intentions, that is, in the pragmatics sense of 'meaning', namely meaning that such-and-such by an act or expression.[4]

This approach is promising, because many objects of interpretation are intentionally produced and produced to communicate in some way. This is true of art, literature, and music, as well as speech and perhaps law. Marmor claims that the conceptual link he is arguing for between interpretation and pragmatic meaning is a point about the structure of interpretation which does not impact the endeavor in any practical way. This is so because, Marmor says, 'interpretations need not be based on the intentions of actual authors; the meaning of an act or an expression is understandable in terms of counter-factual intentions.'[5] Thus the attribution of intention to an author (conceived here broadly as the creator of the interpreted object) need not be an

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[3]Joseph Raz does not use the same terminology as Marmor, but expresses the same idea. He says that the meaning of a work to an individual is not what interpretation seeks. The special importance I attach to a Bach minuet because it was the first piece of music I learned to play on a guitar may fix its meaning to me, but such meanings are not often referred to as the products of interpretation. See J Raz 'Interpretation Without Retrieval' in A Marmor (ed) *Law and Interpretation* (Clarendon Oxford 1997) 155-175, 157.

It is not clear that either Marmor or Raz sufficiently distinguishes this type of meaning from the type of meaning sought by interpretation. If many people attach significance to an event, its meaning to those individuals seems also to be its meaning for the culture, and thus appropriately sought by interpretation. Consider the following interpretive statement: 'John F. Kennedy, Jr.'s death was tragic because he was America's favorite son, the boy everyone hoped would make good.' This statement purports to show the meaning of Kennedy's death, but it is meaning in the *meaning for* sense Raz and Marmor distinguish from the meaning sought by interpretation. Nevertheless it seems that we do not err in thinking this a possible interpretation of Kennedy's death.

[4]Marmor *above* note 2 at 31

[5]Marmor *above* note 2 at 31

assertion that an actual author had the intentions attributed, but can be a fiction of sorts, a counterfactual attribution of intention.

We might reject Marmor's assertion that interpretation aims to discover pragmatic meaning just because of his claim that the meanings which it attempts to discover can be attributed counterfactually. After all, if we need not be attributing an actual communication intention to an actual author, there will be no limits to what we can count as a communication intention for the purposes of interpretation. This lack of limits makes the claim that interpretation seeks pragmatic meaning empty.[6] Nevertheless, it is worth exploring the conceptual link that Marmor argues for between intention and pragmatic meaning, because this view, which Michael Moore calls the communicative model of interpretation, is quite common.[7]

Marmor's argument that interpretation seeks pragmatic meaning is flawed in at least two ways. First, the distinction between the different locutions in which 'meaning' is used is not sufficiently drawn in order to connect interpretation to one of those locutions. Second, some objects of interpretation are not created intentionally, and nothing is gained by maintaining a fiction about their creation.

Let us begin by examining the *meaning of*/*meaning that* distinction. The first difficulty with the distinction is that we often speak of interpretation providing access to the *meaning of* something, the meaning of a novel for example, yet Marmor says that the sense of 'meaning' associated with this locution is the semantic sense and is not what interpretation seeks. While this point may call into question just how natural Marmor's distinction is, it is easily met. We could, if we thought the distinction well-grounded and valuable, understand the appearance of *meaning of* in such talk to be a sloppy use of language and choose to understand all such talk as referring to meaning in the pragmatic sense.

The more important difficulty is that the *meaning that* locution is not clearly tied to communication intentions. For example,

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[6]Stanley Fish makes the same empty claim about interpretation and intentions. S Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Clarendon Oxford 1989). Joseph Raz argues against the Fish/Marmor view in J Raz 'Intention in Interpretation' in RP George (ed) *The Autonomy of Law* (OUP Oxford 1996) 249-286, 256.

[7]M Moore 'Interpreting Interpretation' in A Marmor (ed) *Law and Interpretation* (Clarendon Oxford 1997) 1-29, 4-6

> The meteorologist interpreted the falling barometer to *mean that* rain is on the way.

There are no communication intentions behind a falling barometer.[8] Even more important perhaps, is the fact that we use *meaning that* in discussing what people say when we are not interested in their communication intentions. For example, consider the following.

> So you interpret Bush's saying 'Read my lips: No new taxes' to *mean that* there will be a large battle in Congress over the budget this year.

This use of *means that* is very much like the barometer example despite that fact that it refers to a statement. This interpretive claim is not about the communication intentions of George Bush, but it displays a possible interpretation of his utterance.

Consider an interpretive statement of a different sort.

> Laura's saying that John cannot go to the party with her *means that* she is still upset with him.

Here the statement of Laura's being interpreted to *mean that* is not a predictor of things to come, but is rather evidence of something about Laura. The interpretive statement makes no claim that Laura intended to communicate her anger; in fact, it is consistent with it being the case that she intended to conceal her anger. Likewise, many interpretations of works of art which make use of *means that* are not about

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[8]There is a temptation to say that the barometer is an intentional creation and that there are communication intentions present, those of the creator of the barometer. This would be a mistake for a variety of reasons which are not worth exploring, because we can see an alternative example that would serve our purposes just as well without giving rise to this temptation: The meteorologist interpreted the increasing cloud cover to *mean that* it was going to rain.

Michael Moore would reject the example as a proper use of 'interpretation' because the meaning of the falling barometer is an example of Gricean natural meaning as opposed to non-natural meaning. 'Clouds mean rain' is an example of natural meaning; the use of 'meaning' points out the causal connection between clouds and rain. Language bears non-natural meaning. Below, I reject Moore's suggestion that interpretation only seeks non-natural meaning. See *below* 16-17.

actual or counterfactual communication intentions of the artist. Rather, the artwork is interpreted as revealing something about the artist:

> The blue shading in this painting *means that* Picasso was depressed at the time he painted it.

The *meaning of/means that* distinction fails. We cannot assign different senses of 'meaning' to the different locutions because we have seen that each is attached to multiple senses and the senses overlap. Interpretation is not characteristically attached to *meaning that*. Further, *meaning that* is not attached exclusively to communication intentions. Thus, to the extent that Marmor's argument that interpretation seeks pragmatic meaning relies on this distinction, it too must fail. Of course, Marmor could bypass the failed distinction entirely and argue directly for the association of interpretation with pragmatic meaning. An attempt to do so would have to address cases like the ones above where we speak of interpreting without seeking communication intentions. Any such attempt would fail as a general account of interpretation for reasons we shall now consider.

Many uses of interpretation (of data sets, of fossil records, etc) occur where there are no communication intentions, and we gain nothing by appealing to fictional ones. What could a palaeontologist gain by imagining the fossil record to be an intentionally created message for her to interpret? Excluding such uses of 'interpretation' as deviant or dispensable from the outset, as Marmor does[9], prejudices many of the interesting questions about interpretation. As Timothy Endicott observes, Marmor gerrymanders interpretation, and thus does not offer a theory of interpretation but rather a theory of interpretation of communication intentions.[10] Endicott correctly notes that

> An account of the concept of interpretation should admit the interpretation of dreams, novels, census data, seismograph records, constitutions and the entrails of a chicken, without dismissing any as non-standard uses of the word.[11]

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[9]Marmor *above* note 2 at 13

[10]TAO Endicott 'Putting Interpretation in its Place' (1994) 13 *Law and Philosophy* 451-479, 457

[11]Endicott *above* note 10 at 457

The assertion that interpretation seeks pragmatic meaning fails because it excludes too many of the ways in which we use interpretation; we have no foundation for dismissing some as deviant, non-standard or dispensable. It may turn out that the uses of interpretation are so varied that it is not possible to develop a general theory of interpretation. If this turns out to be the case, we may want to return to pragmatic meaning in our consideration of interpretation and law. It will only make sense to do so if we have independent reason to believe legal interpretation is a type of interpretation which seeks pragmatic meaning.[12] In any case, we have much work to do before we abandon our search for a general theory of interpretation.

Gerrymandering interpretation, Part 2: Moore

Michael Moore appeals to a different distinction between types of meaning—Paul Grice's distinction between natural and non-natural meaning—in explaining what type of meaning is sought by interpretation. 'Clouds mean rain' is an example of natural meaning, while 'she means that you should do the dishes' is an example of non-natural meaning. Interpretation, Moore argues, is concerned with the latter.

Moore writes

> ... 'natural meanings' are just animistic metaphors for causal connections between literally meaningless events. Causes and effects are natural signs for one another, but that just means each is evidence for the other given the connection between the two. ... In this uselessly broad sense of 'meaning', everything which is not causally inert (which is everything we know about) 'has meaning'.[13]

I am sympathetic to Moore's concern that natural meaning makes for a uselessly broad sense of 'meaning'. To me, however, this just highlights the problems inherent in explaining interpretation in terms of meaning. Meaning is amorphous and flexible. We cannot dismiss natural meanings as possible goals of interpretation because we are

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[12]In Chapter Six, we shall consider reasons for interpreting statutes in accord with the communication intentions of their authors.

[13]Moore *above* note 7 at 3

too familiar with instances of interpretation which seek just such meaning. To revisit a previous example,

> The meteorologist interpreted the falling barometer to *mean that* rain is on the way.

Further, scientists, sociologists, and economists, to name just a few, believe that they interpret data sets and evidence. The only sense in which they could be mistaken is for what they do when they interpret to be different from what people do when interpreting in domains more traditionally regarded as interpretive (like literary criticism). Even then, to call them mistaken, to say they do not interpret, would just be rhetorical, as all we would have established is that interpretation is multivocal. Nevertheless, we have no reason to believe that what a scientist does when she interprets data does not share something (however modest) in common with what a literary critic or art historian does. I shall argue that all instances of interpretation do share something in common.

Moore gerrymanders interpretation, albeit in a different way than Marmor. We are wise to keep Endicott's caveat in mind. If we dismiss interpretation aimed at natural meaning as not interpretation at all, we fail to give a full account of interpretation. Of course, interpretation aimed at natural meaning may have nothing to tell us about interpretation in law. True as this might be, we cannot be said to have a handle on what interpretation is, if we exclude such instances at the outset.

Raz's cultural meaning

Joseph Raz offers another explanation of the meaning which interpretation seeks. His remarks are limited to interpretation of works of art, which he says are cultural objects. On Raz's analysis, if an object is a cultural object, it can be interpreted without reference to the intentions of its creator, ie without reference to its pragmatic meaning. How then do cultural objects have meaning? Raz says, 'Having a meaning for a culture means being a suitable object of certain attitudes, responses, and uses.'[14] Interpretation involves elucidating the attitudes, responses, and uses appropriate to an object. This is fine as far as it goes (and to be sure, Raz only intends it to go so far),

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[14]Raz *above* note 3 at 163

but it cannot found a general theory of interpretation. Many of the examples we have appealed to already show that interpretation often seeks meaning in senses other than this. Indeed sometimes interpretation seeks linguistic meaning; sometimes it seeks natural meaning. Cultural meaning fares no better than our previous candidates.

Raz's work on interpretation points us towards a more promising account, however. He begins one of his essays on interpretation with the claim that, 'When interpreting we explain, show or display the meaning of the object of interpretation.'[15] We can read this with emphasis on 'meaning', and then Raz's account of interpretation seems part of the tradition we have been examining. However, if we shift the focus by placing emphasis on 'explain, show or display' we begin to move towards a broader and better account of interpretation. While Raz often speaks of interpretation as seeking meaning, much of what he says hints at an understanding of interpretation similar to the one I shall develop shortly.[16] Before we get there, however, we need to close out our consideration of meaning.

Moving beyond meaning

All of the possibilities we explored—linguistic meaning, pragmatic meaning, non-natural meaning and cultural meaning—are inadequate as a foundation for a general theory of interpretation. Interpretation seeks each of these on some occasions, but none on all occasions. Interpretation probably seeks many other types of meaning as well. The uses of 'meaning' are so numerous and interpretation is connected to so many of them that it looks increasingly unlikely that we can find a sense of 'meaning' to help us elucidate what interpretation is. Moreover, focussing on meaning in our attempt to understand interpretation without having a specific sense of 'meaning' in mind may prove detrimental. It will be tempting to continue to understand interpretation in terms of either linguistic or pragmatic meaning, because these are the senses we are most familiar with, yet both are inadequate for grounding a general theory of interpretation. We need to resist this temptation, which I suspect is the source of many confused theories of interpretation.

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[15]Raz *above* note 3 at 155

[16]Below I argue that interpretation seeks understanding not meaning. Some of Raz's writing suggests a similar view. He says, '"Interpretation" is closely related to explanation,' and he claims that 'The product of [interpretation], when it is successful, is an understanding of what has been interpreted.' Raz *above* note 6 at 250, 251.

We have not shown that it is wrong to say that interpretation seeks meaning, just that it is unilluminating and perhaps misleading. Interpretation seeks many different types of meaning—linguistic, pragmatic, cultural, natural, and perhaps others. This flexibility makes the claim that interpretation seeks meaning uninformative and perhaps empty. 'Meaning', one fears, is no more than a placeholder whose sense changes to fit the context. If we are to make progress towards understanding what interpretation is, if we are to make progress towards a general theory of interpretation, we shall have to move beyond meaning.

2. SEEKING UNDERSTANDING

I have a simple proposal for an account of interpretation which covers all its instances, an account which shows interpretation as univocal. I should say at the outset that the proposal I am about to put forth is at least as vague as the assertion that interpretation seeks meaning. I hope, however, that the vagueness in this account will be a strength, elucidating rather misleading. We shall call the account [U].

> [U]: Interpretation is an activity which embeds an object in an explanatory framework in order to produce an understanding of the object for the purposes brought to the interpretation.

Immediately two features of [U] call out for clarification: explanatory frameworks and understandings. As for explanatory frameworks, I shall start merely by offering other phrases which I might have used to express the same idea.

> (1) Interpretation embeds an object within a web of beliefs to produce an understanding...
> (2) Interpretation tells a story about an object which shows an understanding...

In the sections below, we shall apply this account of interpretation to many examples which will help to illustrate further what happens when we interpret.

The second clarification required concerns the product of interpretation, which I claim is an understanding of an object as opposed to the earlier suggestion that it is the meaning of an object. 'Understanding' may seem just as elusive and flexible as 'meaning'. I hope, in fact, that it seems even more so. We seek an amazing variety of

things when we interpret, and the only word I can find which accurately captures what we seek is 'understanding'. In our discussion of meaning, I suggested that we needed to pin down the meaning of 'meaning' in order for the assertion that interpretation seeks meaning to be helpful. Do we similarly need an understanding of 'understanding', or a grasp of its meaning, in order for my proposal to be useful? I think the answer is 'no', but I shall discuss the meaning of 'understanding' for those inclined to disagree. The reason I insisted on a grasp of the meaning of 'meaning' is because many theorists privilege one sense of meaning over another when discussing interpretation. We saw this with Marmor and Moore particularly. No similar danger exists, however, for the claim that interpretation seeks understanding. This is because we lack technical senses of 'understanding' like the ones we have for meaning. Thus the danger of being misled by the assertion that interpretation seeks understanding is comparatively small compared to the danger attendant the assertion that interpretation seeks meaning.

Still I suspect that some readers might pine for insight into what I mean by 'understanding'. I shall try to provide it, subject to the caveat that my remarks here are exploratory in nature. Understanding seems very much a primitive in our conceptual scheme, and it may not be possible to provide an account of it entirely in terms of other concepts. I take *an understanding* to be a set of beliefs about an object or, in some cases, a set of skills or capacities ('He understands calculus' most often means that he can do calculus). On an understanding of *Hamlet* many people share, Hamlet is paralysed by his indecision. This understanding consists in a set of beliefs about the play. Specific beliefs which compose the understanding may be true or false, and the quality of the understanding may relate to the truth or falsity of the composite beliefs. Here, however, we cannot afford to get bogged down in asking what makes one understanding better than another.

We can have many different types of understandings of the same object. We can have an understanding, or even multiple understandings, which address each question we have about an object. Therefore, I might have an understanding of the Jewish holiday Passover which includes beliefs about the rituals which are supposed to be performed on it. I might even have multiple understandings of the rituals to be performed, and I may be unsure which one is correct or believe that both reflect acceptable interpretations of the tradition. I might also have an understanding about Passover which includes beliefs about its relation to other holidays in other religions. I could have all of these understandings separately, or I might call them part of one

understanding of Passover (we need not worry here about individuating understandings). Since the questions we can ask about any object are limitless, so are the understandings we can have of an object. Complete understanding of any object is an impossibility; we can always ask further questions.

So what do we mean when we say something like, 'Margaret understood John's letter'? We mean simply that Margaret had an understanding which, for reasons relating to the context in which the statement is made, was particularly important or privileged for some reason. (We also probably mean that the content of her understanding is true, or correct, or accurate, or in some other way desirable, but I shall leave this aside.) Suppose Mike wants to know if Margaret found out from John's letter how John feels about his job, because having read the letter himself, Mike was confused. Being told, in response to his query, that Margaret understood John's letter would indicate to Mike that she did glean how John feels about his job. But the same sentence uttered about the same Margaret and the same letter might mean something entirely different. Suppose the letter was written in Swahili. Asserting that Margaret understood the letter in response to an appropriate inquiry or in appropriate circumstances might indicate that Margaret was able to translate the letter into a language she understood (or simply that she understands Swahili). We might say, 'Margaret was the first person we found who understood the letter because it was in Swahili.' But note that even though Margaret understood the letter, it only makes sense to claim so relative to some purpose for being interested in the letter. Margaret's understanding of the letter is necessarily incomplete—she could not answer every possible inquiry about the letter. The fact that we can have an indefinitely large set of possible understandings of any object is why interpretation produces an understanding relative to the purpose of interpreting, relative to the question or curiosity which sparked the act of interpreting. We shall explore how purpose affects interpretation in future chapters.

This discussion of understanding has been quick and dirty. Much more would need to be said to flesh out the concept fully, but I think it is a concept that is fundamental and widely shared enough to do its work here. Remember, in using 'understanding', my main goal is to expand what we see as a possible product of the act of interpreting, rather than restrict it. I think 'understanding' is better suited to the task than 'meaning' because all of the products of interpretation seem to be captured by it, while 'meaning' strains to capture many. Further, I hope 'understanding' lacks the misleading connotations 'meaning' bears.

The next sections explore this account of interpretation further, showing how it covers interpretation across many contexts. Before moving on, however, we should take note of a few important points. The first two are terminological. 'Interpretation' can be used to denote a product rather than an activity. Thus, an interpretation is an understanding produced through the activity of interpretation. Second, I shall call any proposition, remark or statement which shows an interpretation, an *interpretive proposition* (or remark or statement, as the case may be).

I should also comment on the *objects* of interpretation. Interpretation must be of something; whatever it is of is the object of interpretation. Following Endicott, I place no limit on what can be an object of interpretation, as doing so entails gerrymandering the phenomena unnecessarily. Further, not all objects of interpretation are texts, nor is the common practice of metaphorically describing them as texts helpful. I suspect the genesis of this practice lies in (unjustified) attempts to transfer conclusions drawn in literary discussions of interpretation to interpretation in other contexts. We shall examine literary discussions of interpretation further in Chapter Two.

Importantly, one physical object (or sound, event, etc) might constitute multiple distinct objects of interpretation. We might interpret a pile of gunk as chicken entrails. We see gunk, we investigate it, and conclude that it is chicken entrails. We might then interpret the chicken entrails as evidence (should we have some bizarre belief system) of how happy the gods are with our behaviour. These are two different interpretations and they have two different objects. The first interpretation is of a pile of gunk, and the second is of chicken entrails. This allows that we may know that a pile of gunk is chicken entrails without interpreting the chicken entrails themselves. This is important for a variety of reasons. First, it means that we are not always interpreting everything we encounter. Second, the fact that two interpretations of one physical object can be distinct interpretations because they are interpretations of distinct objects (a pile of gunk and chicken entrails) will be significant in Chapter Two, as it will help us identify a fallacy in a common argument about interpretation.

My last preliminary comments reflect two important substantive points. First, nothing in this account should be taken to imply that interpretation is the *only* mode of reaching understanding. Though interpretation seeks understanding, understandings can be acquired in other ways as well. Second, [U] is notable partially for how it is

limited. It leaves entirely open the questions of what makes for a good interpretation and how we choose between competing interpretations. The theory deals only with the structure of interpretation and makes no reference to the norms which govern it. Many of the interesting questions relating to interpretation are questions about the norms which determine when one is interpreting well, the norms which allow us to judge interpretations. While the structure of interpretation is the same in many contexts, we shall see in subsequent chapters that the norms which govern interpretation in different contexts diverge significantly. Thus, a general theory of interpretation cannot provide much insight into how we ought to judge interpretations in specific domains. Nevertheless, [U] is helpful for understanding what interpretation is. The following sections flesh out [U], showing how it captures the activity of interpreters across many different domains.

Conversational interpretation

I shall construe conversation broadly to cover written communication, though not all interpretation of written texts is conversational. Often in conversational interpretation, the type of understanding being sought is understanding of the meaning of an utterance or text. Perhaps the least controversial use of the word 'interpretation' as it relates to conversations occurs in cases of ambiguity.[17] Even philosophers who hold that language generally has plain meaning and that interpretation is not normally required to understand it admit that when the meaning of a sentence is ambiguous it calls for interpretation. Humorous examples abound. The *Albuquerque Journal* once

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[17] 'Ambiguity' is used here in a technical sense, which allows it to be distinguished from vagueness and contestability. Jeremy Waldron defines ambiguity as 'An expression X is ambiguous if there are two predicates P and Q which look exactly like X, but which apply to different, though possibly overlapping, sets of objects, with the meaning of each predicate amounting to a different way of identifying objects as within or outside its extension.' J Waldron 'Vagueness in Law and Language: Some Philosophical Issues' (1994) 82 *California Law Review* 509-540, 512.

There are other types of ambiguity which play an important role in linguistic and legal contexts. In addition to the possibility of predicates or words being ambiguous, syntactic structure can be ambiguous as well. For a review of the ways syntactic ambiguity afflicts law and the often feeble efforts of judges to respond, see L Solan *The Language of Judges* (U Chicago Press Chicago 1993).

ran a headline which read 'Never withhold herpes infection from loved one.'[18] The ambiguity is obvious: the headline might mean that one should never refrain from transmitting a herpes infection to a loved one, or it might mean that one should never hide the fact that one is infected with herpes from a loved one. Clearly, the newspaper intended the headline to mean the latter. How do we know? A variety of clues point us in this direction. Given the nature of herpes, it seems very unlikely that a newspaper would advocate its transmission, especially to loved ones. Moreover, if we were able to read the associated article, we would be able to place the headline in a context. This example is somewhat absurd, but it demonstrates the point. We choose between meanings by embedding the headline in an explanatory framework, by telling a story about it, which supports one meaning over the other. Let us examine a less absurd example.

Suppose I say to you, 'My wife is in the theatre.' In Britain, at least, 'theatre' has two meanings. It can denote a place where performances occur or a place where medical operations occur ('Meet me at the theatre on 19th Street to see Cats' or 'The doctor cannot speak to you now because she is in the operating theatre'). So the statement, 'My wife is in the theatre' is ambiguous because I might be telling you that she is at a playhouse or that she is in an operation. You could decide between the two possible meanings by embedding the statement in an explanatory framework or story which supported one or the other.

Some suppose that interpretation is only necessary when there is ambiguity as to the meaning of a sentence. This is an error, perhaps motivated by the earlier discussed tendency to characterize interpretation as an activity which imposes meaning upon an object. Sometimes interpretation imposes meaning on ambiguous statements, but the need for interpretation is not limited to cases where linguistic meaning is ambiguous. Let us examine an example where we interpret even though the meaning of the sentence in question is clear.

Imagine the following conversation.

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[18] *Albuquerque Journal*, December 26, 1984. Newspaper headlines are ripe for ambiguity because they often shorten headlines to include only essential words. This example, however, is no less ambiguous when extended to a fuller grammatical form: Never withhold a herpes infection from a loved one.

Husband: Who should clean the dishes?
Wife: I made the bed this morning.

Did the wife answer the husband's question? If so, what was her answer? Would we be surprised in the least if the husband started to clean the dishes? Why not? His wife did not even mention the dishes! We would not be surprised because the wife's statement can be interpreted as an answer to her husband's question.

It is time to add to our stock of terms from philosophy of language. We have already noted that meaning is often used in technical senses in philosophy. Much of what we ordinarily mean by 'meaning' is captured in other technical words. One of these is *force*, sometimes called *illocutionary force*.[19] The force of an utterance is the purpose for which is it used. For example, an utterance may be used to assert, to question, to command, to warn, to answer, and so on.[20] With this distinction in mind, we might say that the meaning of the wife's statement is that she made the bed that morning, while its illocutionary force is answering her husband's question. The force need not be to answer the question—perhaps she was 'thinking out loud' about something wholly unrelated to her husband's question. However, let us suppose that the husband believes that her statement is in response to his query and wants to know what her answer is.[21]

Her response, though we have no trouble seeing it as an answer to the question, says nothing about who shall clean the dishes. Nevertheless, if the husband reiterated his question, we would find him obtuse—he would have missed the point of what she said. For the husband to understand his wife he has to go beyond the

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[19]JL Austin *How To Do Things With Words* (2nd Edition Clarendon Oxford 1975)

[20]There is some confusion about how widely the purpose can be characterized and still be referred to as the force of an utterance. Is the force limited to being an answer, or does the force of an utterance extend to it being an answer that, eg you should clean the dishes. We should use the broader characterizations in describing the force of an utterance as the information which constitutes it is often not included in the *locutionary act* (what was said), and must be included somewhere on this taxonomy.

[21]His belief about whether or not she answered might be the result of an interpretation as well, but we can set that aside for now.

meaning of her statement.[22] To understand her statement as an answer to his question, the husband must embed it in an explanatory framework. He must put it together with other information to find its force[23] and understand her answer to the question.

Perhaps the husband tells himself the following story.

> My wife and I have an agreement to split the housework evenly. If she made the bed this morning, then I would have to clean the dishes in order to balance out the work she has done. So she is telling me to clean the dishes.

This spells things out in near excruciating detail. For the most part, we are such competent communicators that we need not make things this explicit in our heads. That does not indicate that we do not engage in a process like this, however. If the husband begins to do the dishes as a result of his wife's statement, and he is acting rationally, we will be able to prompt him for a story like the one above (though it need not be this one) on which her statement has the force of answering his question.[24]

Lest we suppose that this case is so obvious as to be trivial, let us examine an alternative story the husband might tell.

> My wife and I divide daily housework by days of the week. One person does all the work on Monday, the

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[22]It is tempting here to say that he has to go beyond the literal meaning to some other meaning. This is tempting because we often use meaning broadly. We might say 'the wife meant that her husband should clean the dishes.' In order to talk about these matters clearly, however, it helps to assign 'meaning' its technical linguistic sense. The ordinary use of 'literal' seems to restrict the sense of meaning to something narrower and more like the linguistic sense than is otherwise the case, and that is perhaps why it is tempting to use it. Though it is tempting, it would be superfluous here.

[23]Austin suggests that the force of a statement must be governed by convention. That is to say, an utterance can only have the force of a warning if there is a convention between the speaker and the listener that identifies the utterance as a warning. Austin *above* note 18. Donald Davidson argues correctly that the force of statements cannot be governed by conventions in this way, because many activities are parasitic on such conventions and would undermine them if they developed. Activities such as joking or storytelling are examples. D Davidson *Inquiries into Truth and Interpretation* (Clarendon Oxford 1984) 265-280.

[24]See *below* 31-36 regarding whether or not interpretation is necessarily an intentional activity.

> next Tuesday, etc. If she made the bed this morning she should also clean the dishes. So she is telling me she should clean the dishes.

If this was the story the husband told, he would understand the wife's statement as having a different force than in the first story, even though the meaning of her statement held constant between the two. The wife's statement would still be answering but answering in a different way.

Beyond dissolving ambiguity and discovering the force of an utterance, there are other additional reasons we might interpret in conversations. Sometimes we speak about forming an interpretation regarding whether or not a speaker is sincere. Here again, the meaning of a statement is unrelated to whether or not a speaker is sincere in uttering it. When we decide whether or not we take a speaker to be sincere, we interpret in accord with [U]. We embed a statement and the circumstances of its utterance in an explanatory framework which shows the speaker as sincere or insincere. We also form interpretations in deciding when someone has misspoken. Malapropisms are esoteric examples, but there are far more pedestrian ones.[25] We often ignore the meaning of what someone says in favour of an interpretation which recasts their statement. When we do so, we embed the person's utterance in an explanatory framework that shows what error was made, the evidence for there being such an error, and the corrected version of the utterance from which we draw our understanding.

The last case discussed, interpreting what someone has said as an error, may call to mind Donald Davidson's radical interpretation. According to Davidson, radical interpretation is the process through which we discover the meanings of sentences in the technical linguistic sense.[26] Part of what an interpreter does in radical interpretation is aim to interpret most of what a speaker says as true (the famous principle of charity). Against a background of agreement between what the interpreter holds as true and what he interprets the speaker as holding true, the interpreter can then make sense out of error in the speaker's language. This is a very rough outline of radical interpretation, but we have no need for a more precise one.

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[25]For discussion of malapropisms and interpretation, see D Davidson 'A Nice Derangement of Epitaphs' in E Lepore (ed) *Truth and Interpretation: Perspectives on the Philosophy of Donald Davidson* (Blackwell Oxford 1986) 433-446.

[26]Davidson *above* note 22

Radical interpretation falls under the description provided by [U]. In radical interpretation, an interpreter embeds the utterances of the speaker in an explanatory framework in order to discover their meaning. The selection of the framework in which they are embedded is governed by a set of norms that Davidson argues are necessary for achieving the goal (like the principal of charity and satisfaction of certain other criteria he thinks any theory of meaning must meet). The norms which govern radical interpretation are likely peculiar to the task for which they were developed and extending them to other contexts, as is sometimes suggested, may be unwise and unfruitful.[27]

We have seen that [U] suffices as an explanation of what we do in a variety of conversational contexts. The discussion of conversational interpretation has been swift and by no means exhaustive. Nevertheless, we are getting a better grasp of [U] and how it captures what we do when we interpret. The following sections will be even less comprehensive, but will serve to illustrate how [U] applies in various other contexts.

Art

I once attended a lecture at the Renia Sofia on Pablo Picasso's *Guernica*. The lecturer offered a religious interpretation of the painting. He mapped each figure in the painting onto a religious figure and argued that the way in which they were placed on the canvas and the style in which they were painted invoked Christian motifs. In doing so, the lecturer embedded the painting in an explanatory framework. His interpretation made no appeal to Picasso's intentions, but in an exhibit just around the corner from the painting, a different interpretation was offered from the lecturer's, one on which each figure represented a part of the drama of the Spanish Civil War (a more

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[27]Incidentally the relationship between radical interpretation, with its principle of charity, and Ronald Dworkin's method of interpretation, with its best light requirement, is often overstated. The best light requirement and the principle of charity are different norms motivated by different considerations. The best light requirement is discussed at length in Chapter Seven.

common interpretation of *Guernica*, perhaps not incompatible with the first[28]). The explanatory framework this interpretation embedded the painting in made explicit appeal to evidence about Picasso's intentions and traced through photographs the development of the painting and the changing of the figures. It also presented statements Picasso made about the painting. Both interpretations of *Guernica* embed it in an explanatory framework which produces an understanding of the work. Which interpretation we should adopt and whether the intentions of the painter are relevant are not questions about the nature of interpretation itself, but rather are questions about the norms governing interpretation in this context and will be returned to later.

Literature

Interpretation of literary texts can be subsumed under [U] as well. Entire novels, poems, stories, etc, or portions of such work are embedded in explanatory frameworks to produce understandings of the works as a whole or of aspects of them. One point worth noting, true of interpretation generally, is that much of the information in the explanatory framework may come from the work itself, as well as from outside it. Thus, if I offer an interpretation of Hamlet's relationship with Ophelia in which Hamlet and Ophelia are lovers, I may embed the relationship of Hamlet and Ophelia in an explanatory framework which to a large extent appeals to passages from the play. Again, to what extent such interpretations should reflect the intentions of the author and to what extent they should draw on information within and outside the work are questions about the norms which govern interpretation in literature and do not have to be settled in order to offer a general theory of interpretation. The discussion of interpretation of literary texts will be expanded in future chapters, as legal theorists often use analogies from literature.

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[28]Raz offers a useful definition of compatible interpretations. 'Two interpretations will be said to be compatible if they can be combined in one more complex and comprehensive understanding of the original without rendering it self-contradictory. ... Incompatible interpretations offer conflicting views of the original. They cannot be regarded as one 'complete' or 'exhaustive' interpretation' Raz *above* note 6 at 254.

Performing Arts

Interpretation in the performing arts (music, dance, theatre, etc) is the most difficult type of interpretation to reconcile with [U]. This is largely because performances involve not just one interpretation, but two. The first interpretation (temporally) is the interpretation of the performer of what is performed. The second is the interpretation of the performance by the audience.

The second interpretation, the audience's interpretation, is easy to subsume under [U]. I once attended a performance of George Bernard Shaw's *Man and Superman* in which Act III, a dream sequence involving the Devil, was not performed. My interpretation of the performance was that the director thought the play would lose some of its relevance to his modern audience if the sequence was included, and moreover, that the he likely wanted to shorten the play. In reaching this conclusion, I embedded the performance in a framework which included information about the missing scenes, a prediction of the audience's reaction to them, and information about the director's presentation of the scenes performed which supported the idea that he was aiming to increase the relevance of the play to a contemporary audience. The quality of my interpretation is not important; what is important is that the structure of the interpretation a member of an audience engages in is not different from interpretation in other contexts we have investigated.

The first sort of interpretation in a performance is not as easy to reconcile with the theory of interpretation being explored. We often speak of a musician's performance as her interpretation of the work she is playing, or of a performance of a play as the director's interpretation of it, or even of an actor's interpretation of a character. Performances, however, are not understandings; performances show understandings.[29] The understandings shown in a performance can be produced by interpretation.

Let us examine a performance of a piece of music. There is a significant debate among music scholars as to whether the sheet music for a particular piece (the written instructions for how to perform it) ever provide enough information to be translated directly into a performance of that piece. In many cases, perhaps most,

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[29]Raz coins the phrase 'performing interpretation' to cover interpretations shown in performances. Raz *above* note 6 at 250.

however, the sheet music does not provide enough information to produce a performance, that is to say, the rules for the performance on the page under-determine many aspects of the performance. Any aspects of the performance which are under-determined will be in some sense shaped by the performer(s). Sometimes the shaping is unconscious; it happens during the performance, perhaps guided by the performer's emotions; the performer may not be aware that the shaping is taking place. Sometimes the shaping is conscious. Prior to the performance, musicians may engage in historical research in an effort to discover how the aspects of the performance which are under-determined have been performed in the past. Alternatively, they may aim to shape their performance to evoke desired reactions in an audience.

When a musician consciously adds (or ignores) information to the music to produce a performance, it presents no difficulty to conceive of this as embedding the written music in a framework to produce an understanding of it. The understanding is displayed in the performance. When the shaping of the material is not conscious, it is slightly more difficult to conceive of things in this way. This is a specific version of a general problem encountered earlier in reference to how explicit the process of interpretation has to be 'in our head' in order for us to be interpreting. Competent communicators interpret automatically and may not be aware of the process of interpretation they are engaging in. The same it seems is true for competent musicians and other types of performers as well. We shall investigate this issue further below.

Data, dreams, and chicken entrails

We could extend our application of [U] to contexts beyond the ones considered. I shall leave it to the reader to expand on the analysis if interested. In doing so, it is important to remember the distinction between the structure of interpretation and the norms which govern interpretation in a given context. The structure of interpretation applies generally; we have yet to investigate the norms governing it.

3. THE CASE FOR INTERPRETATION WITHOUT AWARENESS

The only situations in which it seems we have to stretch [U] even slightly to cover instances of interpretation are those where the interpreter is unaware of the process of interpretation we attribute to her. Such cases might include a musician performing without prior conscious reflection on the piece of music, or even the husband who just

begins to do the dishes as a result of his wife's reply, 'I made the bed this morning.' Notice that we describe each as having or displaying *an interpretation*—the husband of his wife's statement, the musician of the composition.

Joseph Raz claims that interpretation must be intentional.[30] His argument seems also to assert that we must be aware that we are interpreting. We should explore Raz's argument, because if it is correct, it casts doubt over a portion of the picture I have presented of what interpretation is. However, we need not belabour the point too long, as interpretation in law is almost certainly intentional. Further, if Raz is correct, we would only need to narrow the circle of what we call interpretation. We would not have to change our understanding of its structure.

Raz presents the following example.

> John says: 'Many members of Parliament are revolting.' Jill overhears him. When Jack asks her what John said, she answers: 'He said that many members of Parliament are repellant.' This tells us how she interpreted John's utterance. But she did not intend to interpret it. She merely intended to relay the content of John's utterance to Jack.[31]

Raz says that Jill's remark was not intended to be an interpretive remark, but that it merely shows us how she interpreted John's utterance. Further, he argues, this use of 'interpreted' is interchangeable with 'understood', and that when 'interpreted' is used in this way, it is often done so without there having been any interpretation.

Raz is certainly correct that Jill did not intend her remark as an interpretive remark. This does not establish that she did not interpret, however. Sometimes we interpret and never report the result. More importantly, sometimes the results of our interpretation are revealed in our statements or actions even though we do not intend for them to be. If the husband gets up to clean the dishes, his behaviour reveals how he interpreted his wife's utterance, even though he likely does not intend for his

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[30]Raz *above* note 6 at 252. Raz qualifies his claim by saying that it is not a necessary condition of interpretation. He might agree that interpretation is sometimes unintentional or unconscious. Nevertheless, he does argue against attributing interpretation in cases where we do, so it is worth considering his argument.

[31]Raz *above* note 6 at 281n4

behaviour to do so.[32] The fact that Jill did not intend her statement to report her interpretation, but merely intended to relay the content of John's utterance does not help us to decide whether or not she interpreted John's utterance.

The pertinent question is this: is it appropriate to say of Jill that she interpreted John's statement if we have no reason to believe she actively engaged in an interpretive process? I think that it is for a variety of reasons.[33] First, we often make attributions of interpretation to ourselves in circumstances where we did not engage in any explicit interpretive reasoning. I might protest, 'That's not how I interpreted what you said,' even when I automatically reached an understanding of what you said without reflection upon it. Second, Raz's view that we only interpret when we intend to and are aware of the process is inconsistent with the way linguists view our language capacity. We interpret 'on the fly' as we read or listen, and linguists have discovered many strategies we use unconsciously and automatically to interpret

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[32]Of course it does not do so with certainty—he may have decided to clean the dishes irrespective of what she said. We have no reason to demand certainty, however.

[33]It may be wrong to say that Jill's answer shows her interpretation of John's utterance. She may have misspoke or misheard or misremembered. The context will determine how confident we are in asserting that it reflects her interpretation of John's utterance, and what we will be looking for is evidence that it is the product of her understanding of what he said and not a mistake.

utterances.[34] In *The Language of Judges*, Lawrence Solan presents a useful example. Linguist Lyn Frazier describes a strategy we use in interpreting utterances known as the Late Closure Strategy.

> The Late Closure Strategy specifies that the incoming items are preferentially analysed as a constituent of the phrase or clause currently being processed.[35]

We can become aware of our automatic application of this strategy by looking at a sentence where it misdirects us, so that we have to go back, perhaps consciously, and reappraise the situation. Consider Solan's example

> After he cross-examined the witness was in tears.[36]

Solan explains what happens

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[34]In an extensive discussion of Davidson's radical interpretation, Marmor argues that our ability to understand language is not (normally) the result of an interpretation. He argues 1) that interpretation cannot be rule or convention governed; 2) that there is normally no process of interpretation going on when we understand language; and 3) that Wittgenstein has shown that there is a way of grasping language that does not require interpreting it. Marmor *above* note 2. In order: I see no reason why interpretation cannot be rule or convention governed. Some interpretive activities might be highly regulated by rules delineating the method for making interpretations appropriate to the goals of the task. The second claim Marmor makes is similar to Raz's discussed in this section, and is flawed for the same reason. Indeed, I think there is reason to believe we always interpret language, as this is the view of linguists who study our language capacity. Marmor seems misled by Wittgenstein's arguments which suggest that we do not need to interpret language to understand it, and this brings us to Marmor's third claim. Wittgenstein's view is examined in detail in Chapter Four. For our purposes here, we need only note that Wittgenstein uses the word 'interpretation' in a non-standard way, not the way that linguists use the word when they claim that we always interpret language. Wittgenstein's arguments about interpretation are of no use to Marmor in demonstrating that language or law can be generally understood without interpretation, unless by 'interpretation' one means the odd thing Wittgenstein does. Again, we shall return to all this in Chapter Four.

[35]Solan *above* note 16 at 31

[36]Solan *above* note 16 at 32

> ... we initially attempt to incorporate *the witness* into the phrase being processed: the verb phrase of the clause beginning 'he cross-examined.' Only after continuing do we discover that *the witness* is actually the subject of the main clause of the sentence.[37]

Discussing similar issues later in his book, Solan sums up

> These facts seem to us simple and uncontroversial only because this aspect of interpretation occurs automatically, without any thought going into it... Nevertheless, processing of sentences occurs so rapidly that we are not capable of watching it in progress even if we try.[38]

The second objection to Raz's position is simply that linguists believe that we employ complex interpretive strategies without awareness of our doing so. The only way they could be wrong is if it is inappropriate to use 'interpretation' to describe this phenomenon.

The fact that we attribute interpretation to ourselves and others, even when the agent was not aware of any process of interpretation, is prima facie evidence that it is appropriate to do so. After all, we are attempting to develop a theory of interpretation that matches as much as possible the way in which we use the concept. Raz does not offer an argument for thinking that it is inappropriate to attribute interpretation in such cases. He merely asserts that when we do so, 'interpreted' is properly taken as meaning 'understood'. This does no work in showing that interpretation must be intentional, however. To be sure, we can replace 'interpretation' or 'interpreted' in such contexts with 'understanding' or 'understood' but we can do that in any context, even one where the interpretation took three years of painstaking research. The interchangeability is due to the fact (which Raz recognizes) that 'an interpretation' in the product sense is an understanding; that is, understandings are the products of interpretations. Because we can always interchange 'interpretation' or 'interpreted' with 'understanding' or 'understood', we cannot use the interchangeability as a basis

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[37]Solan *above* note 16 at 32
[38]Solan *above* note 16 at 95

for drawing any distinctions.[39] Raz's argument provides no reason for denying that we can interpret without awareness of our interpreting or the intention to do so. Indeed, if we are to remain faithful to the way the concept is used by linguists, among others, we must admit that interpretation is not always a conscious activity. While this discussion is important for developing a full understanding of interpretation, nothing in the remainder of this thesis is affected by the conclusion drawn here.

4. REACH FOR YOUR GUN

As I noted at the outset, interpretation is fashionable. Indeed, it has been fashionable for so long by contemporary academic standards that the fashion should be near the end of its run. The death knell for interpretation has already begun to sound. Michael Moore reports Michael Devitt's admonition, 'when someone starts talking about "interpretation", reach for your gun.'[40] Moore himself hopes for the demise of 'the bloated interpretivism of current postmodernist fashion,'[41] which holds that all knowledge is interpretive. I may have more sympathy than Moore for bloated interpretivism; I have offered a fairly expansive view of what interpretation is. The

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[39]Endicott aims to draw a distinction between interpretation and understanding based on their grammar which might be thought relevant here. He claims that interpretation is an activity while understanding is an ability. He writes, 'Thus the verb "to interpret" has an ordinary imperfect tense; the verb "to understand" does not.' Endicott *above* note 10 at 461n15. But Endicott has got his grammar wrong. The following sentence demonstrates the ordinary imperfect tense of both verbs: 'As he was interpreting the poem line by line, I was understanding every bit of it.' The use of 'was understanding' is grammatically correct, though unidiomatic and uncommon. I am told that in other languages, the ordinary imperfect tense of 'to understand' does not seem so odd. In any case, drawing philosophical conclusions from the grammar of our language is always a risky business, and the conclusion that interpretation is categorically distinct from understanding because the former is an activity while the latter is an ability is unwarranted. Moreover, activities can be unconscious and unintentional so it is not clear that this is relevant. Endicott goes on to note that understanding is not interpretation, and that an understanding does not have to be the result of an interpretation. I agree with these latter two points, but they do not cut in any way against the account of interpretation I have offered, nor do they help to show that interpretation must be intentional. I am grateful to Leslie Kendrick for a grammar lesson.

[40]This is a third-hand report. Moore *above* note 7 at 2 citing W Lycan *Judgement and Justification* (Cambridge UP Cambridge 1988) 195n7

[41]Moore *above* note 7 at 2.

main difference between Moore's view and mine is that he views interpretation as a distinctive reasoning process. Remember, according to Moore, interpretation seeks non-natural meanings of texts (and 'text' is another term of art on Moore's analysis). If one believes that interpretation is a distinctive reasoning process like Moore does, then there will be reason to resist expansive visions of the role of interpretation. But if one believes, as I do, that Moore and most others unhelpfully gerrymander interpretation and that [U] provides an adequate, though thin, account of what interpretation is, then there is no reason to reject an expansive view of the role of interpretation in our lives.

Had interpretation turned out to be multivocal, if we had been unable to find anything which all instances of interpretation share in common, then we might have had reason to fix on one or more explanations of interpretation as a distinctive kind of reasoning process. However [U] suffices as an explanation of interpretation across the board. We have no reason to dismiss some uses of 'interpretation' as deviant or dispensable, because we can show them all to exhibit the same general structure. [U] allows us to remain faithful to Endicott's injunction that a true account of interpretation must admit of the great variety of phenomena to which the word is applied. Though [U] is expansive by Moore's standards, only such an expansive account can capture the concept of interpretation.

I think the reaction against expansive views of interpretation is occasioned by two particularly pernicious confusions which often accompany such views. First is the belief or hope that a deeper understanding of what interpretation is will help us to resolve interpretive debates, that is, debates over the interpretation of particular novels, paintings, laws, or what have you. A recurrent theme of this thesis will be that nothing about the nature of interpretation itself sheds much light on interpretive debates, though a proper understanding of interpretation can often help us to clarify the debates and to dismiss some common arguments as misguided (namely those that are grounded in a flawed picture of what interpretation is). The second confusion which has led to the reaction against expansive interpretation is reflected in the refrain, 'that's just your interpretation.' As Moore notes, variations of this phrase have become a preferred method of expressing scepticism about nearly anything, scepticism most often unjustified.[42] In Chapter Two, I shall argue that objects can constrain their own interpretation. Though I believe scientists interpret, I do not

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[42]Moore *above* note 7 at 1

believe that this fact alone motivates any scepticism about the claims of scientists; the same is true of all disciplines. We can have expansive views of interpretation without falling prey to either of these confusions. Indeed, we ought to, because otherwise we fail to do justice to the concept. Despite my bloated interpretivism, at this stage, reaching for a gun is premature.

Conclusion

This chapter opened by considering the suggestion that interpretation seeks meaning. We rejected this, because we were unable to find a sense of meaning which made this a true and illuminating claim. We also rejected meaning-based approaches to interpretation because they have the potential to be misleading, tempting theorists to focus on one type of meaning to the exclusion of others which interpretation in fact seeks. Last, meaning often does not seem an apt description for some of the aims of interpretation.

We adopted [U] instead. On [U], interpretation seeks an understanding of an object (relative to the purpose for interpreting) by embedding it in an explanatory framework, or telling a story about it. We have explored interpretation in many contexts and discovered that the various activities we call 'interpretation' exhibit this structure. One part of the definition has been left unconsidered—the fact that interpretation is in some sense (to be explained later) dependent on the purpose brought to it. This has been left unconsidered because it is not a matter of the structure of the activity, but rather relates to the norms which govern it. As we shall see later, the purpose we bring to interpretation helps us to adjudicate between competing interpretations.

We have not made much progress in our investigation into interpretation and law. The theory of interpretation offered does not begin to develop answers to any of the perplexing questions about interpretation in law. This is a consequence of its generality; it would be unwise to expect answers to our specific questions about interpretation and law to fall out from such a general inquiry. Nevertheless, a number of conceptual confusions which might have led us astray have been cleared away. What we have put in their place is modest, but hopefully will provide a solid foundation on which to expand our inquiry into interpretation and law.

CHAPTER TWO

CONSTRAINING INTERPRETATION

If boundaries are not recognized, then there can be no *civitas*.

—Umberto Eco[1]

Eco's warning was intended to highlight the importance of geographic boundaries for the development of cities and states. Geographic boundaries, however, are not the only boundaries that play an important role in the life of a political community. If judges do not recognize and respect boundaries when they interpret law, the authority of law and law-makers is undermined. A common worry about interpretation, judicial and otherwise, is that it is unbounded. This chapter is about boundaries; it is about what, if anything, constrains interpretation.

Though judges and lawyers interpret many things in the course of legal practice, texts are the primary objects of legal interpretation. Texts are also central to literature, and literary theorists have done much work towards unravelling the mysteries associated with the interpretation of texts. Thus it is not surprising that many legal theorists have looked to literature for guidance in understanding interpretation in law, and a number of literary theorists have branched out to write about judicial interpretation. Indeed, a whole discipline known as Law and Literature has been spawned. This chapter fills out the theory of interpretation under development by explaining the norms which govern interpretation and the nature of interpretive constraints. Along the way we shall explore an idea common in modern literary theory which poses a significant challenge to law's authority: the idea that interpreters are free to impose any meaning whatsoever on a text. Since our ultimate concern is the interpretation of texts, we shall spend the major portion of our effort

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[1]U Eco *Interpretation and over interpretation* S Collini (ed) (Cambridge UP Cambridge 1992) 27

examining texts, but the theory of interpretive constraints which will be developed applies generally.

To start our inquiry, we shall examine the work of literary-cum-legal critic Stanley Fish. Fish is a good place to start, because he is the most prominent literary voice in legal theory debates, and he holds a radical position. Fish asserts that there is no such thing as a text independent of interpretation, and therefore nothing which can constrain meanings, nothing which imposes boundaries on its own interpretation. Before we search for text-based constraints on interpretation, we ought to at least establish, contra Fish, that texts exist. Establishing this, however, will not end our engagement with Fish. He advances a second controversial claim important for our inquiry. Fish argues that authority over what interpretations are acceptable lies with interpretive communities and not with texts or authors. This view has a substantial history within legal theory, and we shall examine the claim in detail.

Consideration of the authority of interpretive communities will form the bridge to our more explicit consideration of interpretive constraints. I shall explain what, properly understood, interpretive constraints are. I shall also show that objects, including texts, can and do constrain their own interpretation. Moreover, I shall complete the work of Chapter One by explaining the role purpose plays in determining the norms which govern interpretation. In the final section, I shall use the account developed to reject one last attempt to gerrymander interpretation, this one made by Umberto Eco.

1. IS THERE A TEXT IN YOUR HANDS?

According to Stanley Fish, debates over interpretation invariably oppose two incoherent views. The first is the view that texts constrain their own interpretation, that an interpretation can be good or bad in virtue of features or qualities of a text. The second view is that readers are free to interpret texts however they wish, that texts impose no constraints on how they are interpreted. This section explores Fish's rejection of the former view; it explores why he believes that texts, and objects generally, cannot constrain their own interpretation.

Fish's argument against the idea that texts can constrain their own interpretation is simple. Texts, he asserts, do not exist, and their non-existence guarantees that they cannot exercise any sort of constraint. Fish often puts the argument this way, but at times he presents a more refined version, and it is the more refined version we are interested in. Texts do not exist, Fish claims, *apart from*

interpretation. Interpretation creates texts, and because of this, texts cannot constrain interpretation in anyway. About poetry, Fish writes, 'Interpretation is not the art of construing, but the art of constructing. Interpreters do not decode poems; they make them.'[2] More generally, he recounts, 'Whereas I once agreed with my predecessors on the need to control interpretation, lest it overwhelm and obscure texts, facts, authors and intentions, I now believe that interpretation is the source of texts, facts authors and intentions.'[3] Or again, 'Interpretive communities are made up of those who share interpretive strategies not for reading but for writing texts, for constituting their properties.'[4]

Now it is still far from clear what it means to say that texts do not exist apart from interpretation. We can get a better understanding of Fish's view by contrasting it with what he rejects, metaphysically confused 'positivism'. A positivist, in the Fishian sense, believes that texts exist independent of interpretation.[5] A positivist believes that an independently existing text remains the same across time and context; it exists uninterpreted, waiting to be interpreted. Positivists also believe that interpretations can be checked against texts, that texts constrain their own interpretation. Yet, this contrast only gets us so far, because Fish's definition of 'positivism' raises the very same questions about what he means as when he denies that texts exist apart from interpretation.

Let us make a first pass at understanding what Fish is claiming. Whenever we read, we do so as part of a social practice. Suppose we are reading a newspaper. We are participating in the practice of reading newspapers, which carries a set of assumptions about the content of newspapers (stories, op-eds, advertisements, etc), the role of newspapers in our lives, and so on. Indeed, it is because of the practice that we identify what we read as a newspaper rather than as something else. The interpretive assumptions contained in the practice affect our experience of what we read. We saw an example of how this works in the opening chapter, when we looked at the Albuquerque Journal headline, 'Never withhold herpes infection from loved one.' As we noted, this sentence is ambiguous, but in the context of a newspaper, the

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[2]S Fish *Is there a Text in this Class: The Authority of Interpretive Communities* (Harvard UP Cambridge 1980) 327

[3]Fish *above* note 2 at 16

[4]Fish *above* note 2 at 14

[5]Positivism in the Fishian sense bears almost no relationship to legal positivism, though legal positivists are almost certainly Fishian positivists as well.

ambiguity is resolved, as we do not expect newspapers to be recommending the transmission of herpes to loved ones.[6] All of our reading experiences take place in such an environment, an environment which provides background information and interpretive assumptions which determine (partly or fully?) the meaning we will see in what we read. The background assumptions we bring to newspapers make 'Never withhold herpes infection from loved one' a different text, on the Fishian view, than it might be in other contexts (whatever they might be) which would lead us to understand the text as recommending the transmission of the disease. This raises an obvious question, 'why not say that we have one text which bears different meanings in different contexts, instead of two texts?' Let us, however, put this question aside, as we shall explore Fish's view in greater detail soon enough.

Before beginning, I want to note the oddity of Fish's view and the language he uses to express it. What do authors do if it is interpreters who create texts? Is the very existence of the text in your hands right now dependent on your reading it? What if you stop? What if you had picked it up but never started reading it? These seem like silly, pedantic questions, and yet, Fish makes bold claims that suggest odd answers to them. The normal course of events for an essay like this would involve my presenting, in a systematic fashion, Fish's arguments in support of his claim that texts do not exist apart from interpretation, and then assessing each of those arguments to see if Fish's conclusions are warranted. I shall not, however, follow the normal course, as Fish's writing does not lend itself to distilling a single strand of argument, or even multiple strands aiming at the same conclusion. I hasten to point out that there is much of value in Fish's writing, and considering it will deepen our understanding of interpretation. But we must treat it very carefully, lest we fall prey to the siren's call. So instead of the normal course, we shall instead make a number of passes at understanding Fish. We shall begin with the most radical reading we might give his work, and shall move from there to more modest, and I think more valuable, ways to understand his contribution to interpretive theory. I have no idea which of the

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[6]Fish would put the point differently. He claims that ambiguity is not a property sentences have apart from contexts. A sentence may be ambiguous or unambiguous in a particular context, but there are no sentences which are inherently either. Fish is concerned to show that there is no sentence whose meaning cannot vary with context and no sentence whose meaning cannot be determinate in a particular context, and he is right on both scores. See Fish *above* note 2 at 269, 281-284.

readings Fish gives himself (though I am sure that he created his text by writing it, not by reading it).

The strong reading

We can take Fish at face value when he denies the existence of texts apart from interpretation, and for that matter, when he denies the existence of anything apart from interpretation. On this reading, Fish flirts with a very controversial ontological thesis. I will follow Colin McGinn in calling this ontological thesis *linguistic idealism.* According to McGinn, linguistic idealism holds that 'there is nothing more to reality than our symbolic interpretations.'[7] Linguistic idealism is a rejection of *external realism*, the common sense view that the world exists independently of our representations of it.

Fish sometimes argues against the existence of texts in ways that closely track an argument for linguistic idealism which John Searle labels the argument from *conceptual relativity*. Fish repeatedly suggests that our categories for identifying features of texts, like figure or style, or even things like dialogues and subject headings, are conventional, and thus in some sense are things we create, things which do not exist apart from our interpretations of them.[8] He argues that the facts we take as evidence in support of one interpretation or another are not things that classify or announce themselves; we have to recognize them as facts and we can do so, he suggests, only from an interpretive perspective. Texts too are a conventional category, and thus they are things we create, not things which exist independent from interpretation. Fish often goes further. He suggests that physical entities are also things we create, because the terms we use to describe them, like mass and momentum, are conventional, and thus arbitrary, in the same way.[9]

Searle describes conceptual relativity as follows

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[7]C McGinn 'Sign Language' *The New York Review of Books* June 15, 2000 62-65

[8]S Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Clarendon Oxford 1989) 76-78, 82; Fish *above* note 2 at 271

[9]Fish *above* note 2 at 331; Fish *above* note 8 at 82

> Any system of classification or individuation of objects, any set of categories for describing the world, indeed, any system of representation at all is conventional, and to that extent arbitrary. The world divides up the way we divide it, and if we are ever inclined to think that our present way of dividing it is the right one, or is somehow inevitable, we can always imagine alternative systems of classification.[10]

This is certainly true. We can create new concepts easily and can imagine beings who employ different concepts than the ones we use to describe the world.[11]

Nelson Goodman, like Fish, concludes that conceptual relativity implies linguistic idealism. He writes

> Now as we thus make constellations by picking out and putting together certain stars rather than others, so we make stars by drawing certain boundaries rather than others. Nothing dictates whether the sky shall be marked off into constellations or other objects, we have to make what we find, be it the Great Dipper, Sirius, food, fuel, or a stereo system.[12]

The inference that Fish, Goodman, and others make from conceptual relativity to linguistic idealism is unjustified. Indeed, conceptual relativity presupposes external realism. As Searle notes, we cannot understand Goodman's claim that we make stars (or by extension Fish's claim that our interpretations make texts) 'except by presupposing something there on which we can draw boundaries. Unless there is already a territory on which we can draw boundaries, there is no possibility of drawing any boundary.'[13]

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[10]J Searle *The Construction of Social Reality* (Free Press New York 1995) 160

[11]It may be the case that we, as biological creatures, could not get by without certain concepts, eg water or food. Though these concepts may be a necessary feature of our conceptual schemes, this does not change the fact that equally good descriptions of the world may be possible on conceptual schemes which do not carve up the world in this way, though these conceptual schemes would not be equally good for us.

[12]N Goodman *Of Mind and Other Matters* (Harvard UP Cambridge 1984) 36 Quoted in Searle *above* note 10 at 163.

[13]Searle *above* note 10 at 166

Moreover, Searle writes

> From the fact that a *description* can only be made relative to a set of linguistic categories, it does not follow that the *facts/objects/states of affairs,/etc., described* can only *exist* relative to a set of categories. Conceptual relativism, properly understood, is an account of how we fix the application of our terms: What counts as a correct application of the term 'cat' or 'kilogram' or 'canyon'... is up to us to decide and to that extent is arbitrary. *But once we have fixed the meaning of such terms in our vocabulary by arbitrary definitions, it is no longer a matter of any kind of relativism or arbitrariness whether representation-independent features of the world satisfy those definitions, because the features of the world that satisfy or fail to satisfy the definitions exist independently of those or any definitions*... Contrary to Goodman, we do not make 'worlds'; we make descriptions that the actual world may fit or fail to fit.[14]

So when Fish argues that we only see the things we do because we are participating in practices which provide us with interpretive frameworks that are conventional, and when he points out that facts do not announce themselves, or that nothing classifies itself, he is on firm ground. But when he tries to extend these remarks to claim that the things we classify, like stars or texts, do not really exist because the classification is arbitrary, his inference does not follow. Conceptual relativism presupposes external realism.

One might think that there are important differences between texts and other objects, like stars or seashells. The things the words 'star' and 'seashell' refer to clearly would exist even without language-possessing beings to describe them. This is not so clear regarding texts. Texts are not representation-independent; they exist only because we have language, a representational system. Nevertheless, the argument from conceptual relativity does not establish that our interpretations create the texts we find. A brief digression will show why.

The physical manifestations of texts are most often marks on paper. We can leave other manifestations, like electrons on a computer screen, aside, as everything I

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[14]Searle *above* note 10 at 166

shall say about marks on paper applies equally well to them. Marks on paper exist independently of observers. Even if all sentient beings were zapped out of existence, there would still be marks on paper. It is at least arguable that these marks would no longer be words without language speakers around to regard them as such.[15] Nevertheless, just because these marks would not be words without language speakers around to regard them as such, it does not follow that words do not constitute texts independent of their interpretation. This will be easier to see if we consider another type of entity which requires language-possessing beings in order to exist—money.[16]

In order for there to be money, it must be the case that people regard bits of paper or metal (or some other substance) with certain properties as a medium of exchange. If many people do so, these bits of paper or metal are money. Now imagine that somewhere in the United States a five dollar bill falls behind the cushions of a couch, never to be found again. That five dollar bill is still money, even though nobody regards it as such. The distinction here is between the type and token. In order for there to be money, things of a certain type must be regarded as money. But tokens of that type are money regardless of whether or not anyone so regards them. The same is true of texts. In order for there to be texts, people must regard certain types of marks on paper as texts. But an individual token of that type is a text regardless of whether or not people recognize it as such. Imagine that an automated press is printing copies of *The Unbearable Lightness of Being* and one slips off a conveyor belt, onto the floor under a heavy piece of machinery. It is not noticed, and it remains there until the factory is dormant and demolished. It is carried along with the rest of the rubble to be buried in a landfill. No one ever lays eyes on it or regards it as a text, and yet, it is a text, unread and uninterpreted.

Now it may be the case that identifying marks on paper as texts (or identifying certain bits of paper as money) requires us to make an interpretation. I do not think it is important that we settle whether or not this is true here, as even if it is, it would not serve to establish, in the sense under consideration now, that texts do not exist independent of interpretation. The main reason is that this is an epistemic point which cannot support an ontological conclusion. The fact that we often have to interpret a bright light in the sky to recognize it as a star and not an airplane does not mean we

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[15]See Searle *above* note 10 at 9-13 discussing the distinction between intrinsic and observer-relative features of the world.

[16]The following explanation is distilled from Searle *above* note 10 at 42-43.

create the star by so interpreting it; similarly the fact that we often or always have to interpret marks on paper to recognize them as a text as opposed to ink blotches does not mean that we create the text by so interpreting it. Throughout his writing, Fish confuses epistemic and ontological claims. For example, he writes

> [Wolfgang] Iser might reply... that whatever one makes of 'Arcadian Simplicity' the words are, after all, there and do constitute a determinate textual feature... But this assumes that the words are 'pointable to' apart from some or other interpretive perspective.[17]

To Fish, Iser should reply that the words are there, even if they are not 'pointable to' except from within an interpretive framework. The fact that interpretation mediates our access to words does not entail that the existence of words somehow depends on our interpretation of them. Fish also makes this mistake in his exchange with Ronald Dworkin. Fish quotes the following passage from Dworkin's 'How Law is Like Literature'

> The text provides one severe constraint in the name of identity: all the words must be taken account of and none may be changed to make 'it' a putatively better work of art.[18]

Fish rejects Dworkin's position, because, he says, it assumes that the text is 'available in an uninterpreted shape.'[19] But Dworkin assumes no such thing. A text can exist and its words require accounting for, even if our access to it is through interpretation.[20] In addition to the fact that Fish's epistemic claims do not support his ontological conclusions, there is another reason to consider the assertion that we only have access to texts through interpretive frameworks irrelevant to his claim that texts do not exist apart from interpretation. Interpretation takes place on many levels. Once I interpret certain marks as words, I have identified a text, but this leaves

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[17]Fish *above* note 8 at 78

[18]R Dworkin "How Law is Like Literature" in *A Matter of Principle* (Clarendon Oxford 1986) 146-166, 150

[19]Fish *above* note 17 at 105

[20]Fish is aware that Dworkin's argument is making an ontological point about the status of texts, yet all he musters is a claim about our epistemic access to texts. Fish *above* note 17 at 105.

entirely open the question of what the text means (as well as many other interpretive questions about it), which is the subject of a different interpretation, the one we are interested in presently and the one Fish is predominately concerned with. Simply put, interpreting something as a text does not require interpreting the text.

It is possible that on occasion these interpretations will become bound up in each other. That is to say that from time to time I will see if I can make sense out of certain marks when viewed as a text before regarding them as a text; if I am unsure whether something is a text, seeing if I can understand its meaning may help to resolve the question. This practice, however, is rare and the evidence it provides helpful only in the affirmative case. Knowing as few languages as I do, and being unfamiliar with cryptographic methods, I would dismiss many things that might indeed be texts. Normally, interpretations which identify texts and interpretations which aim at understanding them do not become intertwined. You knew that you had a text in your hands before you began reading this thesis. It exists independent of your attempts to understand it. It was, in the relevant sense, uninterpreted, waiting to be read and interpreted. Fish conflates these different types of interpretations.

This brings to a close our investigation of the strong reading of Fish's claims. We do create texts—by writing them—not by reading them. We can now move on to the more modest, but perhaps more interesting, ways of understanding Fish.

The epistemic reading

On the strong reading, Fish fails to make good his claims. The fact that we only pick certain things out as texts, or as titles, as words, or as washing machines from within an interpretive framework does not entail that we create those things by our interpretation or that they do not exist independently of our interpretation. We can read Fish's claims in other ways, however. We can move our focus away from his denial of the existence of texts to his assertion that we only have access to texts from within an interpretive framework. Fish is right about this, and it is an important insight. Only with a background in the practices of writing and reading can one recognize an object as a text or pick out features of a text (like titles, subject headings, or characters), and picking out certain features requires backgrounds in fairly specific practices. In part at least, what I pick out as features of a novel depends on what interpretive assumptions I have about the things novels have in them. What does this show? Fish suggests that it shows that interpretation creates texts, but this is mistaken

for the reasons just canvassed. Fish also suggests that this shows that texts cannot constrain their own interpretation. Let us call this view—the view that because our access to texts is mediated by interpretive assumptions, texts cannot constrain their own interpretation—the epistemic reading of Fish's claim. Later I shall build an account of what it means for an object to constrain its own interpretation, and I shall show that, contra Fish, texts can do so. However, here we can note an important problem with the epistemic version of Fish's claim, namely that its underlying assumption is mistaken.

Though we may only be able to experience texts as we interpret them, this does not entail that a text which exists independently of our act of interpretation cannot impact our experience of it. Who has not experienced being given a text, with the command, 'read this!', with no prior knowledge of what the text is about? One begins to make hypotheses about the text as one reads, and continually tests and revises the hypotheses against what they read: 'this is a science fiction story.....no, no...it is a fanciful beginning to a newspaper editorial....with an ironic twist at the end.' If the text was irrelevant, we could not have these experiences. Everything would be, as Fish claims, exactly what we expected it to be antecedently. But texts can provide resistance to how we want to interpret them and, moreover. provide us clues how to interpret them when our antecedent expectations under-determine our understanding of the text. Of course, such under-determination is the standard lot of readers; were it not, reading would be unnecessary. Our understanding of a text, in short, is produced by an interaction between the interpretive framework we bring to the text and the text itself. I do not want to dwell here too long, as we will revisit all of these issues when I present my account of interpretive constraints. Let us for the moment just note that, though all of our access to texts is mediated by interpretation, this does not entail that texts are irrelevant to interpretation.

Stanley Fish is a positivist and it's a good thing too

I want to take a detour from our course of examining different ways to understand Fish to explore an instructive tension in his writing. A recurrent theme of Fish's work is exposing the 'hidden' positivism of writers he criticizes. Remember, positivism in this context is the view that texts exist independently of interpretation. Unfortunately, for Fish, it turns out that he is just as much a positivist, in this sense of the word, as anybody else.

In *Is There a Text in This Class?*, Fish describes happening upon a sign in the Johns Hopkins University Club which read:

PRIVATE MEMBERS ONLY

When Fish asked some of his literature classes what the sign meant, he was met with a chorus of responses, most mildly obscene.[21] Invariably, Fish says, a student would challenge the exercise and note that the sign just means that members of the club are the only people allowed. Fish acknowledges that the student is right. But he is interested in how we know and why it is the case that the student is right. He writes

> How is it that a text which is so demonstrably unstable can be stabilized to such a degree that a large number of people immediately know what it means? ... the meaning will be a function of the shape language *has already* when we come upon it in a situation, and it is the knowledge that is the content of being in the situation that will have stabilized it. In the case of PRIVATE MEMBERS ONLY, the knowledge is the knowledge of what to do with signs of faculty club doors. Those who enter the club do not first perceive the sign in some uninterpreted or acontextual form and *then* construe it so as to conform with the situation; rather, being in the situation means they have already construed it, even before they see it.[22]

Fish is making the familiar point that context fixes the meaning of language. In a different context, like Fish's classroom, PRIVATE MEMBERS ONLY, can bear a whole set of different meanings than it does in the context of the club. One has to know what 'private' and 'members' mean in the context of an exclusive club in order to parse the sentence as 'Private, Members Only' as opposed to 'Private Members, Only.' Fish is concerned to establish that there is no core of meaning that extends across all contexts, and I do not want to minimize the importance of this insight.

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[21]Fish *above* note 2 at 275
[22]Fish *above* note 2 at 275

I raise this example, because Fish's presentation undercuts his denial of the existence of texts independent of interpretation. To see how, we need to fill in a portion of the above passage which was cut out.

> The answer can be found in the exercise performed by my students. What they did was *move the words* out of a context (the faculty club door) in which they had a literal and obvious meaning into another context (my classroom) in which the meaning was no less obvious and literal and yet was different. What they did not do was move away from a meaning that was available apart from a context to the various meanings contexts confer.[23]

Again, Fish states his familiar and important point—words do not bear constant meaning across contexts or have meaning outside of contexts.[24] But in the course of

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[23]Fish *above* note 2 at 275, emphasis added

[24]'Literal meaning' is often used to denote a meaning which remains the same across contexts and holds outside of any context. Fish properly objects to this understanding of 'literal meaning', but there are a number of ways we might go in revising this understanding, and I am not sure Fish chooses the best. We might say the literal meaning is the meaning most often attached to a word or sentence. In some circumstances, other meanings are parasitic upon the literal meaning understood in this way, which is to say they are discoverable because one first understands the literal (or more common) meaning. The exchange between the husband and the wife in Chapter One is one such example. Some meanings are not parasitic or dependent on the literal meaning in this way, eg in the context of a baseball game, 'Clemens balked and that sent the runner to third' means that Clemens violated one of a number of rules governing the actions of a pitcher (eg, a pitcher is not allowed to throw to first base after his front leg crosses behind his back leg), the penalty for which is that all runners advance one base. This is clearly a different sense of 'balked' than the one most commonly used, and knowing the most common usage does not assist in discerning what 'balked' means in a baseball game.

Fish asserts repeatedly that in different situations words have different literal meanings. Thus, he would say that the literal meaning of 'balked' in baseball is that the pitcher violated one of the aforementioned rules. I dissent from Fish's view, but do not want to make too much out of the difference as what is at stake here is merely how we describe a situation that we agree upon (that the word has different and unrelated senses in different contexts). Fish's use of the word 'literal' does strike me as odd, however, because it is completely dispensable. If there is can be no difference between the meaning of a word or sentence in a context and its literal meaning, why ever use the word 'literal'? If the label 'literal' is to do any useful work, we need a

(continued...)

giving his answer, Fish slips. He says what his students did was 'move the words' out of one context and into another. Of course, he is perfectly right. But if Fish wants to maintain that there is no uninterpreted text waiting for us to interpret it, then he cannot maintain that they moved *the words*. It is the words after all that many a theorist, whom Fish pejoratively labels 'positivist', insist constitute the text. The words are what remains the same across time and context, even if in different contexts, they can be shown to have different meanings. Fish falls prey to his own charge; he is a positivist, if being so means thinking that there is something, a text, which 'remains the same from one moment to the next'[25] and can be moved from context to context. He shows that he does think so: the words can be moved from context to context yet still be *the words*, and Fish is as helpless to deny it consistently as everyone else because it is simply true.

Perhaps we could ignore some of Fish's words and think that what he has been denying when he says that there is no text which remains the same across time and context is that there is no *meaning* which remains the same across time and context. We can understand Fish this way, I suppose, but this makes Fish's claim wholly uninteresting. I do not know whether in literary theory people have often seen fit to deny this. However in philosophy and law, it has been recognized for quite a long time that meanings can change radically from context to context. In law, this recognition is even enshrined in two traditional canons of statutory construction,

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[24](...continued)
different understanding of it.

A third way we could go, perhaps the one with the most promise, is to accept that words do not have constant meaning across contexts or meaning outside of contexts, and yet continue to draw a distinction between literal meanings and metaphorical or figurative meanings *within* contexts. Thus, the literal meaning of balked in a baseball game might involve the violation of the aforementioned rule, but we could imagine metaphorical uses in the same context. Thus, 'the pitcher balked and it cost him the game' can be read within the context of baseball as saying the pitcher violated the rule which plated the winning run, and within the same context, it might have an additional layer of meaning, that the pitcher did what he did because he was flustered or upset. This second layer of meaning plays off the meaning 'balk' bears outside baseball. The first, we might say is the literal meaning, the second metaphorical. Much more work is needed to ground this distinction, but it does seem that we can accept Fish's point about the importance of context in determining meaning, without succumbing to his dispensable use of 'literal'.

[25]Fish *above* note 2 at *vii,* quoting ED Hirsch *Validity in Interpretation* (Yale UP New Haven 1975) 46

alluded to by U.S. Supreme Court Justice Antonin Scalia in his treatise on interpretation. *Noscitur a sociis*, which means, 'it is known by its companions,' directs judges to understand the meaning of a word in virtue of those around it. *Ejusdem generis*, which means, 'of the same sort,' directs judges to understand a general term in a list as limited to items of the same sort as other items in the list. Scalia explains, '... if someone speaks of using "tacks, staples, screws, nails, rivets, and other things," the general term "other things" surely refers to other fasteners.'[26] These canons focus on meanings which change within the context of a text. Meaning can also, of course, change from situation to situation, as in the 'theatre' example from the opening chapter or in the newspaper example above. If the variability of meaning across context is all Fish is trying to establish by denying the existence of texts, he is fighting a war long since won.[27]

Still wrong on all these readings

Fish is relentless in arguing that words do not bear meanings outside of contexts, and he is right about that. Fish is relentless in arguing that our interpretive frameworks affect our encounters with the world, and he is right about that. Fish is relentless in

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[26]A Scalia *A Matter of Interpretation: Federal Courts and the Law* (Princeton UP Princeton 1997) 26

[27]Among the lawyers and philosophers who explicitly recognize the variability of meaning across context are: Richard Posner ('Words have a reliable meaning only by virtue of their location in a sentence or larger verbal structure and often in a social practice as well.'), Ronald Dworkin ('But we cannot escape from the whole enterprise of speech to a different and transcendent plane where words can have meanings wholly independent from the meaning any practice, ordinary or technical, has given them.'), and Frederick Schauer ('... certain uses of language have distinct meanings because of the context in which they occur.') Additionally, Laurence Tribe argues that the meaning of portions of the Constitution can be changed just by changing the surrounding text. And this is just a tiny sampling. Certainly the list would also include legal theorists and philosophers such as Joseph Raz, Lon Fuller, HLA Hart, Ludwig Wittgenstein and Donald Davidson. One wonders, in fact, who would *not* be included on this list. Quotations from R Posner *Law and Literature* (Revised Edition Harvard UP Cambridge 1998) 220; R Dworkin "Pragmatism, Right Answers, and True Banality" in M Brint and W Weaver (ed) *Law and Pragmatism in Society* (Westview Boulder 1991) 359-388, 362; F Schauer 'An Essay on Constitutional Language' in S Levinson and S Mailloux (eds) *Interpreting Law and Literature* (Northwestern UP Evanston 1988) 136. L Tribe 'Comment' in A Scalia *A Matter of Interpretation: Federal Courts and the Law* (Princeton UP Princeton 1997) 65-94, 86.

arguing that we cannot engage with texts outside of interpretive frameworks, and he is right about that. Fish is also relentless in arguing that texts do not exist apart from interpretation, but he is wrong about that. And Fish is also relentless in arguing that texts existing independent of interpretation could not impact our experience, but he is wrong about that. Indeed, Fish's strongest claims seem wrong no matter what reading we give them.

In the end, I think we ought to give Fish one last reading, one so modest I imagine he would reject it outright, but the only reading I can see which makes sense of his flamboyant metaphysical pronouncements. We ought to take Fish's denial of the existence of texts and all its accompanying hoopla as a rhetorical flourish. Upon learning of the Christian subtext in *The Lion, The Witch and The Wardrobe*, one might exclaim 'Wow, that completely changes the book!' But she would not mean that the book itself, the one sitting on her shelf, had changed, just that her understanding of it did. Such use of language, at best metaphorical, at worst sloppy, is not uncommon. Fish is a talented writer, and he is almost persuasive in raising the metaphor to metaphysics. Almost persuasive, but wrong.

I am reluctant to let Fish off the hook this easily. The confusion engendered by denying the existence of texts is significant, as is Fish's influence. Moreover, Fish argues for his claims, making it difficult to dismiss them as mere flourish. Yet this seems the most generous way to understand Fish, and given the value in his writing, generosity seems in order. In any case, we are not yet done with Fish. Fish has a theory about what does constrain interpreters, and it is time to turn our attention to that.

2. THE AUTHORITY OF INTERPRETIVE COMMUNITIES

> Nay whoever hath an absolute authority to interpret any written or spoken laws it is he who is the lawgiver to all intents and purposes and not the person who first wrote or spake them.
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> —Bishop Hoadly[28]

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[28]Quoted in HLA Hart *The Concept of Law* (2nd Edition Clarendon Oxford 1994) 141

Centuries ago, Bishop Hoadly gave voice to a concern which still stands at the centre of one of the most interesting controversies in jurisprudence. HLA Hart rejected Hoadly's view that judges are the true locus of legislative power, holding instead that judges maintain standards, but do not make them.[29] Fish has lined up with Hoadly—authority, he claims, lies with interpretive communities and not with the authors, with judges and not with legislators.

There are two ways we can understand the claim that authority rests in interpretive communities. The weak version holds that objects of interpretation (again we are concerned mostly with texts) do not provide self-enforcing constraints on interpreters. This is certainly true. No one has ever died just because she offered an inane interpretation (though inane interpretations have played a small role in a large number of deaths).[30] If texts impose constraints on interpreters, only interpreters themselves or the communities and institutions they are a part of can observe or enforce those constraints. This weak view is consistent with the possibility that some interpretations are good or bad in virtue of the text (we shall have to explain what this means), though nothing may stop one from successfully advancing a bad interpretation. The stronger version of the claim holds that texts provide no constraints on interpreters, only communities do. On this view, there is no sense in which an interpretation can be said to be good or bad aside from the success one has in advancing it within her community. Fish advances the stronger claim, though I suspect much of his rhetorical success is due to the fact that the weaker claim is so obviously true. This section examines the stronger claim. I shall not deny that interpretive communities constrain their members; I merely question how strong the constraint is and, in sections to follow, argue that there are other sources of constraint as well.

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[29]Hart *above* note 29 at 146

[30]Dworkin notes the same in a discussion of the work of Fish and Steven Knapp. In Dworkin's view, both suggest that text-based interpretive constraints must operate in a 'physical way, like sentences fighting back' such that 'a person who challenges them violates a law of nature.' Dworkin disagrees, writing 'constraints can be intellectual as well as physical or legal.' Knapp cannot win the argument over interpretive constraints, Dworkin says, 'by observing that if someone persists in an absurd interpretation, by our lights or even by his, he will not go to jail or run into a stone wall.' Dworkin *above* note 28 at 376-377; S Knapp 'Practice, Purpose and Interpretive Controversy' in M Brint and W Weaver (ed) *Law and Pragmatism in Society* (Westview Boulder 1991) 323-342

In claiming that authority rests in interpretive communities, Fish is rejecting the second pole in what he sees as the standard debate—the idea that interpreters are free to impose whatever meaning they wish upon a text. It is impossible that readers could be free to interpret texts in any way they desire precisely because of the fact that when they read, they read within interpretive communities, within social practices. As we saw before, these practices provide assumptions which inform a reader's understanding, limiting the interpretations a reader might generate in advance. Further, the practices contain standards of evidence and patterns of argument interpreters must appeal to in articulating the case for any interpretation they might offer. Through these standards, the practice constrains which interpretations will be deemed successful. Fish does not argue that the constraints imposed by interpretive communities are static—they can change dramatically over time—but that there is no way to read outside an interpretive community, so interpretation is always constrained. To sum up, interpretive communities, for Fish, are the source of authority for interpretations. What one can offer as an interpretation is what one can successfully persuade members of the interpretive community one inhabits is acceptable. Constraints reside in the practice, not in the text. Judges then are constrained, on Fish's view, only by what their interpretive community finds an acceptable interpretation. When a judge is successful in persuading others of her interpretation, she has offered an acceptable interpretation. Those who write the laws have limited control over how they are understood. To the extent that they are familiar with the standards of evidence and argument within the legal community they can craft statutes they expect to be interpreted to have the effects they desire, but as interpretive communities are dynamic, this is a very tenuous control.

Kenneth Abrahams also argues for the view that interpreters are constrained by their communities. He writes

> I use the term 'community of interpretation' as a way of speaking about the power of institutional settings, within which assumptions and beliefs count as facts. Membership in a community of interpretation means that one has accepted its beliefs. These beliefs determine readers' strategies of interpretation. Within a community of interpretation a text may be considered a self-interpreting and literal object, a reflection of legislative intention, or a product of the legislature's observance of a 'law' of interpretation. Within a given

> community of interpretation the reader may believe that he is separate from the text and can be considered a disinterested interpreter of it. But this separation of reader and text is only possible because membership in that community of interpretation often renders one's central beliefs transparent. These beliefs then become matters of common sense , and are so indisputable that their role in constituting the very understanding goes unrecognized.[31]

There is an important lesson here. Our membership in communities of interpreters that share a common culture and a similar background can make us blind to important assumptions which underlie our interpretive activities, assumptions which, once laid bare, we sometimes find embarrassing. At their best, post-modernist approaches to literature and law expose such assumptions.

Yet it is important to ask where the community view comes to an end. Communities do not have natural demarcations. Presumably the legal community writ large is too diverse in its interpretive practices to be considered a community of the type that Abrahams invokes. The communities must be smaller; perhaps originalists are a community, textualists another, strict constructionists, Dworkinians and so on. But attendance to any one of these schools reveals significant divergence within them, as well as overlap between them (not to mention incoherence within them). Even these communities seem too diverse to allow beliefs to be rendered transparent and considered fact. Taxonomy of views on interpretation is extremely difficult. One suspects that if we were to produce the Venn Diagram of views held about legal interpretation, many individuals would occupy their own island of idiosyncrasy. A community of one offers sparse constraint on the actions of its members.

Debates over interpretive methods have been with us as long as there has been written law. They are carried out in such a reflective manner that it seems unlikely that the central beliefs which underlie any of them remain transparent to legal practitioners. Importantly, judges and lawyers who self-identify as members of an interpretive community must still on occasion justify their claims to members of other

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[31]K Abraham 'Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair' in S Levinson and S Mailloux (eds) *Interpreting Law and Literature* (Northwestern UP Evanston 1988) 115-129, 122

communities. Doing so often moves them to defend their views on interpretation explicitly.

Fish also fails to show that the authority of interpretive communities prevents readers from offering whatever interpretations they desire for another reason as well. His argument just plain misses its mark. He claims that our communities limit what we are capable of desiring, by providing us with assumptions which inform our experience of what we read. It is certainly true that the types of interpretations I am capable of desiring to offer are limited by my culturally- and community-bound education and experience. Nevertheless, this does not establish that my community prevents me from offering any interpretation I actually come to desire to offer. This may seem pedantic, but it is important. When people voice the concern that interpreters can offer any interpretation they desire, it is interpretations which the community's practice have not ruled out *tout court* that cause them fear. They are worried, for example, that *Roe v. Wade* might be overturned or that the death penalty may be held to violate the 8th amendment (both real possibilities), not that a judge might decide that the 22nd Amendment means that Mickey Mouse shall serve as Vice-President in case of vacancy.[32]

I do not deny that communities and institutions constrain the actions of their members in significant ways. Certain interpretive approaches, certain styles of argument are considered legal, while others are excluded. Nevertheless the legal community sustains great diversity and debate over interpretation, and its standards are dynamic. What primarily concerns us here are these debates within the legal community. The fact that they are so vigorous belies Fish and Abraham's suggestion that interpretive communities strongly constrain their members. Still, it is possible that this constraint is all there is. In order to find out whether communities are the sole source of authority for interpretations as Fish asserts, we shall have to investigate the very idea of interpretive constraints thoroughly.

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[32]Fish helpfully tells us that the interpretive community of the Johns Hopkins English faculty does not allow a student to argue in a literature class that a text is 'a prophetic message inspired by the ghost of her Aunt Tilly.' Fish *above* note 2 at 343.

3. THE NATURE OF INTERPRETIVE CONSTRAINTS

What constraints are

Constraints are the holy grail of interpretive theory; we are constantly searching for them, not sure they exist, and have only a fuzzy sense of what they might look like. The very word 'constraint' invites unhelpful imagery—a straitjacket restricting our interpretive activity. But as we have already noted, nothing constrains interpreters in this way—one can offer anything as an interpretation, though not always with a straight face. Moreover, there is rarely if ever a PROOF or DEMONSTRATION that a particular interpretation is bad. We may have reasons for believing so which are not conclusive reasons. Moreover, people can fail to acknowledge reasons for believing an interpretation bad, conclusive or not. So what are constraints if not limits on what interpretations can be offered or requirements that certain interpretations be accepted? Constraints, if they exist, are the standards which justify our evaluations of interpretations. They vindicate judgements that an interpretation is good, or acceptable, or incorrect, or inane, or any of the other multitude of evaluative terms we use to assess interpretations.

We evaluate interpretations on many different dimensions: correct or incorrect, good or bad, acceptable or unacceptable. We judge interpretations bold or timid, long or short, flippant or erudite, and so on. Some evaluative dimensions judge a relationship between an interpretation and its object, some between one interpretation and others, and some between interpretations and us. For example, saying that an interpretation of a data set is correct evaluates a relationship between the interpretation and the data. Saying that an interpretation of a novel is unique or long evaluates a relationship between the interpretation and others. Saying that an interpretation of a poem is provocative states our reaction to it. Some evaluations, like successful, acceptable, or good, may encompass a combination of these judgements, and different combinations in different contexts. What counts as a good or successful interpretation of a poem may be different than what counts as a good or

successful interpretation of a dream, or a data set, or a law.[33] We shall explore the context sensitivity of interpretive standards in depth below.

An object constrains its own interpretation relative to a standard for judging the interpretation, if the standard is a standard for evaluating a relationship between the interpretation and the object. Thus, an object may constrain its own interpretation on some dimensions, and not others. It might constrain which interpretations of it are good or successful, but not which are bold or interesting or long. We can now understand the nature of the challenge posed by those who hold that objects (including texts) cannot constrain their own interpretations: it is no less than the assertion that evaluative standards such as good and correct never describe relationships between interpretations and their objects or that, if they do, there is never any justification for making such an evaluation.

Can objects constrain their own interpretation?

So to show that objects can constrain their own interpretation, we have to show two things. First, that some evaluative standards assess a relationship that holds between interpretations and objects, and second, that we are sometimes justified in making such evaluations. These two propositions strike me as obviously true and hardly in need of argument. Nevertheless, many intelligent people deny them, so I shall argue at length on their behalf. I should warn in advance: the discussion will be tedious at points, as the issues involved become complex very quickly.

Let us begin with the first proposition—that some evaluations assess relationships between objects and interpretations. Suppose you say that Joe Christmas in William Faulkner's *Light in August* is a Christ figure. I respond, 'that's a plausible interpretation.' Plausible is an evaluative term. Our question is, what does it evaluate? Some theorists would have us believe that it only evaluates a relationship between the interpretation and us. On this view, in calling your interpretation plausible, I have noted that I am not immediately disposed to reject it or that I believe our interpretive community will not reject it. Both may be true, but this leaves open the question of why I am not immediately disposed to reject it and why I believe

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[33]I shall argue that it is not the genre to which a text is assigned that determines the standards appropriate for judging it, but rather the purpose one has in interpreting it. See *below* 73-77.

others will not be either—that is, why I find it plausible. If you ask me, I will likely respond that it accounts for a number of features of the novel (putting aside for a moment Fish's assertion that texts do not have features apart from interpretations): Christmas's name, his initials, his uncertain paternity, his life-span, his arrival at an orphanage on Christmas Day, and his wandering. That is, I will assess the relationship of the interpretation to the novel. Moreover, we always respond in this way. It would be very odd if I said, 'I find it plausible because it suits my fancy.'

Such behaviour is not just limited to evaluating the plausibility of interpretations. It is characteristic of most of our interpretive behaviour. We do sometimes assess interpretations in ways that do not relate them to their object, eg as loquacious or surprising. However, these evaluations are not the ones which concern us here. Given that many of our evaluative terms purport to assess relationships between interpretations and objects, we have *prima facie* evidence to believe that they do so, but they might not. Perhaps we are systematically confused, and no relationships exist between interpretations and objects which could be assessed. This must be false, however. If there were no relationships between interpretations and objects whatsoever, then an interpretation could not be *of* an object, as this entails a relationship. Moreover, if our interpretations could not bear relationships to objects, there would be no reason to interpret one thing rather than another, or indeed anything at all.

The real question regards the second proposition: are our assessments of relationships between interpretations and objects ever justified, or are we just playing a rhetorical game whenever we offer such evaluations? An example will help. Suppose I get an MRI of my ailing elbow. The technician interprets the image on the spot for me. He says, 'See this red area here. It indicates an inflammation in your tendon. But it is not a tear; it is not large enough.' Later I show the MRI to a specialist, and she says, 'I interpret this differently than the technician. This shows a tear in your tendon.' We have two competing interpretations of one MRI. Can one interpretation be better than the other; that is, can one stand in a more desirable relationship to the object of interpretation (which, crucially, is the MRI and not my arm)? Importantly, we need make no reference to what is going on inside my body in order to make out the case that one of the competing interpretations can stand in a better relationship to the MRI than another.

Let us assume for a moment that doctors agree that red splotches greater than a certain size, say one inch in length, indicate a tear on a MRI (we will examine disagreement later). I am making this up, of course; interpretations of MRIs is complex business. However, a simplified example will help us to understand how constraints work generally, and we shall build the complications back in once we get a preliminary grasp. Let us then further suppose that there is a zone of indeterminacy around one inch, such that doctors call red splotches within that zone indeterminate. If a red splotch is too much below one inch, they agree that the MRI does not show a tear. The specification of the range of indeterminacy is unimportant, and of course it will be impossible to define its boundaries precisely.

What doctors agree on when they agree that a red splotch of greater than one inch length shows a tear is the criteria for proper application of what we will call a *tear interpretation*. In a way, this is like agreeing on what 'cat' or 'kilogram' means, although what is going on is more complex because doctors do hope that their interpretations bear relationships to what is happening inside patients' bodies. Thus the criteria for application of the interpretation that an MRI shows a tear are not purely arbitrary. We shall bracket this off for a bit and return to the complications introduced by the hoped for correspondence between interpreting an MRI as showing a tear and there actually being a tear in the patient's body below.

Once the criteria for a tear interpretation are set, whether or not any MRI shows a tear is a matter of facts about the MRI, not a matter of what we think about it. It might show a tear, even if we do not believe it does (or even if no one believes it does), because we failed to note that it has a red splotch of sufficient size. Similarly, it might not show a tear, even if we believe it does. There might be a splotch that is actually in the indeterminate zone, or is in the zone where we can be sure there is no tear, and we may be wrong because we did not measure, or we measured poorly, or what have you. Once the criteria are set, facts about the MRI determine whether or not a claim that the MRI shows a tear will be correct or not, not our beliefs about whether or not the claim is correct. Thus, one of the competing interpretations of my MRI can be correct while the other is incorrect, because the MRI either contains a splotch of sufficient size or it does not. Because the interpretation will be correct or incorrect in virtue of facts about the MRI, the MRI constrains its own interpretation. This completes our task. When we say the technician offered a bad interpretation or an incorrect one, this judgement can be justified by, for example, showing that the MRI has a red splotch greater than one inch in length.

Now a number of complications were bracketed off in order to make the case that our evaluations of relationships between interpretations and objects can be justified, and a number of objections can be raised. We shall go through both the complications and the objections, but none of them shall force a revision in the story just told. Let us begin with the relationship between an MRI showing a tear and what is happening on the inside of a patient's body. Chances are we set the criteria for proper application of a tear interpretation based on a correlation between certain red splotches and what we see when we cut people open. Assuming that the correlation is not perfect, which it is very unlikely to be, it makes sense to say that some MRIs will show a tear where there is none, and some will not show tears where there is one. This may strike some as odd, at least part of it might. There is no problem with the latter, with saying that an MRI fails to show a tear, even though there is one. Some might object, however, to the idea that an MRI might show a tear where there is not one. I admit that this is unidiomatic in a way. We would probably say something like, 'There appeared to be a tear, but there was not one.' However, this is not too far off from saying, 'The MRI showed a tear, but when we cut him open there was none—something else caused the red splotch.' If this happens frequently enough, we shall begin to revise what we call 'showing a tear', perhaps by expanding the zone we consider indeterminate. There will be an evolving interplay between the criteria we use in deciding whether or not an MRI shows a tear and the evidence we have about correlations between features of MRIs and tears in people's tendons.

Maintaining conceptual space between an MRI 'showing a tear' and there actually being a tear is useful, because doing so allows us to make sense of the judgement, for example, that a doctor's interpretation that an MRI showed a tear was plausible, even though no tear was present when the patient was cut open. Moreover, the unidiomatic conclusion—that an MRI can show a tear where there is none—is not a general consequence of the account of interpretive constraints I have offered. Rather, it is limited to cases where an interpretation is of an object which is taken to display evidence of further facts about different objects. When we come to literature, for example, there will be no possibility of saying, 'This novel displays a Christ figure, though there is none.'

Another major complication that was factored out above is the fact that doctors might disagree over what showing a tear consists in. Perhaps doctors disagree because they were trained differently, or are basing their conclusions on different data sets, or different experiences, or any of a multitude of possibilities.

When one doctor says 'this shows a tear' and another says 'it does not,' there are two possibilities for the source of their disagreement. They may disagree about what 'showing a tear' consists in, or they may agree about that and disagree about whether the MRI satisfies the criteria for 'showing a tear'. The latter is not problematic. If the former is the case, the dispute is terminological in character. They may both be saying true things relative to the way they use 'showing a tear'. Of course, it would be unsatisfying to think that they are not actually disagreeing and are talking past each other, but we should not conclude that. As noted above, the definition of 'showing a tear', though a matter of convention, is not entirely arbitrary—it is designed to track as well as possible the correlations between features of the MRI and features of people's bodies.[34] Thus one doctor might have a better theory of what it means to 'show a tear', one which would make proper application of the term better track actual tears in people's bodies. Having a better theory of what it means to show a tear may make one doctor's interpretation better than another, but this will be relative to the goals of the interpretive endeavour and not a comment on the relationship between the interpretation each doctor is offering and the MRI..[35]

Reintroducing the complications makes our story more complex, but it does not change the fact that we can be justified in making evaluations which assess relationships between interpretations and objects. It is now time to turn towards a number of possible objections to the account I have offered of how we can make these justified assessments. The first objection arises from the possibility of indeterminacy and is fairly straightforward to dispatch. One might think that, because it is possible that it will be neither true nor false of some MRIs that they show a tear, MRIs do not constrain their own interpretation, at least in cases where this is true. This, however, is a non-sequitur. As long as it is possible that an MRI shows or fails to show a tear, as long as it is possible that the question is not indeterminate, then the MRI is

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[34]This assumes that both doctors are using the term to serve this purpose, or purposes closely related. If they are not, then their disagreement is likely one where they are talking past each other.

[35]Below I shall suggest that many concepts used in interpretation are themselves interpretive. For example, when we call a character in a novel a Christ figure, we are interpreting the novel *and* interpreting the past use of the term 'Christ figure'. See *below* 70-73. I am agnostic, however, as to whether or not 'showing a tear' is criterial or interpretive, partially because of my unfamiliarity with the reading of MRIs and the character of disputes doctors have about them. I suspect that 'showing a tear' is an interpretive concept, but it might be criterial.

constraining its own interpretation. To say of an MRI which shows a tear that it does not is to say something false. This is all that is required to show constraint; the existence of cases of indeterminacy along the border do nothing to undermine the conclusions drawn about cases where there is no indeterminacy.[36]

The second objection arises from another possible complication. Suppose an MRI has a red splotch two inches in length. This qualifies as showing a tear, but suppose a doctor believes that the spot is the result of machine error and that there is no tear. Here again we get into difficulty because of the fact that 'showing a tear' is meant to track something going on inside a person's body. A red splotch might have multiple causes, and on occasion we might have reason to believe that the splotch was not caused by an actual tear. Hence we might be reluctant to say of the MRI that it showed a tear (though in fact I see nothing wrong with saying that it showed a tear due to machine error). This does nothing, however, to challenge the fact that an MRI constrains its own interpretation. To see this, simply note that the alternative reading which attributes the splotch to machine error still takes account of the presence of the splotch. Interpretations of the MRI are still constrained, they must account for the red splotch, whether as an error or a tear.

Another objection would follow a path Fish takes frequently in his writing, trying to regress the argument. The objector would claim that I explained what it means to show a tear in terms of the presence of red splotches, and that what counts as a red splotch is itself an interpretive matter. The objector concludes that red splotches in MRIs cannot constrain interpretations because they are identified interpretively. A mistake we have seen before undermines this objection. Different interpretations are getting conflated. Perhaps it is true that red splotches are identified interpretively.[37] However, we can identify red splotches before asking what, if anything, those red

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[36]Indeterminacy should not be confused with uncertainty. We can be uncertain whether an MRI shows a tear, perhaps because we have not measured the red bits, and yet it can still be true or false that it does show a tear. Moreover the possibility of uncertainty presents no challenge to the idea that objects constrain their own interpretation. As long as claims assessing relationships between interpretations and objects can be true or false, then the object constrains its interpretation, even if we are uncertain if a specific claim is true or false.

[37]I doubt this. Red splotches seem like primitives in our perceptual scheme. We do not first see something else, then interpret it as a red splotch, though it may be that unconsciously our brains interpret certain stimuli as red splotches. Regardless, Fish's regress strategy fails for the reasons outlined in the text.

splotches signify. Moreover, appealing to the fact that people may disagree over whether a certain splotch is red, or whether some red constitutes a splotch, is of no help here either for the same reason that disagreement was not problematic before. As long as it means something to be a 'red splotch' something can be a red splotch regardless of whether or not people think it is one. Further, indeterminate cases, cases perhaps in which a splotch is neither red nor not red, will not serve to undermine the idea that red splotches can constrain tear interpretations. It is enough that some things are red splotches, while others are not. No matter how far the objector wants to regress the argument, we will always be able to draw a distinction between interpretations taking place on different levels, so the strategy will not undermine the possibility of objects constraining their own interpretation.

The final objection is related to the previous one. This objection states that since all terms are defined conventionally, from within an interpretive framework, objects do not constrain what we can say about them, do not constrain their own interpretation. This objection fails for familiar reasons. First, though the definition of our terms is conventional, definitions are not always arbitrary—they are designed to serve purposes (which we must share to a large extent to be using a term in the same way). I shall have more to say about this below.[38] More importantly, though we set the definition of our terms conventionally, whether or not facts fit those definitions is a question about the facts, not about the definitions or our beliefs about whether the definitions are fulfilled. There is a complex interplay between our beliefs about whether or not definitions are fulfilled and the content of definitions that allows the meaning of terms to evolve over time. What starts as a mistake may come to be a paradigm as continued deviant use becomes increasingly normal and slowly changes a definition. How exactly this happens is a matter we need not investigate here. It is enough for our purposes that at any instant, whether or not the facts fit a definition is a matter of the facts, not our beliefs about whether they do. This allows objects to constrain their own interpretation.

Now you may think that I have been devious here, using an example from the natural sciences when what we are really interested in is whether or not texts constrain their own interpretations. In fact the opposite is true; in many ways the MRI example made the argument more difficult. The example was made more difficult because of the additional complication of the hoped for correspondence between the

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[38]See *below* 70-73.

interpretation of an MRI and the goings on in the body of which the MRI is an image. No such correspondence issues arise in most interpretive projects within law or literature. Despite this extra difficulty, the MRI was a good place to start, because it allowed us to explain how objects constrain their own interpretation in a context removed from the contentious debates in law and literature.

My goal thus far has been to show that objects can constrain their own interpretation, in the sense that some standards for evaluating interpretations judge relationships between an interpretation and its object. We have noted throughout our inquiry that different norms may govern interpretive activities in different domains, and so we must turn our attention specifically to texts, and more importantly laws. However, we have carried the initial burden that we needed to by showing that objects can constrain their own interpretations and we have explained what this means. An object constrains its own interpretation relative to an evaluative standard if the standard is a standard for assessing a relationship between an interpretation and the object. Now we can explore how texts constrain their own interpretation.

Can texts constrain their own interpretation?

Texts constrain their interpretations in the same way other objects do. Whenever a standard for evaluating an interpretation assesses a relationship between an interpretation and a text, the text constrains interpretation relative to that dimension of evaluation. The example looked at above was judging that an interpretation of *Light in August* which shows Joe Christmas as a Christ figure is plausible. There is no need to rehash the MRI example in its entirety with a text, as the story would be much the same. But I do want to explore objections and complications which might undermine the ability of texts to constrain their own interpretation.

The first challenge we need to tackle is Fish's assertion, alluded to earlier, that texts do not have features apart from interpretations. Remember above I listed a number of features of *Light in August*, including Christmas's name, his initials, his uncertain paternity, etc, which are analogous with the story of Christ. In doing so, I took for granted something Fish would dispute—that texts have features apart from interpretations. According to Fish, textual features are constituted by interpretations and cannot be used to adjudicate between competing ones. Now this is just another version of the claim that interpretations create texts, and it goes equally awry. Fish is wrong because once again he confuses and conflates different types of interpretations.

Texts are written language, and language operates through conventions. As competent language-users, we have no trouble exploiting these conventions to recognize names, to find initials, to follow stories about the actions of characters, and so on. Identifying 'Joe Christmas' as a name might require an interpretation (I think it does), as might identifying 'J.C.' as the initials of the person with that name. But remember that even identifying something as a text may require interpretation. These interpretations, however, are distinct from literary interpretations of texts. Suppose we interpret 'Joe Christmas' as a name based on our knowledge of the conventions for demarcating names within written language and our familiarity with Joe as a common name in our (and Faulkner's) culture. This interpretation leaves open a whole host of other interpretive questions, the ones that interest literary critics, like whether or not Joe Christmas is a Christ figure. Understanding 'Joe Christmas' as a name is the result of an interpretation which is separate from understanding the name as an indication that Joe Christmas is a Christ figure. In following sections we shall explore in greater detail the multiplicity of possible understandings and different types of interpretations one can make of any object. For now, what is important is that we can have an understanding of features of the language of a text without having an antecedent literary understanding of the text.[39] We can pick out features of the

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[39]A lot of confusion about this issue is caused by misleading use of the word 'understanding'. There are an indefinite number of questions we might ask about any object, and thus indefinitely many understandings we might seek of any object. We might be interested in an understanding of its history, an understanding of its relationship to other objects, an understanding of its composition, and so on, endlessly. When we talk of understanding something, be it a text or a game or an argument, we sometimes seem to be talking about complete understandings. The notion of a complete understanding does not make sense, however, given the indefinitely large number of possible understandings one could seek of anything that interested her. When we ask, 'Did you understand that?' the question is best understood as asking whether or not the listener grasped a particular understanding important in the context. See *above* 20-21.

The upshot of this is that if I tell someone who reads *Light in August* without noticing the Christ interpretation that she has not understood the novel, all I can sensibly mean is that she does not have a particular understanding which I take to be important for whatever endeavour we are engaged in. She may have understood many things about the novel including, almost assuredly, the names of the characters and the events described.

text—its words, the names, the action it describes, the utterances of characters, etc—that we would like to explain with a literary interpretation.[40]

Only rarely do these interpretations get intertwined, that is to say, it is rare that I cannot have an understanding of what a sentence is saying Joe Christmas did or said except by reference to a literary interpretation of the novel. Also rare, we sometimes revise our understanding of a portion of the language because of a compelling interpretation of a work as a whole: perhaps we can become convinced that 'He lived thirty-three years' (a sentence I created for convenience) tells us not someone's age but someone's height. But this will only be so because other features of the novel are accounted for compellingly on this interpretation. Generally, literary interpretations add to the understanding, or we might say add another understanding of a text we already understood. Thus, when I read *Light in August* through the story of Christ, the sentence, 'He lived thirty-three years' is now understood both as communicating an age and as indicative of the analogy being drawn with Christ.

Fish and others would have us believe that reading *Light In August* through the prism of Christ's life creates a different novel than reading it as a story about a crisis of identity and the social construction of race (though of course we could read it as both). We have already exposed the misleading metaphysics behind the view that our interpretations create texts. In fact, the first time I read *Light in August* I had neither of these interpretations in mind. I was so unfamiliar with the novel, with Faulkner, and the time period that my expectations severely under-determined my understanding of the novel (again, this is why I read). Yet, I developed an impoverished version of the Christ interpretation many critics find compelling on my own as I read, because in the course of reading and understanding the language, I noticed many connections. Now as I developed this interpretation, portions of the novel which I had already read took on a different significance, that is, alongside my old understanding, I had a new one. For example, the passage which explains that Christmas was found on Christmas

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[40]Things can work in reverse as well. It is becoming increasingly common to apply well-developed frameworks of interpretations to novels. Thus, I might aim to offer a feminist interpretation of a particular work, and this desire will lead me to look for certain sorts of things within the novel, perhaps hierarchical relationships, and binary dichotomies. Thus, in interpreting I might not be explaining things I was interested in apart from the framework, but rather explaining features I notice because of my interest in applying the framework to see what fruit it bears. See, in this light, Fish *above* note 2 at 343.

Day at an orphanage now seemed to me not just a piece of biographical history as I initially understood it, but also a symbol, or sign-post, indicating that Christmas's life parallels Christ's. The text did not change; I had a new understanding of it. Texts have features, identified no doubt through interpretations, but features that can constrain the literary interpretations we give them.

Our next challenge is disagreement, which might be thought to pose a special challenge to the ability of texts to constrain their own interpretations. To begin, I want to start with a hypothetical case of agreement. Suppose that literary critics agree on criteria for a character's being a Christ figure. In this moronic but useful example, a character is a Christ figure if he: 1) has uncertain paternity; 2) lives 33 years; and 3) has the initials J.C. Whether any character in a novel satisfies these criteria is a matter of facts about the novel, the features we identify at lower, non-literary levels of interpretation. That these different levels of interpretation can normally be kept separate is crucial. We can know that a character has uncertain paternity, lived 33 years and has the initials J.C. without wondering if these things signify anything further. Because of this, the fact that the features of the novel which constrain whether a character is a Christ figure are identified interpretively does not undermine the ability of the text to constrain its own interpretation.

So far we have just summarized what we have seen many times over. Of course, reality is much more complex—people disagree not only about whether or not a certain character is a Christ figure, but about what being a Christ figure consists in. There is no list of criteria that literary critics, even the professional as opposed to the armchair, share for identifying a character as a Christ figure. Some may regard uncertain paternity as essential; others will think it counts in favour but is not decisive. Some may think a lot of parallels between a character's life and Christ's must be shown before a character is properly called a Christ figure; others will require

less strict evidence.[41] Does this type of disagreement undermine the ability of texts to constrain whether or not it is appropriate to call a character a Christ figure?

To answer, let us get a clearer picture of what is happening when people disagree in this way. As we noted above in reference to the MRIs, when people disagree about what being a Christ figure consists in, each can say true things relative to her own understanding. I might say that a character is a Christ figure because I mean by that simply that he has uncertain paternity, whereas you deny that a character is a Christ figure because you take that to require that he also suffer on behalf of others. We can understand this disagreement as terminological and see the debate as one in which we are talking past each other. This would be a mistake, however, as we are having a genuine disagreement.

The disagreement can be explained in different ways. We might say that we are having a genuine disagreement because 'Christ figure' is not a criterial concept, but is rather, as Ronald Dworkin might put it, an interpretive concept. On this view, when we call a character a Christ figure, we are not just interpreting the novel in which the character appears; we are also interpreting a practice of calling characters Christ figures. We look to past applications of the label, the reasons that we have the practice of labelling characters Christ figures, the purpose it serves in our literary endeavour, and from all this evidence, we build a theory of what being a Christ figure consists in. Relative to any theory of what a Christ figure is, texts can constrain the appropriate application of the term.

Now nothing will stop someone with an odd theory of what it means to be a Christ figure from seeing *any* character in literature as a Christ figure. What will make her interpretations implausible, however, is that she has a poor theory of what

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[41]Disagreement in literature often occurs in surprising ways. Explicit disavowals of certain interpretations within a text are not always taken to rule out those interpretations. For example, suppose you say, 'Joe Christmas is not a Christ figure, because it says here in the book, "Joe Christmas is not a Christ figure"' and I respond, 'he can still be a Christ figure, despite the explicit avowal that he is not.' Importantly we are disagreeing over what being a Christ figure consists in, and not over a feature of the novel. You think that an explicit disavowal rules out the possibility; I may think, on the contrary, that the disavowal marks Christmas as a Christ figure. Both of us, however, feel responsible in a way to that feature of the novel. We aim to explain it, and take doing so as a virtue of our interpretation, failure to do so as a vice.

being a Christ figure consists in. She has made a bad interpretation of the practice of calling characters Christ figures, and this in turn leads her to offer implausible interpretations of novels, even where what she says about novels is true given her own understanding of what a Christ figure is. This shows that in order to offer plausible interpretations in some cases, one must do more than say true things given how one uses one's terms. One must also use terms in a worthwhile way.

We could also aim to explain the disagreement in criterial terms. Perhaps we agree on a broad criterion for application of the term 'Christ figure'; perhaps we agree that a character has to be 'like Christ' in order to be a Christ figure. On this view then, our disagreement is genuine and not terminological, but it is explained by further disagreement over what it means to be 'like Christ', which may in turn be explained on either a criterial or interpretive model. I suspect that in the end criterial explanations will have to rest on interpretive ones further down. I suspect that saying we agree that a character has to be 'like Christ' in order to be a Christ figure merely passes the buck and not very far. If we disagree over what being like Christ consists in, my guess is that we do not have a further criterion in common we can appeal to, but that we are having an interpretive disagreement which involves the value in the practice of saying characters are like Christ and what best serves that value. This debate, however, mirrors one of the most difficult (and important) in all of legal theory, the debate between Dworkin and positivists over how disagreement over the grounds of law is to be explained.[42] I cannot pretend to resolve that debate, though I have made my inclination clear. Regardless of which explanation of disagreement we ultimately decide works best (and it may be different ones in different contexts), the fact of disagreement does not undermine the ability of texts to constrain their own interpretation, because relative to the way in which we use our terms (including whether the terms we use are criterial or interpretive), our interpretations may be good or bad on some evaluative dimension in virtue of features of the text we are interpreting, and this is all we need to show.

This brings to a close my argument that texts can constrain their own interpretations. The picture of how they do so is complex, but neither disagreement, nor the fact that features of texts are identified interpretively undermines the possibility of constraint. Now that we have shown that objects, including texts, can

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[42]R Dworkin *Law's Empire* (Hart Oxford 1998); J Raz 'Two Views of the Nature of the Theory of Law: A Partial Comparison' (1998) 4 *Legal Theory* 249-282

constrain their own interpretation relative to some standards of evaluation, we can turn our attention to asking what standards are appropriate for judging interpretations.

4. INTERPRETING FOR PURPOSES

The reasons we interpret determine, in large part, the standards we use to evaluate interpretations.[43] What counts as success is what helps us to achieve the goals we have for the activity. Suppose you write me a letter. I may read your letter because I want to know what you were trying to communicate to me. If so, I will count success as discovering your communication intentions. If I interpret your letter as indicating you were exasperated with your boss, but find out later that you were only trying to convey that you were fed up with the situation, then I will conclude that I misinterpreted your letter. Wanting to understand what someone is communicating is perhaps the most common reason for reading a letter, but it is certainly not the only reason. I might read your letter because I want to know whether, for example, you are happy with your new job. I will count success as accurately inferring your mood and not your communication intention (they can come apart).

There are no limits to the reasons we might read letters. Historians read letters to learn about different time periods. Forensic detectives read letters to develop personality profiles of suspects. Teachers read letters to evaluate a student's competency in a foreign language. Psychologists read letters as part of psychoanalysis. Lovers read letters to reminisce about old times. Each of these activities has a different purpose, and what counts as success in each one is different. Because of this, interpretations made in the course of different activities are subject to different evaluative standards.

We also make different types of evaluations of interpretations depending upon the reasons we are making the evaluation. Let us distinguish between *volitional*

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[43]Some interpretive enterprises may assess interpretations in ways that are not related to success in achieving the goal of that enterprise. Longstanding tradition might cause this, for example, if an evaluative standard which once was related to the purpose of the enterprise ceases to be, yet is maintained as a standard. We shall not be concerned with such standards here.

standards of evaluation and *critical standards* of evaluation.[44] Volitional standards are the standards suggested by the purposes an interpreter actually has. Suppose a dishonest doctor is interpreting an MRI. She might have the sole purpose of finding a justification to operate, no matter how thin, in order to increase her profits. She will judge her success in interpreting the MRI by whether or not she discovers any basis to operate. Critical standards of evaluation, on the other hand, evaluate interpretations relative to the purposes an interpreter ought to have, whether or not she actually has them. When we make a critical evaluation of the dishonest doctor's interpretation, we will not assess her interpretation relative to the purpose she actually has, but relative to the purpose she should have given her role and responsibilities. The distinction between volitional standards and critical standards will be crucial for assessing the interpretations of judges.

Since the evaluative standards appropriate for judging interpretations are dependent on the purpose for making the interpretation, objects constrain their own interpretations in different ways and to varying degrees depending on the project. One of the chief aims of the natural sciences is improving our ability to make predictions about and manipulations of our environment. In science, we judge one interpretation better than another if its explanatory power is greater. We are often willing to sacrifice some degree of explanatory power if it purchases theoretical elegance. How much we are willing to sacrifice is a matter of convention and often controversy. Nevertheless, even these choices are the result of generations of experience with successful theory construction. Since scientific interpretation is tightly integrated with a set of pragmatic aims, its objects constrain their interpretation to a high degree, which means only that the primary standards for assessing evaluations will be ones which judge a relationship between an interpretation and its object. In other domains, constraint may not be so stringent.

Literature occupies the opposite end of the spectrum. Literature is what it is partially because it is insulated from pragmatic aims. The norms which govern interpretation in literary practice reflect this.[45] Not only does it seem out of place to suggest that one interpretation of a novel is the correct one; it has long been thought

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[44]This distinction is a cousin of Ronald Dworkin's distinction between volitional and critical well-being. R Dworkin *Sovereign Virtue: The Theory and Practice of Equality* (Harvard UP Cambridge 2000) 242

[45]Cf Posner *above* note 28 at 237

that a hallmark of excellence in a novel is the ability to sustain multiple readings. Further, literary practice puts a premium on originality and creativity in interpretation. Within literature it makes perfect sense that interpretations are judged more for the reactions they provoke in their audience than for their relationship to the work they interpret, though even in literature an interpretation must be seen as relating to its object sufficiently before it will be assessed on other grounds. Both scientists and literary critics interpret, but the standards for good interpretations could hardly differ more between the two domains. Yet this is not a problem. It is what we should expect, as the reasons that scientists and literary critics interpret are radically different.

The problem comes when literary theorists, in an effort to justify their interpretive practices, declare that it only makes sense to evaluate interpretations the way they do. I suspect a desire for justification is what leads some literary theorists to advance the odd and indefensible metaphysical claims we examined earlier. Of course, literary practice stands in no real need of this type of justification. Literary criticism is an enjoyable activity and engaging with literature often deepens our understanding of ourselves and our world. The interpretive practices common in the study of literature are justified even though they are not demanded by deep metaphysical truths about the construction of the world or the nature of interpretation.

Law stands somewhere in the vast middle ground between science and literature. Law is certainly not, as some have suggested, a subset of literature.[46] Law is bound up with plenty of pragmatic aims: resolving disputes and guiding behaviour, to name two of the more important. As Richard Posner observes, '[Courts] cannot revel in statutory ambivalence'[47] the way literary critics often enjoy ambivalence in novels.[48] The standards we apply to our literary interpretations are ill-suited for

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[46]Eg S Levinson 'Law as Literature' in S Levinson and S Mailloux (eds) *Interpreting Law and Literature* (Northwestern UP Evanston 1988) 155-173.

[47]Posner *above* note 28 at 237

[48]Cf. W Brennan 'The Constitution of the United States: Contemporary Ratification' in S Levinson and S Mailloux (eds) *Interpreting Law and Literature* (Northwestern UP Evanston 1988) 13-24, 14. ('Unlike literary critics, judges cannot merely savour the tensions or revel in the ambiguities inhering in the text—judges must resolve them.')

judging legal interpretations.[49] Legal interpretation is different from literary interpretation not because of any inherent difference in the texts, but because of the different aims each has.

This leads to an important aside. Throughout this thesis, I have spoken, and will continue to speak of legal texts. By legal texts, I generally mean statutes, constitutions, and judicial decisions, but also contracts, legislative records, regulatory reports, and so on. All of these legal texts are like letters in the sense that there is no limit to the reasons one might have for interpreting them. Indeed, the historian approaches legal texts for different reasons than a judge, and will count different things as success in interpreting them. One could also read a legal text with literary aims, to look for stories, symbolism, tensions, or to study the rhetoric. Indeed, calling some texts 'legal' can be misleading. Nothing limits legal texts to being the subject of legal interpretations. By calling certain texts 'legal texts', all we indicate is that these texts are integral to the practice of law and are most often interpreted from a legal standpoint (unless 'legal' is given a technical definition, as is the case in many legal systems). I shall persist in referring to these texts as 'legal texts' even though what distinguishes them as legal texts is how they are used and not any inherent differences from other categories of texts, like letters or novels or shopping lists.[50]

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[49]Strangely enough, Fish actually recognizes that there are *reasons* that interpretive practices differ from enterprise to enterprise other than the whims of the community. He points out that judges have reason to minimize interpretive crises in order to give the appearance at least that law is stable, while literary critics have professional reasons to multiply crises. S Fish 'Fish v. Fiss' in S Levinson and S Mailloux (eds) *Interpreting Law and Literature* (Northwestern UP Evanston 1988) 251-268, 265-266. See also J Lane 'The Poetics of Legal Interpretation' in S Levinson and S Mailloux (eds) *Interpreting Law and Literature* (Northwestern UP Evanston 1988) 269-284.

[50]Cf. WB Michaels 'Against Formalism: Chickens and Rocks' in S Levinson and S Mailloux (eds) *Interpreting Law and Literature* (Northwestern UP Evanston 1988) 215-225, 225. Michaels correctly notes that the differences between legal and literary interpretation are not due to any differences inherent in the text. He suggests that the differences in the standards used to judge interpretations are institutional. He is right, but his explanation is not complete. It is not just an accident that the literary institutions and legal institutions judge interpretations differently; they do so because they interpret for different reasons.

Posner declares that literary and legal interpretation share nothing *useful* in common.[51] The purposes for interpreting, in his view, are just too different, and the challenges each project faces distinct. I agree with Posner, though the question of how closely related the evaluative standards used in law and literature are is too large for this essay. The next chapter explores the standards appropriate for judging legal interpretation and expands on the relationship between purposes and interpretive standards. Before we move on, however, we can use the account of interpretation developed to reject a misguided distinction commonly drawn between interpreting an object and using it.

5. INTERPRETATION AND USE

We can illuminate our theory of interpretation by considering the distinction Umberto Eco draws between interpreting and using a text. According to Eco, interpreting a text is attempting to understand the text on its own without relating it to things outside the text. When one does relate a text to things outside it, one uses it. Such a distinction is misguided. First, it is not possible to understand a text without referring to things outside it; no text can specify its own method of interpretation entirely.[52] In order to understand texts, one must bring to the text an antecedent understanding of at least a language. If it is acceptable to employ knowledge of the conventions of language in interpreting a text, why not knowledge of different sorts of societal conventions or knowledge of the historical time in which the work was written? No satisfactory answers have been offered, no satisfactory way of drawing the line between interpretation and use.

More importantly, interpretation seeks understandings, and as we have seen, there is no limit to the types of understandings of an object that may be sought. A single object can be interpreted as part of many different endeavours, and thus may constrain different interpretations in different ways. Consider the following passage from Holly Eley's introduction to Zora Neale Hurston's *Their Eyes Were Watching God*

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[51]Posner *above* note 28 at 250. Amusingly, Posner calls this his 'separation thesis'.

[52]Cf Tribe *above* note 28 at 76-77

> With hindsight, and knowing what we know of Hurston's own life, it is clear that her evocation of her heroine is a bold and inventive affirmation of a woman's right to imagine: 'women forget all those things they don't want to remember, and remember everything they don't want to forget. The dream is the truth.' ... Sam Watson, Lige Moss, and their friends, always ready for a 'lyin' ' session on the store porch, getting on with their own lives, untouched by the kind of deprivation commonly experienced by Southern Blacks during the depression, were not Uncle Toms conjured up to please a white readership. However untypical, they are drawn from life; they are, though, products of an exceptional circumstance. [53]

Eley commits several violations of Eco's interpretation/use distinction in this short passage. She invokes information about Hurston's life, the plight of Southern Blacks during the Depression, and an archetype from another novel. Nevertheless, all of this is adduced in an attempt to understand *Their Eyes Were Watching God*, and all of the information is helpful to that end. Indeed, one could hardly offer a *literary* interpretation without an appreciation of the important works within the tradition. Drawing a line between the text and things outside it is arbitrary and counterproductive. Eco's distinction between interpreting and using a text is simply another unhelpful attempt to gerrymander interpretation.

Eley seeks to understand the novel in light of facts about the author's life, knowledge about time period, and another important work. One could interpret the novel for a completely different purpose. For example knowing that Hurston was trained as an anthropologist, one might be led to believe the dialect she evinces throughout the book faithfully transcribes the speech patterns of Southern Blacks during the depression. Thus we might be interested in making linguistic interpretations of many of the dialogues.

Eley's interpretation is a literary interpretation of the novel, but the nature of literature is such that there is space for many literary interpretations of the same work. One might offer a deconstructive interpretation or an intentionalist interpretation among indefinitely many others. Literature is such that each of these might be

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[53]H Eley 'Introduction' in ZN Hurston *Their Eyes Were Watching God* (Virago London 1986) vii-xv, viii

CHAPTER THREE

JUDGING INTERPRETATIONS

So far we have learned about interpretation generally, what it is and how it works. We have learned very little, however, about law. This chapter begins the work of applying what we have learned about interpretation to questions which have perplexed students of jurisprudence. We shall begin with a capstone of sorts to the account of interpretation developed in the previous chapters—a brief exploration of the relationship between the account I have put forth and the philosophical tradition known as pragmatism, which is best represented in the works of Richard Rorty. I explain that my account of interpretation is a qualified form of pragmatism—I call it *almost pragmatism*—and that two prominent legal theorists, Richard Posner and Ronald Dworkin, subscribe to its key tenets.

The middle portion of this chapter aims to move from interpretive theory to interpretive practice, asking what standards are appropriate for judging interpretations in law. As we have seen, what the appropriate evaluative standards are in any context depends on the purposes of the interpretation, and so we shall have to ask why lawyers and judges interpret law to find out how to assess if they have done so well. I argue that jurisprudence is limited in the insight it can give into how to evaluate judicial interpretations, because the purposes judges and lawyers have may vary in normatively significant ways from one legal system to another. I provide an outline of the types of questions which must be asked in order to determine how to judge interpretations, but answers to many of those questions lie outside jurisprudence. Subsequent chapters (Six and Seven) explore attempts to argue for universal standards for judging judicial interpretations.

The final section of this chapter discusses the relationship between legal theory and legal practice. Dworkin has famously claimed that legal theory and legal practice

are continuous. I consider a variety of ways this claim might be understood and argue that one reading is vindicated by what we have learned about interpretation thus far.

1. ALMOST PRAGMATISM

Many readers will identify the account of interpretation developed in the previous chapters with a tradition known as pragmatism. 'Pragmatism' is one of those words, like 'positivism', that has been used to refer to so many loosely related ideas that it has lost much of its utility as a label. Indeed, our foil from Chapter Two, Stanley Fish, falls squarely within the pragmatist tradition, but my account of interpretation differs considerably from his. In this section, I shall explore the relationship of my account to pragmatism by contrasting it with the work of two self-styled pragmatists—Richard Rorty and Richard Posner—and also with the work of Ronald Dworkin, who calls pragmatism 'philosophically a dog's dinner.'[1]

If pragmatism has a prophet, it is Richard Rorty. According to Rorty, accepting pragmatism means abandoning in all our endeavours attempts to discover what is really the case, attempts to discover truth, and instead seeking only to develop vocabularies and beliefs we find useful. I am not so much concerned with pragmatism as a general philosophy; I am not concerned with its provocative pictures of truth and justification. The debates are simply too robust to canvass here.[2] Rather, I am concerned with Rorty's views on interpreting texts and how they relate to what we have discussed so far. According to Rorty, when it comes to interpreting texts, pragmatism requires abandoning the idea that texts really mean something. For Rorty, like for Fish, what we can justifiably say about a text is a matter of what we can persuade our peers to accept.

Rorty denies that the relationship between an interpretation and its object can be assessed. He claims that 'all descriptions... are evaluated according to their efficacy as instruments for purposes, rather than by their fidelity to the object

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[1]R Dworkin 'Pragmatism, Right Answers, and True Banality' in M Brint and W Weaver (ed) *Pragmatism in Law and Society* (Westview Boulder 1991) 359-388, 360

[2]A helpful volume is R Brandom (ed) *Rorty and His Critics* (Blackwell Oxford 2000)

described.'[3] Rorty believes that assessing the fidelity of an interpretation to an object would require, to borrow from John McDowell's gloss of Rorty, the ability to see our interpretation and its object 'sideways on', rather than from within our interpretive framework.[4] Since we cannot 'climb outside our own minds,'[5] cannot get outside our own interpretive frameworks, to see how our interpretations match up with objects, Rorty concludes we can assess interpretations only for their usefulness, and not for fidelity of any sort. He argues that though our interpretations may be changed by stimuli from objects, 'they are never capable of being *checked against* those stimuli.'[6] Rorty tells us, 'You cannot *check* a sentence against an object, although an object can *cause* you to stop asserting a sentence.'[7] Rorty is only right, however, if such a sideways glance is necessary to check fidelity. What he does not tell us is how being caused to stop advancing an interpretation by stimuli from an object is different from checking an interpretation against the object. Surely I can sidle up to an MRI, whip out my ruler, and see if my previous interpretation squares with what I find now. Perhaps it will, perhaps it will not. If I do so, have I not, in the only relevant sense, checked my interpretation against the object? Why do I need any sort of sideways glance, and what would it help if I could have it? Rorty's claim is another version of Fish's assertion that interpretively accessed objects cannot constrain interpretation, but it is wrong for the very same reasons.

The talk of stimuli, however, introduces a tension in Rorty's writing. If I understand it correctly, it marks a significant divide between Rorty's version of pragmatism and Fish's. Rorty writes.

> Opposition to the idea that texts are really about something in particular... is opposition to the idea that the text can tell you something about what *it* wants, rather than merely provide stimuli which make it relatively hard or relatively easy to convince yourself or

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[3]R Rorty 'The pragmatist's progress' in U Eco *Interpretation and Overinterpretation* S Collini (ed) (Cambridge UP Cambridge 1992) 89-108, 92

[4]J McDowell 'Towards Rehabilitating Objectivity' in R Brandom (ed) *Rorty and His Critics* (Blackwell Oxford 2000) 109-121, 115

[5]McDowell *above* note 4 at 115, quoting T Nagel *The View From Nowhere* (Oxford UP New York 1986) 9

[6]Rorty *above* note 3 at 100 (emphasis original)

[7]Rorty *above* note 3 at 100 (emphasis original)

> others of what you were initially inclined to say about it.[8]

Fish's theory leaves no room for texts to make it more or less difficult to say what we would like to about them; only communities can do that. Yet Rorty recognizes that texts can 'provide stimuli' which do so. These stimuli seem to open the door for texts to constrain their own interpretation. I must confess, however, that I see no reason to speak of the stimuli provided by texts instead of the texts themselves.

The talk of stimuli is emblematic of an ambiguity in Rorty's writing between a view like Fish's, on which only communities constrain interpretation, and a view like my own, on which objects can constrain what we can justifiably say about them. This can be seen again when Rorty discusses

> [The distinction] between knowing what you want to get out of a person or thing or text in advance and hoping that the person or thing or text will help you to want something different—that he or she or it will help you change your purposes, and thus to change your life.[9]

Stefan Collini, commenting on this passage, penetratingly notes that it remains curious

> how things which have no 'nature' of their own but are merely described in ways which suit our purposes can, on occasion, offer resistance to those purposes, resistance so strong that it succeeds in re-arranging the reader's priorities and purposes.[10]

I would like to think that Rorty's understanding of interpretation is a shade closer to mine than Fish's. If he truly does believe that texts can offer resistance to certain interpretations, making them difficult or impossible to offer successfully relative to some evaluative standards, and if he really does think that texts can change our purposes and our lives, then our views may converge. I harbor some doubt that our

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[8]Rorty *above* note 3 at 103

[9]Rorty *above* note 3 at 106

[10]S Collini 'Introduction: Interpretation terminable and interminable' in U Eco *Interpretation and Overinterpretation* S Collini (ed) (Cambridge UP Cambridge 1992) 1-22, 12

views actually converge, however, because Rorty hints that failure to develop a particular interpretation successfully may be due to a failure in the 'monomania'[11] of the interpreter in accommodating the text, and not due to any constraints imposed by the text itself. Of course, it remains unclear why a 'natureless' text needs accommodating and why monomania is necessary, let alone potentially unsuccessful.

Other aspects of Rorty's pragmatism are less problematic. Rorty rejects Umberto Eco's distinction between interpreting and using a text for the same reasons we did in Chapter Two. He writes, 'Reading texts is a matter of reading them in light of other texts, people, obsessions, bits of information, or what have you, and then seeing what happens.'[12] He also declares, 'all anybody ever does with anything is use it.'[13] Though I agree with the last statement in the context of Eco's distinction, it rubs me a bit wrong, as it seems to imply that we only use objects when we interpret them, rather than say learning something about them. We do both. In any case, Rorty and I agree on the essential point: objects can be interpreted for a limitless variety of purposes and there are no limits on the types of information which may appropriately be brought to bear upon an interpretation.

Pragmatism, when it comes to the interpretation of texts, is characterized by two beliefs. First is a belief that objects can be interpreted for a limitless variety of purposes and that any information may be relevant to interpretation. Second is the belief that objects do not constrain our interpretation, only communities do. Fish is a pragmatist in this sense, and Rorty claims to be, though there is ambiguity in his case. As is clear by now, I reject thoroughgoing pragmatism, because I reject its second tenet.

I shall label my view by borrowing a phrase from Fish (but assigning it a different sense than he did): *almost pragmatism*.[14] My account of interpretation is almost pragmatic, because it accepts the first tenet of pragmatism while rejecting the second. Almost pragmatism is characterized by three key tenets. The first it shares

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[11]Rorty *above* note 3 at 96

[12]Rorty *above* note 3 at 105

[13]Rorty *above* note 3 at 93

[14]Fish uses the phrase 'almost pragmatism' to lament what he sees as Rorty's and Posner's failure to recognize that pragmatism does not offer the hope of improving legal practice. S Fish *There's No Such Thing as Free Speech... and it's a Good Thing Too* (Oxford UP New York 1994) 200-230

with pragmatism, the belief that objects can be interpreted for a limitless variety of purposes. The second is that the standards appropriate for judging interpretations vary with the purposes of the interpretation, and the third is that relative to some standards, objects constrain their own interpretation.

I am not alone in my almost pragmatism. Richard Posner self-identifies as a pragmatist, but he does not sign up to the full-blown version. Posner's views are evident in the following passage, part of one of the most insightful discussions of interpretation ever written by a legal theorist:

> ... interpretation is always relative to a purpose that is not given by the interpretive process itself but that is brought in from the outside and guides the process. The purpose of interpreting a set of directions for assembling a stereo system is to assemble the system, and it is best achieved by using the directions to infer the procedure for assembly that the author of the directions had in mind. Whether the conductor of a piece of music written in the eighteenth century should try to recreate the experience of an eighteenth century audience, and thus use the original instruments rather than their modern, improved successors, depends on whether the goal of the musical interpretation is historical or aesthetic. And whether in interpreting a written contract the court should listen to the testimony of the parties as to what they intended when they negotiated the contract may depend on whether the purpose of contractual interpretation is to recreate the intentions of the parties or to encourage contracting parties to embody their agreement in a clearly written, comprehensive document.[15]

Posner recognizes that an object can be the subject of a multitude of interpretations aiming at different goals. The purposes brought to the interpretation, in Posner's view as in my own, determine what counts as success, what standards should be used to judge the interpretation. Posner also argues at length that judicial interpretation is more tightly constrained than literary interpretation due to its integration with pragmatic aims.

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[15]R Posner *Law and Literature* (Revised Edition Harvard UP Cambridge 1998) 210

My view shares so much in common with Posner's that I fear I have simply argued anew to many of his conclusions.[16] Hopefully the value lies in the arguments themselves, as Posner presents little insight into the reasons supporting his almost pragmatism. Though almost pragmatism may not be new to legal theory, it has not previously been articulated fully or defended.

Ronald Dworkin would certainly resist any attempt to pin a pragmatist label on his work, yet I believe he also shares the three tenets I have described as almost pragmatism. He believes that objects can be interpreted for varying purposes, and that the purpose one has in interpreting affects what will count as success in interpreting. Dworkin writes

> We might well turn out to have different techniques for attributing intentions to gunmen in the street, for example, than biblical interpreters have for attributing intentions to Old Testament prophets, or psychiatrists for attributing unconscious motives to their patients, or lawyers for attributing purposes to legislators. If so, these differences would reflect the different assumptions we have about the points of these different enterprises.[17]

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[16]Posner's presentation in Chapter Seven of *Law and Literature* strikes me as right on almost all counts. I disagree, however, with Posner's suggestion that there is no value to reflecting on the nature of interpretation, that doing so cannot improve a judge's ability to interpret law. See Posner *above* note 15 at 209-254. As will become clear, I believe a judge's interpretive approach is partly a function of her understanding of the purposes of law and adjudication within her society. I also argue that judges may have normative reasons to consider some purposes more important than others. If this is true, eschewing all debate over the nature of interpretation may cause judges to interpret less well than if they reflected on it.

[17]Dworkin *above* note 1 at 374. It would be a mistake to conclude from this passage that Dworkin thinks interpreting is always a matter of ascribing intentions. Dworkin argues forcefully against this view, see R Dworkin *Law's Empire* (Hart Oxford 1986). In the passage quoted, he is discussing Steven Knapp's suggestion that all interpretation seeks intention. Dworkin asserts that even if one sees interpretation as a matter of ascribing intentions, the standards for judging success in doing so, and hence the methods appropriate, are sensitive to the purpose of the endeavour. See also S Knapp 'Practice, Purpose and Interpretive Controversy' in M Brint and W Weaver (ed) *Pragmatism in Law and Society* (Westview Boulder 1991) 323-342.

Dworkin also holds that, relative to some enterprises, objects constrain their own interpretation. He urges judging interpretations on a dimension of fit which relates interpretations to their objects.

Dworkin's chief objection to pragmatism is that he thinks it is built upon an incoherent metaphysics. Dworkin argues that 'pragmatists use scare-quotes and italics like confetti'[18] when they reject claims that there are facts 'out there' to be discovered or suggest that the things we talk about do not *really* exist but are instead things we invent. Dworkin argues, in too much detail to explore thoroughly here, that the scare-quotes, italics, and metaphors used by pragmatists obscure arguments that are in the end nonsense.[19] I find Dworkin's rejection of the metaphysical component of pragmatism compelling, and in the previous chapter I argued against Fish's attempt to ground a thoroughgoing pragmatism in metaphysical arguments about the nature of interpretation. Dworkin is certainly not a pragmatist, and neither am I, but we are both almost pragmatists.

2. JUDGING INTERPRETATIONS

We want to know how to judge legal interpretations, most importantly judicial interpretations. The key question given what we have learned so far is, 'Why do judges interpret?' Answering will help us identify the standards we should use in judging judicial interpretations. Before we get onto the business of answering, however, we need to settle some preliminaries.

First, we need to recall the distinction drawn in Chapter Two between *volitional standards* and *critical standards* for judging interpretations. Volitional standards are the ones suggested by the purposes a judge actually has, whereas critical standards are the ones suggested by the purposes the judge ought to have. Our task is a normative one; we want to know whether judges are interpreting well. Whether a judge is interpreting well is a matter of what she ought to be doing, and thus it is the critical standards which concern us. A judge who interprets with the sole purpose of reinforcing her current belief and justifying the decision she wants to make will judge her own success according to how much support for her view she discovers in the

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[18]Dworkin *above* note 1 at 364.

[19]This is not a rhetorical flourish: Dworkin argues that the claims of pragmatists are nonsense—claims we cannot give a sense. Dworkin *above* note 1.

interpreted text. However, we should only judge her interpretation by such a standard if she ought to be interpreting with that purpose, that is only if the standard is a critical one as well as a volitional one.[20]

Once we restrict our focus to critical standards, we have another important problem to confront.[21] Judges will (and ought to) have many different aims when they interpret. A judge might aim to dissolve an ambiguity in the language of a statute, to determine whether a provision in a statute conflicts with the constitution, to provide a reasonable justification for resolving the case in favour of the plaintiff, or simply to find out what the law requires. A judge might properly have some or all of these aims, and many more at the same time. Different purposes suggest different standards for judging interpretations, and we shall have to choose which to use, or we shall have to apply different standards in tandem.

Suppose we work out [P], the set of purposes judges ought to have in interpreting law given all the relevant considerations (we will explore what these are below). Assuming, as is likely the case, that [P] has more than one member, we confront the possibility that the standards suggested by the members of [P] are in tension with one another, such that performing better relative to one reduces one's performance relative to another. Standards may even be incompatible; that is, achieving success according to one may entail failure according to another. Moreover, we will have to order our purposes in importance if it is not possible to maximize performance relative to all the standards suggested by the members of [P] simultaneously.

The key to meeting these challenges rests in the observation that judging interpretations is a normative endeavour. Because our task is a normative one, we

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[20]Such a standard is plausibly critical under some circumstances. Defences of casuistry, particularized decision-making, often suggest that a purpose to justify a desired result through interpretation of existing legal texts is warranted under some circumstances. See C Sunstein *Legal Reasoning and Political Conflict* (Oxford UP Oxford 1996) for a limited defence of casuistry.

[21]Focusing on critical standards short circuits a third problem which would confront the use of volitional standards—how to characterize the purposes that judges have. We could be more or less specific: 'Smith is trying to discover what the law requires'; or 'Smith is trying to assign an antecedent to a preposition in the statute.' Different characterizations of the purpose for interpretation might suggest different standards. Since we are using critical standards, we circumvent this need to describe the purposes judges actually have.

shall ask which purposes are more important for the judge's project. We would aim to settle which standards suggested by which purposes have priority in conflicts through normative argument. I suppose it is possible that we will not be left a complete ordering of standards. If this is true, there may be incommensurably good ways of judging interpretations, and hence incommensurably good interpretations. We cannot, however, assume that this is so, nor is it a natural default position. That there are incommensurably good ways of judging interpretations is a conclusion which would require as much argument as the conclusion that any specific method of judging interpretations is correct.

Before we begin I want to foreclose a move which might seem tempting at this point—claiming that the only purpose judges ought to have when interpreting is to find out what the law requires. In the broadest sense, this may be true, but it may not be—judges plausibly have other duties as well. Nevertheless, it will be entirely unhelpful, as it is reasonable to suppose that the law is whatever legal texts, practices, history, and whatever else we deem relevant, say when properly interpreted. Of course, 'properly interpreted' does all the work here, and we are aiming to figure out what constitutes proper interpretation in the legal context. Fortunately, there is much more that can be said about the purposes of judicial interpretation beyond claiming that it aims at discovering law, so the futility of this tempting move will not hinder our quest.

3. WHY DO JUDGES INTERPRET?

We might begin our inquiry with the common suggestion that judges interpret when they encounter indeterminacy in law, when application of the language of a text presents some problem. Judges interpret, then, to reduce vagueness, or ambiguity, or some other type of indeterminacy. No doubt this is often true, but it will not get us very far. What evaluative standards are appropriate if the goals of interpreting are to reduce indeterminacy? One standard is obvious: the degree to which the interpretation successfully reduces indeterminacy. We can imagine that a judge might offer an interpretation of a statute that fails to resolve the indeterminacy, or perhaps an interpretation which replaces one indeterminacy with another. Clearly we ought to judge interpretations aimed at reducing indeterminacy by the degree to which they do so.

Notice how short a distance focussing on the need to resolve indeterminacy gets us towards a theory of judicial interpretation. It tells us nothing about how judges should go about resolving indeterminacy. Should they defer to the intention of the legislature? Should they understand the law as the best law they could make out of it? Should they construe the law to help the most disadvantaged party to the case? Approaches growing out of each of these possibilities might serve equally well to reduce indeterminacy, and thus satisfy the standard for judging interpretations we have focussed on. We shall have to broaden our search significantly if we hope to discover a useful set of standards for judging interpretations.

The reasons judges interpret extend far beyond the need to resolve indeterminacy, even if that is a primary reason for interpreting. In order to understand the reasons judges interpret, we must ask a number of fairly abstract questions. Below follows a list of questions (certainly not exhaustive) which have important implications for the standards we use to judge judicial interpretations. With each, I shall briefly discuss how the answer might impact judicial interpretation.

1. What are the purposes of having law?

This is perhaps the most abstract question we could ask about judicial interpretation, and it is not immediately apparent why it matters. The answer, however, will be integral in developing a theory of how judges ought to interpret. The reason is simple. The purpose a judge has for interpreting depends, in part, on the purpose of the entire endeavour the judge is participating in, on the purposes of the legal endeavour.

Many different answers have been given to the question of why we have law, and many are likely correct. Law is one of our most complex social phenomena; it plays a variety of roles in society, though the roles it does and should play are the subject of much dispute. Further, law serves different purposes in different communities. To the extent that communities differ in their purposes for having law, the appropriate standards for judging interpretations in those communities may diverge. Nothing like a full consideration of these issues is possible here, but we can look at the different interpretive standards different answers to the question of why we have law might suggest.

Ronald Dworkin suggests that one of law's purposes is to justify the coercive action of the state.[22] It is not hard to see why, given this view, Dworkin arrives at the interpretive theory that he does (though Dworkin's view of interpretation is motivated by much more than this view of law's function).[23] Dworkin believes that all interpretation should show an object in its best light, make it the best it can be. If we have law in order to justify coercive action, showing law as the morally best it can be may further this purpose. This is not to suggest that interpretations should show state coercive action as justified when it is not, but legal interpretation should aim at justifying as much of the state's coercive action as possible. These issues are taken up in detail in Chapter Seven.

A minimalist suggestion about the purpose of law might be that it exists to guide behaviour and coordinate collective action. Both HLA Hart and Joseph Raz indicate that, at a minimum, law (ideally) serves this role.[24] Even this minimal suggestion might have some consequences for the appropriate interpretive method for judges to adopt. Raz suggests that in order for law to serve this function, it must be possible to identify law without reference to the considerations it is there to mediate or settle, which is to say we must be able to identify the law of our community without asking what would be good law for our community. This, Raz claims, rules out any interpretive method like Dworkin's. We shall also take up this conflict in depth in Chapter Seven.

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[22]Dworkin *above* note 17 at 93. Dworkin is often misunderstood as suggesting that this is law's only purpose, or even its primary one. He has indicated in lecture and conversation that he believes neither, though he believes justifying coercion is an important function of law.

[23]Dworkin specifically disavows any connection between his suggestion that law aims to justify state coercion and the account of law as integrity that he develops later in *Law's Empire*. The suggestion, he claims, can serve to structure debates about law where it is accepted by participants in the debate, and he thinks it 'sufficiently abstract and uncontroversial' to be accepted by most participants in the debate, and thus serve its organizing role. Subsequent debate has proven that it is not uncontroversial. Nevertheless, Dworkin is clear that neither his own arguments for law as integrity nor the project of jurisprudence generally depends on our ability to agree on any statement of law's function. Dworkin *above* note 17 at 92-94.

[24]HLA Hart 'Postscript' in *The Concept of Law* (2nd Edition Clarendon Oxford 1994) 238-276, 249; Raz asserts that law necessarily claims authority, and that in order to do so it must be the type of thing capable of guiding behaviour. J Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Oxford 1994) 210-237

Law serves a myriad of other purposes as well. Law provides an orderly way to resolve disputes. Law can be used (with more or less success) to restructure society or redistribute its wealth. Law punishes people who commit heinous acts. Law creates new and valuable forms of social relationships, like marriage and adoption. Law protects the weak and infirm. Law provides citizens a forum in which to air grievances against each other and their government. Law transmits wisdom from one generation to another.

None of this should be taken to suggest that law always serves these roles well, or even serves them at all. Nor should it be taken to suggest that law does not have many negative functions. For example, law can be an instrument to protect elite interests, and law can be used to prevent people from participating in political life on the basis of their race, ethnicity or gender. Nevertheless, our consideration here ought to be aspirational in character. We ought to ask why we have law not just as a historical matter, though this may provide much insight, but as a normative matter as well. What do we want law to accomplish for us? What roles would good law play? Remember, our question is how *ought* judges to interpret; answering requires a focus on the roles law should play in society. Each of the purposes we have mentioned has potential implications for the ways in which we should judge judicial interpretation. A full theory of judicial interpretation might make recourse to many of these purposes and many others as well.

2. What are the purposes of different areas of law?

This question is a subsidiary of the last, put here to remind us that just as law serves different purposes, different domains of law serve different purposes as well. Of course, there is overlap, but environmental regulation plays a very different role in society than laws regulating the transmission of property through wills. Tort serves a different function than contract, and property is different yet again from tax. The appropriate standards for judging interpretations may vary from one area of law to another, though it is possible that more general concerns about law will mitigate towards similar standards for interpretation throughout the judicial endeavour. What is clear is how nuanced a complete theory of judicial interpretation would need to be and how unlikely we are ever to have one.

3. What is the purpose of having legal texts in general? What is the purpose of having the text which is being interpreted? What is the purpose of making decisions based (in some way) on legal texts?

These questions are all interrelated, and all concern the reasons judges have for paying attention to the text they are interpreting. Legal texts, like legal systems, serve a variety of purposes. They communicate laws from one institution to another, and they make the content of the law publically available. They provide a reference point through which people can settle disputes. They allow people to plan their affairs with expectations about how the government will interfere on their behalf or against it.

Not all legal texts serve the same purpose. Judicial decisions and statutes serve different purposes. Typically judicial decisions explain the reasons for which a decision is being made. Statutes, while sometimes containing explanatory material, often express the decision without rationale. The rationale included in judicial decisions indicates that they serve a different role within the legal system than statutes. There are other types of legal texts as well: regulatory instruments, contracts, legislative histories and so on. Each of these serves a different role within a legal system and as a result the appropriate standards for judging interpretations of them may differ.

All modern legal systems have legal texts of some type, but this has not been true of all legal systems. Though legal texts are now a universal feature of legal systems, it is not required by any means that we make decisions by reference to legal texts. Some (or even all) decisions made by a judge might be better made by reasoning directly about the merits of the case, rather than by considering the bearing of a text on the matter. Every modern legal system has decided that texts serve a vital function, and it is worth considering why. The primary reasons may be the ones canvassed above; determinacy and transparency are valuable. So, however, is flexibility and the ability to revise a previous decision which no longer seems apt given the circumstances. To the extent that making decisions according to texts might inhibit these goals (which need not be the case) it is worth inquiring why we pay attention to legal texts.

Judges might pay attention to statutes partially because legislatures have the authority to control the development of the law. Some believe this implies that we should judge interpretations of statutes by their fidelity to the legislature's intentions.

We shall take up this common suggestion in Chapter Six. Judges might pay attention to legal texts because they aid in peaceful and orderly dispute resolution. Michael Moore suggests that, for example, this is the reason Americans ought to pay attention to the Constitution.[25] Though we shall not take up this idea here, notice that it will have different implications than the view that legal texts are important because they communicate the decisions of a legislature. Another suggestion, similar to Moore's but importantly different, comes from Heidi Hurd. Hurd suggests that we decide legal disputes through reference to legal texts because legal texts embody wisdom about moral issues.[26] Such a view might lead us to use legal texts in helping us to decide what the morally appropriate resolution to a case is, but to cast them aside if they fail to assist towards that end.

4. What is the purpose of having judges make decisions about what legal texts require?

Different legal systems allot power among institutions in different ways. Indeed many interpretive debates can be understood as debates over the appropriate allotment of power among institutions. In some legal systems, judges are more or less partners in the law-making process. In others, they have a subsidiary role to the legislature. In the United States, judges exercise the power of judicial review to declare statutes unconstitutional, whereas in England, parliamentary sovereignty excludes any such option. Cass Sunstein argues that this institutional difference, among others, gives rise to different types of law in the two countries. Congress is given to passing law dominated by flexible standards. Parliament, in Sunstein's view, produces law that is comparatively rule-oriented.[27] Regardless of whether or not Sunstein is right on this score, it is reasonable to suppose that different institutional structures might give rise to different interpretive challenges for judges. Further, the proper way to resolve those challenges may depend on the relationship among the different legal institutions. Those who see legislatures as the law-maker, or see legislatures as the institution in a democracy most closely tied to the electorate, often

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[25]M Moore 'Interpreting Interpretation' in A Marmor (ed) *Law and Interpretation* (Clarendon Oxford 1997) 1-29, 14

[26]H Hurd 'Interpreting Authorities' in A Marmor (ed) *Law and Interpretation* (Clarendon Oxford 1997) 405-432, 418

[27]Sunstein *above* note 20 at 163-164

argue for fidelity to legislative intent as an appropriate standard for judging judicial interpretations. Those who see judges as a bulwark for liberty against the potential tyranny of more democratic branches often argue for a more independent approach to judicial interpretation. I do not mean to endorse any of the arguments hinted at here; they are certainly too simple. But we can see how debates over interpretation are impacted by our view of the relationship and relative power of different legal institutions.

More generally, I think we can see that a full account of judicial interpretation will require an account of law's authority in a community, how it is legitimized and where it is invested. If authority to develop law is vested in the legislature, then perhaps judges ought to defer to legislative intent in interpreting statutes. If, on the other hand, authority to develop law is distributed across institutions, with some of this authority vested in the judicial branch, fidelity to legislative intent may be comparatively less important. These ideas are the subject of Chapter Six.

4. A THIN THEORY

By now, developing a full theory of judicial interpretation should seem like an overwhelming task, because it is. More importantly, the foregoing discussion should have made it clear that it is not a task for a general jurisprudence to undertake. Legal systems vary greatly in their purposes, aims and structures. Interpretive standards must be sensitive to these differences. Thus, a general jurisprudential theory of interpretation must be very thin. Indeed, it may be limited to the three claims of almost pragmatism, but concluding so now is unwarranted.

Two standards for judging judicial interpretation are commonly put forward as more or less universal standards, appropriate for all legal systems, or at least legal systems of our type. One of these is fidelity to legislative intent. Joseph Raz and Andrei Marmor have separately offered arguments aimed at showing that in order to make sense of certain aspects of law's authority, we must judge interpretations by their fidelity to legislative intent, at least in a limited fashion. As previously noted, these arguments are the subject of Chapter Six.

In *Law's Empire*, Ronald Dworkin outlines what he calls *constructive interpretation*, a method which requires that objects of interpretation be shown in their best light. Dworkin does not see himself as doing general jurisprudence; he limits his

claims to Anglo-American legal systems. Nevertheless, Dworkin appears to believe the requirements of constructive interpretation apply broadly. He claims it is the appropriate method of interpreting literature, art, and many social phenomena (like courtesy), as well as law. As Dworkin's arguments in support of his interpretive method do not hinge on specific aspects of any legal system, we shall treat constructive interpretation and its best light requirement as a general claim about how judges ought to interpret. Dworkin's interpretive method, specifically the best light requirement, is the subject of Chapter Seven.

Though we shall return to these universal suggestions, I want to stress that the appropriate standards for judging judicial interpretation of laws are sensitive to the particulars of the legal system in question and the type of legal text being interpreted. Debates over judicial interpretations, the way they should be made and the way they should be judged, are part and parcel of our legal practices. These debates are carried out on the ground, so to speak, by participants in particular legal systems, and indeed, that is where they belong.[28] Even if both of the proposed universal standards we shall consider in the following chapters proved to be apt for all legal systems, we would still be left with a very thin theory of judicial interpretation. Both suggestions radically under-determine how judges ought to interpret.[29] Every legal community must settle for itself (or more accurately, debate for itself) its own standards for judging interpretations. This is not just the banal (yet true) claim that different legal communities may adopt different interpretations of the same concept (say *mens rea*) or the same text. Rather, it is a stronger claim: what it means for a judge to interpret well differs among legal systems because of the disparate structures and aims each system has.

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[28]WN Eskridge *Dynamic Statutory Interpretation* (Harvard UP Cambridge 1994) is the best investigation of the considerations which affect judicial interpretation in a specific legal system I have encountered, though it is limited to statutory interpretation.

[29]Dworkin's best light requirement on its own under-determines how judges ought to interpret, because what will count as showing texts in their best light will vary among legal systems and within them. Different legal systems will assign different roles to texts, and this alone will mean that interpretive methods will properly differ. The under-determination can be seen clearly by looking at the different interpretive methods Dworkin suggests will be appropriate within legal systems, eg for statutes and constitutions. Dworkin *above* note 17.

5. THE CONTINUITY OF THEORY AND PRACTICE

A recurring topic in jurisprudence is the relationship between legal theory and legal practice. Dworkin, among others, claims that legal theory is continuous with legal practice.[30] There are many ways of understanding this claim, and whether or not it is true depends on how it is taken. I argue in this section that what we have learned thus far about interpretation shows one sense in which the claim of continuity is true.

One way of understanding claims about the continuity of legal theory and legal practice is as suggesting that legal theory is a domain of law, like tort or contract. I must confess that I have never understood why some interpret Dworkin and others as claiming this. If this is the claim, it is patently silly. People do not bring claims under jurisprudence. There are no rules of jurisprudence assigning rights and duties as there are of torts, contract or property. Legislatures do not pass laws changing jurisprudence. I can see no way of making sense of the claims that legal theory is on all fours with traditional domains of laws, no way of making sense of the claim that legal theory is a part of law.

We can understand the claim that legal theory and legal practice are continuous in a different way. One might say that there is no sharp division between legal theory and legal practice, or that there is no clear boundary beyond which one has ceased to be engaged with a question of legal practice and begun to consider a question of legal theory. This is often cashed out as the claim that what we call questions of legal theory are distinguished only by their level of abstractness, not any difference in kind or subject matter from what we call questions of legal practice. At first glance, this seems unlikely to be true. 'What is the concept of law?' seems to differ in more than just abstraction from 'Does the 14th amendment permit affirmative action?'. The subjects of the inquiries appear different. Yet, in a recent lecture[31], Dworkin expanded the view he articulates in 'Objectivity and Truth: You'd Better Believe It'[32] about the relationship between ethics and meta-ethics. In that article, Dworkin denies any sharp boundary between the two (indeed, he questions the

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[30]Dworkin *above* note 17 at 90

[31]R Dworkin 'Political and Legal Archimedeans' *unpublished manuscript*, which was delivered as the Hart Lecture in Oxford during 2001.

[32]R Dworkin 'Objectivity and Truth: You'd Better Believe It' (1996) 25(2) *Philosophy and Public Affairs* 87-139

existence of meta-ethics). Dworkin now makes a similar claim about legal theory and legal practice. He argues that questions of legal theory are questions of law, not just questions about law. He argues that legal theory cannot be 'Archimedean', which is to say, in part, that it cannot be neutral regarding questions within law. Roughly the idea is that when positivists, for example, claim that all law can be identified by reference to social facts, they are making a claim which has *implications* for arguments about what the law is in particular communities. We shall not explore Dworkin's argument here, as even if he is right, it is in a different sense altogether that my theory of interpretation entails that legal practice and legal theory are continuous.

Another way to understand the claim that legal theory and legal practice are continuous is as suggesting that questions of legal practice are often impacted by questions of legal theory, that questions of legal practice can sometimes, or always, turn on questions of legal theory (Dworkin also makes this version of the claim). This sense of the claim is the one that is vindicated by what we have learned about interpretation. How a judge ought to interpret is intimately connected with abstract questions about her legal system: why it exists, what her role in it is, what roles texts play, and so on. These questions are normally considered part of legal theory, and what we have learned so far shows that they will have an impact on the appropriate way for a judge to interpret legal texts. In order to discover what counts as interpreting well, what makes for a good interpretation of a legal text, a judge will have to make recourse to normative argument about the nature and character of her legal system. She identifies the legal norms operative in her community if she interprets legal texts, practices, and history well, and what counts as interpreting well depends on the answers to the questions of legal theory we have been discussing. Since these questions impact what counts as a good interpretation of a legal text, they

in turn affect the content of the law thus making legal theory and legal practice continuous.[33]

Some judges, of course, will eschew any reasoning which seems to them remotely theoretical. They might protest that they can determine the law simply by reading statutes or precedents, and that such law can almost always be applied straightforwardly. I do not deny that judges can take this attitude towards their work, though I think they suffer from deep conceptual confusions about the nature of language, law, and judging. But what is important is that their behaviour presupposes certain answers to questions of legal theory, contentious answers, whether or not they realize it. An interpretive theory, or an approach to interpretation, presupposes what is necessary to justify it. Thus, if a judge claims to have identified law through reliance on moral argument, she implicitly denies the positivist assertion that law is identified only through reference to social facts without recourse to morality. If the positivist assertion were true, her claim of having identified the law would be false. Now claiming that the interpretive behaviour of judges presupposes answers to questions of legal theory does not indicate that judges are aware of these implications, much less that they consider them every time they interpret. This, however, is beside the point, as if their behaviour presupposes incorrect answers to questions of legal theory, they may act in unjustified ways. Since the proper interpretive method for a judge to use is dependent on deep theoretical issues, it is possible that avoiding the theoretical debate entirely will cause judges to be unaware of important reasons they have for interpreting texts in one way as opposed to another (eg aiming for fidelity to legislative intent as opposed to reading in light of our contemporary problems). Legal theory is then continuous with legal practice in the sense that the interpretive method one uses presupposes answers to questions of legal theory. Moreover, failure to grapple with certain questions of legal theory might lead one to misidentify the law of one's community systematically.

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[33]John Gardner has suggested to me that this shows only that parts of legal theory are continuous with legal practice, and he is right about this. I have shown only that questions within legal theory which affect what it means to interpret well are continuous with questions of practice. Gardner is pointing to the possibility that certain questions within legal theory might not be continuous with legal practice in this way, because they may never impact the right answer to a question of legal practice. This is a possibility my argument leaves open, but I have a hard time seeing what those questions might be. It does not seem that the question, 'what is law?' is one of them. I argue below that the answer is relevant to determining what the law is.

I want to consider a few objections to the view put forward here. The first, articulated by Joseph Raz, concedes that questions of legal theory can sometimes impact questions of legal practice, and even that on occasion questions of practice might turn on questions of theory. Raz, however, denies that this shows any special relationship between legal theory and legal practice.[34] He notes the same is true regarding biology, or sociology, or any other number of subjects. That is, questions of legal practice might be impacted by any of these subjects. A patent case might turn on whether or not two phenomena are considered distinct biologically, or a constitutional case might turn on whether or nor segregated education can produce educational and social equality. Yet Raz argues that this does not make biology or sociology continuous with legal practice, and he is right.

This objection, however, misses its mark because it overlooks the systematic relationship between legal theory and legal practice. In every case, a judge's identification of law depends in part on how she interprets the relevant texts and history, and indeed on what she considers relevant at all. Her approach to interpretation presupposes answers to theoretical questions about the nature of her legal system, whether or not she is aware of it. If it presupposes incorrect answers, she may be interpreting poorly, misidentifying the law of her community. Moreover, a mistake about the nature of her legal system may lead a judge to misidentify the law of her community systematically, whereas mistakes in biology or sociology will have limited impact. The relationship between legal theory and legal practice is special because of its systematic character.

Raz offers another objection more relevant to the argument I have offered about the continuity of legal theory and practice. He challenges the claim that a judge presupposes answers to questions of legal theory in rendering decisions. Perhaps a judge presupposes only that her decision is right as a matter of the law of her country, Raz contends.[35] Though Raz is right that judges might have quite limited presuppositions, this objection fails, because the assertion important to my argument is not that judges presuppose truths of legal theory, but rather that their decisions do. The difference is that a decision might be said to presuppose whatever is necessary to justify it, whereas the judge rendering the decision may not have presupposed any

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[34]J Raz 'Two Views of the Nature of the Theory of Law: A Partial Comparison' (1998) 4 *Legal Theory* 249-282, 278

[35]Raz *above* note 32 at 279

such thing—she might have erroneously thought the decision was justified on entirely different grounds.

Raz also objects to this way of understanding the claim of continuity, however. Raz writes

> Judicial decisions in American courts are vulnerable to the charge that they are wrong as a matter of American law. But it is irrelevant to their justification that they conform, if we can make sense of the notion, with the correct theory of the nature of law.[36]

Is it irrelevant? Suppose a judge sitting on an American appellate court declares that the death penalty is unconstitutional, and hence that the statute making provisions for it is not law, because it provides for punishment that is cruel. Suppose further that the judge concludes so based on a moral inquiry into the cruelty of capital punishment. A dissenting judge responds that moral inquiries cannot play a role in interpreting constitutional provisions, and hence in determining what the law is, Instead, she suggests, we must appeal to some socially settled meaning of cruel, even if inconsistent with the moral truth about cruelty. True these judges are having a dispute over what American law is on capital punishment, but they are also having a dispute over what law is. The two are not exclusive. It is open to the dissenting judge to say, 'You crazy Dworkinian, you have misunderstood what law is and are therefore misidentifying the law of your country; you are thinking about what the law should be instead of what it is.' The nature of law is certainly relevant to what the content of law is in any particular locale, as this hypothetical debate points up. Disagreements will occur as disagreements over the content of law in a specific country, since that is what judges are charged with determining, but this does not mean that answers to questions of legal theory are irrelevant to these disagreements, nor does it mean that they are not presupposed by judicial decisions.

Raz's last attack on this understanding of continuity rests on his assertion that a community might have a legal system, yet lack the concept of law. I am unsure of this, but we can grant the possibility for the argument here. Raz argues that judges in this system could identify the law of their community—they would think of it as

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[36]Raz *above* note 32 at 280

identifying the rules of their system—without recourse to the concept they lacked.[37] I suppose this is true, and moreover, it would seem odd to say that their decisions presupposed truths about a concept which may never come to exist in that community. Yet, their decisions would still presuppose some theoretical truths about their system, perhaps that moral considerations can play a role in the identification of valid rules or that they cannot. That these presuppositions are truths about the nature of their system, rather than truths about the nature of law, seems to me not to matter much. For them legal theory may not be continuous with legal practice, but the theory of their system is continuous with its practice, in that claims within the practice presuppose theoretical claims about it. From the outside, of course, we know that these are claims of legal theory and legal practice, but their lack of that knowledge does not seem to affect the presupposition one way or another.

A final objection, similar to the last, might suggest that legal systems can adopt answers to the important questions of legal theory, thus allowing a judge to answer questions of legal practice without reference to any questions of legal theory.[38] By embedding answers in the practice, so to speak, the theoretical considerations are cut off. In a way this is true—a judge's role in the legal system is a matter of the practice, as are the roles of texts, and the concept of law is certainly a product of how the institution it picks out is practised. However, none of this changes the fact that decisions will presuppose claims about legal theory, claims that turn on the results of a necessarily normative inquiry into what a legal system's purposes are, which features are more or less important, and so on. Thus the fact that a legal system may adopt answers to questions of legal theory does not pry practice apart from theory.

Conclusion

The tone of this chapter has been largely deflationary. While we saw at the outset that two prominent legal theorists, Richard Posner and Ronald Dworkin, share the view of interpretation I am calling almost pragmatism, we saw very quickly that a proper philosophical understanding of interpretation provides little insight into the actual

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[37]Raz *above* note 32 at 280

[38]Raz cites the unfortunate yet amusing instances in which a number of courts ensconced 'misunderstandings of Kelsen's misguided theory' into their law as they struggled with the continuity of their legal systems in the wake of coups d'etat. Raz *above* note 32 at 278.

interpretive debates which take place among lawyers. General jurisprudence can say very little about how judges ought to interpret, because the appropriate standards for judging interpretations will be sensitive to a multitude of considerations specific to each legal system. We outlined some of the more important considerations, but doing so only served to reinforce the enormity of the task. What we did see is that the proper way to interpret is a function of a variety of considerations which are often thought part of legal theory, and thus a version of the claim that legal theory and legal practice are continuous was vindicated.

Though concrete conclusions about how judges ought to interpret are not forthcoming—they are not appropriate for a work of jurisprudence—subsequent chapters explore some of the more common suggestions for standards for judging interpretations. Chapter Six tackles fidelity to legislative intent, and Chapter Seven tackles Dworkin's best light requirement. Before we get there, however, we have more general philosophical work to finish. The next chapter examines Ludwig Wittgenstein's remarks on rules and what they might teach us about legal interpretation. Chapter Five explores the concept of authority, an understanding of which will be crucial for assessing the arguments of the final chapters.

CHAPTER FOUR

WITTGENSTEIN ON RULES: THE PHANTOM MENACE

Ludwig Wittgenstein is the phantom menace of legal theory.[1] He never wrote about law, but his influence is felt throughout the discipline.[2] At first his influence was indirect; HLA Hart's philosophy bears its imprint.[3] Increasingly, however, legal theorists have turned directly to Wittgenstein's works for insight into the nature of law.[4] Many facets of Wittgenstein's thought raise interesting questions about law. His work on the nature of intention, for example, casts doubt on the coherence of the idea of *mens rea* and intention-oriented theories of interpretation. The subject of this chapter is Wittgenstein's remarks on rules.

Wittgenstein's philosophy presents unique challenges, especially when attempting to apply it to a field as far beyond the scope it sets for itself as legal theory. The main challenge comes from the obscurity of the writing. Wittgenstein's work proceeds not through linear argument advancing a thesis, but through a series of short sections jumping from topic to topic and approaching the same subject in many different ways. Indeed, it is often hard to locate Wittgenstein's voice in his work and separate it from his frequent imagined interlocutors (whose interjections he usually

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[1]Citations to Wittgenstein's works will follow the standard convention of identifying passages by book title and section number. Full citations to editions used are listed in the bibliography.

[2] Wittgenstein occasionally mentions law. See *Zettel* 48, 350; *On Certainty* 335, 441, 485, and 604. This list was borrowed from B Langille 'Political World' in D Patterson *Wittgenstein and Legal Theory* (Westview Boulder 1992) 233-247. See also *Remarks on the Foundation of Mathematics* III 65.

[3]For an account of the relationship between Hart's notion of the 'open texture' of legal language and Wittgenstein's philosophy, see B Bix *Law, Language and Legal Determinacy* (Clarendon Oxford 1995) 7-35.

[4]This trend reached its zenith with D Patterson (ed) *Wittgenstein and Legal Theory* (Westview Boulder 1992)

denotes by quotation marks). Because of this, a significant portion of the secondary literature on Wittgenstein is exegetical rather than critical, and what Wittgenstein's view is is often as contentious as whether or not he is correct.

Given the nature of Wittgenstein's writings, it is not surprising that legal theorists appeal to his work for a diversity of purposes which often run counter to each other. In this chapter, we shall develop two such lines of thought which use Wittgenstein for opposed purposes. The first develops a scepticism about rules and argues that law is radically indeterminate.[5] The second claims that Wittgenstein's remarks explain how law can be determinate; they are used to ground the oft-drawn distinction between easy and hard cases and to show that laws can be understood without interpretation.

Many persuasive rejections of the rule-sceptic view have been offered.[6] Though I agree in substance with many previous rejections of rule-scepticism, I shall nevertheless recap the sceptical argument and its rejection here. A proper understanding of them is necessary to see the second topic—Wittgensteinian explanations of determinacy in law—in its proper light. We shall see that many of the theorists who rightly reject rule-scepticism err in the opposite way, misapplying Wittgenstein's remarks to explain certainty in the application of some legal rules. Wittgenstein's remarks lend no support to the distinction between easy and hard cases or the view that laws can be applied without interpretation.

1. KRIPKE'S RULE-SCEPTICISM

There is a sceptic present in Wittgenstein's writings, but whether Wittgenstein is the sceptic is the subject of much controversy. Wittgenstein's discussion of rules occurs primarily in sections 139-242 of the *Philosophical Investigations* (PI), though rules

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[5]C Yablon 'Law and Metaphysics' (1987) 96 Yale Law Journal 613; M Radin 'Reconsidering the Rule of Law' in D Patterson *Wittgenstein and Legal Theory* (Westview Boulder 1992) 125-155; M Tushnet 'Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles' (1982) 96 Harvard Law Review 781

[6]G A Smith 'Wittgenstein and the Sceptical Fallacy' in D Patterson *Wittgenstein and Legal Theory* (Westview Boulder 1992) 157-188 presents a detailed account of the importance and failure of the rule-sceptic view which is more comprehensive than the one I present here; see also N Stavropoulos *Objectivity in Law* (Clarendon Oxford 1996) 147-155; Bix *above* note 3 at 36-62.

are a recurring topic in the *Remarks on the Foundations of Mathematics* (RFM) and the *Blue and Brown Books* (BB).[7] In the course of the discussion a sceptical position is developed which suggests that it is impossible to follow a rule because any action can on some interpretation of the rule be shown to accord or conflict with it. Saul Kripke has famously argued that this sceptical position is Wittgenstein's, that he accepts it, and offers what Kripke terms a sceptical solution to the problem.[8] Many disagree with Kripke on the exegetical point.[9] They argue that Wittgenstein rejects the sceptical position Kripke identifies, seeing it as symptomatic of a flawed metaphysical picture of what is involved in following a rule. We shall put aside the exegetical question, for the most part, and focus on the sceptical position itself, using Kripke's work to explore it. We will discover that the rule-scepticism many writers find in Wittgenstein fails on its own.

Kripke uses the rule of addition to present the sceptical argument. I grasp the rule of addition. As Kripke notes, part of my grasping the rule is that 'although I myself have computed only finite many sums in the past, the rule determines my answer for indefinitely many new sums I have never previously considered.'[10] Suppose that I have never considered the addition of two numbers larger than 57 (though this is false, there is a number which is the largest number I have ever added to another, so this simplifying assumption is innocuous). Now I am asked to compute the following sum

68+57

Of course, I would answer '125'.

Kripke's sceptic challenges this answer. He says that given how I used the term 'plus' and the symbol '+' in the past, I should have given the answer '5'. Of

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[7]Quotations from the PI use the following edition: L Wittgenstein *Philosophical Investigations* GEM Anscombe (tr) (Blackwell Oxford 1998)

[8]S Kripke *Wittgenstein on Rules and Private Language: an elementary exposition* (Blackwell Oxford 1982)

[9]G Baker and PMS Hacker 'On Misunderstanding Wittgenstein: Kripke's Private Language Argument' (1984) 58 Synthese 407; C McGinn *Wittgenstein on Meaning* (Blackwell Oxford 1984); J McDowell 'Wittgenstein on Following a Rule' (1984) 58 Synthese 325.

[10]Kripke *above* note 8 at 7

course, this is absurd, but suppose we indulge the sceptic. What I should do is use '+' as I have in the past, but the sceptic notes, *ex hypothesi*, I have never considered this case, indeed never considered a case with arguments this large. Thus, everything I have done and thought in the past is consistent with my having used 'plus' and '+' to denote a function which Kripke terms 'quus' and represents with '⊕'. Quus is defined as

$$x \oplus y = x+y, \quad \text{if } x, y < 57$$
$$= 5 \qquad \text{otherwise.}[11]$$

Kripke sums up the sceptical challenge

> The sceptic doubts whether any instructions I gave myself in the past compel (or justify) the answer '125' rather than '5'. He puts the challenge in terms of a sceptical hypothesis about a change in my usage. Perhaps when I used the term 'plus' in the *past*, I always meant quus: by hypothesis I never gave myself explicit directions that were incompatible with such a supposition.[12]

The sceptic holds that no fact about me, about my mental states or behaviour, makes it the case that I meant plus rather than quus, or vice versa for that matter. Kripke considers a number of candidate facts that might make it so (eg dispositions), and in turn rejects each as either susceptible to the sceptic's reinterpretation or in some other

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[11]It may appear problematic that the definition of quus includes the symbol '+'. However, Kripke claims it is not problematic, as the sceptic is not questioning what I currently mean by '+', just whether or not this accords with what I meant by '+' in the past. Kripke *above* note 8 at 12. As we shall see, the sceptic's position quickly leads to the conclusion that there is no fact of the matter about what I mean by '+' now. Thus, it is unclear to me, whether the sceptic is entitled to appeal to it in defining quus, but there are other ways of defining quus, consistent with Kripke's aims, which would not appeal to any meaning of '+' (for example, we could replace 'x+y' in the definition of quus with a table of the arguments and solutions for all of our previous applications of '+'), and thus we need not worry about its appearance here. A more significant worry for the sceptic's argument, which will be discussed below, is that it is presented *in language*.

[12]Kripke *above* note 8 at 13.

way inadequate.[13] It is a very short step from here to see that not only is the accordance of my present usage of 'plus' and '+' with my past usage called into question, but the possibility of my meaning either plus or quus by using them in the present is impossible as well.[14] If there is no fact of the matter as to whether I mean plus or quus (or any number of other non-standard interpretations of my past behaviour we could generate), I cannot use words in accord with rules for their meaning. Rule-following is impossible. Kripke suggests that this is what Wittgenstein was asserting in the following passage from the PI:

> This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here.[15]

Let us put this in the context of law. In order to simplify things, suppose that our society has a single legislator and adjudicator, Rex. Rex imposes the following law

> [Tax]: Everyone must pay 10% of their income to the state.

However many times [Tax] has been applied, the number is finite. Furthermore, even if Rex considered how [Tax] would apply to many cases, he could not have considered how it would apply to all cases. Suppose Gates has an income which is larger than any income to which [Tax] has been previously applied and is larger than any income for which Rex has considered the application; let us suppose this number is $1,000,000.

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[13]Dispositions are not susceptible to reinterpretation, but they are inadequate in other ways. First, they are finite; I do not have dispositions to answer many addition problems (likely very large ones) in one way rather than another. Second, they include mistakes. Third, dispositions cannot provide normativity. If being disposed to answer a question a particular way made the answer correct, then we could have no account of making an error, as one always does what one is disposed to do. Kripke *above* note 8 at 22-37.

[14]Kripke *above* note 8 at 21

[15]PI 201

Suppose Gates receives his tax bill, and it says that he should pay $100,000. Gates challenges this, suggesting that in order to comply with [Tax], he should pay $50,000. We would of course reply that this sum is 5% and not 10% as [Tax] requires. Gates, however, might assert that '%' as it appears in [Tax] denotes quercent, which I will symbolize with '⊙'. Quercent is defined as

$$\begin{aligned} x⊙ \text{ of } y &= x\% \text{ of } y, && \text{if } y < 1{,}000{,}000 \\ &= 50{,}000 && \text{otherwise.}[16] \end{aligned}$$

We would think Gates crazy. But, he would assert, no fact about Rex's mental state when he imposed the rule, nor his subsequent applications of the rule, make it the case that Rex meant percent rather than quercent as the function for tax calculation. The problem is even worse than this. Absolutely any action can be made out to accord with a rule, even if the case in question is one which has already been considered. All we need do is generate a non-standard interpretation of the rule of the following form

$$\begin{aligned} x⊙ \text{ of } y &= x\% \text{ of } y, && \text{before time t} \\ &= 50{,}000 && \text{afterward,} \end{aligned}$$

where t is the moment just before we offer our interpretation. No fact about Rex's mental state or the previous application of the rule, the sceptic argues, will make it the case that this function was not what Rex meant by '%' in the past.

If the sceptic is right, law, as a system of rules, is radically indeterminate. Any action can be made out to accord or conflict with any rule or set of precedents on some interpretation. Rules are useless as guides to behaviour. Rules cannot be used as justification for decisions in adjudication.[17] In short, law cannot be authoritative. Fortunately, the sceptic *must* be wrong. Or at least, there must be more to the story. After all, the sceptic's argument, if it works, undermines not just law, but all rule-following, and this includes using words according to rules, using language. Some

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[16]Remember, it is possible to state this definition without using the symbol '%' by providing a table of all the previous arguments and solutions for calculations involving '%', the arguments of which are by hypothesis all less than 100,000.

[17]Some mistakenly identify the consequence of the sceptical position, thinking instead that it shows that *any* decision can be justified, eg Tushnet *above* note 5. What has really been shown, if the sceptical arguments are correct, is that rules do not provide any basis for choosing one decision over another; if this is the case, it does not make sense to talk of justification. See also Smith *above* note 6 at 171.

think, and I am inclined to agree, that the sceptical argument fails on its own, that it is mistaken in some way and that we need not accept the paradox it urges. Before we explore why this may be the case, let us look briefly at the way Kripke continues the story.

2. THE SCEPTICAL SOLUTION

Kripke argues that Wittgenstein accepts the sceptical argument just outlined. According to Kripke, Wittgenstein offers a *sceptical solution*. A sceptical solution is one which accepts the conclusion of the sceptical argument but suggests that the practice called into question, in this case rule-following, is still justified, because it does not require the justification rejected by the sceptic.[18] In contrast, a straight solution aims to undermine the sceptical argument itself. We shall briefly examine the sceptical solution Kripke finds in Wittgenstein.

Kripke argues that in the early sections of the PI, Wittgenstein replaces the truth-condition model of meaning found in Wittgenstein's earlier *Tractatus Logico-Philosophicus*[19] with an assertability-condition model of meaning. Roughly, the idea is that the meaning of a sentence is not given by what facts make it true (the *Tractatus* picture) but rather is given by the conditions under which one can assert it, the role it plays, and the utility of asserting it in those circumstances. There is no need to explore this shift in detail here. The upshot is that Kripke suggests that instead of looking for facts which make it the case that an assertion about somebody's meaning such-and-such is true, we should look for the conditions under which such assertions of meaning are made and what role they play. Or as Kripke puts it

> All that is needed to legitimize assertions that someone means something is that there be roughly specifiable circumstances under which they are legitimately assertable, and that the game of asserting them under such conditions has a role in our lives. No supposition

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[18]Kripke *above* note 8 at 66

[19]L Wittgenstein *Tractatus Logico-Philosophicus* Pears and McGinnis (tr) (Routledge London 1995)

> that the 'facts correspond' to those assertions is needed.[20]

So what are the conditions under which it is legitimate to make an assertion of meaning? Kripke suggests that what licenses such ascriptions is agreement between the rule-follower in question and the community in applications of the rule. He writes

> ... *Smith* will judge Jones to mean addition by 'plus' only if he judges that Jones's answers to particular addition problems agree with those he is inclined to give, or if they occasionally disagree, he can interpret Jones as at least following the proper procedure... If Jones consistently fails to give responses in agreement (in this broad sense) with Smith's, Smith will judge that he does not mean addition by 'plus'.[21]

So the conditions for the assertability of meaning statements are that the putative rule-follower agree with the community's application of the rule in a sufficient number of cases; now we need only see what the utility of such statements is. Kripke asks us to consider a transaction between a customer and a grocer. The utility of such ascriptions is that the customer, if he attributes to the grocer command of addition, expects certain behaviour from the grocer in their dealings. He does not expect him to 'behave bizarrely, as he would were he to follow a quus-like rule.'[22] Indeed, returning to the previous example, Kripke writes

> Of course if we were reduced to a babble of disagreement, with Smith and Jones asserting of each other that they are following the rule wrongly, while others disagreed with both and with each other, there would be little point to the practice just described. In fact, our actual community is (roughly) uniform with its practices with respect to addition.[23]

Thus the sceptical solution is as follows. While there is no fact of the matter as to what someone means or whether or not they are following a rule, we are justified

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[20]Kripke *above* note 8 at 77-78
[21]Kripke *above* note 8 at 91
[22]Kripke *above* note 8 at 92
[23]Kripke *above* note 8 at 91

in ascribing meaning or rule-following when the application of the rule by the putative rule-follower agrees with his community's application in a sufficient number of cases. The utility in such ascriptions derives from the role they play in shaping our expectations about interaction with those to whom we attribute the rule following.

How might this apply to law? While there is no fact of the matter about what a legislature meant in enacting a rule, nor is there a fact of the matter about whether or not any judge follows that rule, we are justified in asserting that a judge is following the rule if the decision the judge gives when applying the rule agrees with the decision the community (judges, lawyers, etc) is inclined to give on sufficiently many occasions.[24] A judge who routinely reaches different conclusions when applying a law than the rest of the community will be said not to be following the rule, and though this assertion may not be true or false (there is no fact of the matter), it serves to indicate that we cannot rely on the judge to do what the rest of us would do when confronted with similar circumstances. When there is wide disagreement about what a law requires, attributions of rule-following to anyone lose their utility; where people in the legal community disagree as to what action a rule requires, there is no such thing as following or breaking a rule.

None of the consequences so far seem too odd; indeed they bear surface similarity to many prominent theories of law.[25] However, Kripke's view does have an odd consequence. Right answers to mathematical questions, for example, become a matter of what nearly everyone would say they are. Yet, the question of what makes one answer to a mathematical question rather than another correct seems to call for a normative answer, not an empirical one. That is, it seems that '125' is the answer to '68+57' because that is how addition works, not because most people are inclined to

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[24]And here we have a position curiously like Stanley Fish's suggestion that an interpretation is acceptable in virtue of the community's acceptance of it and not because of any facts about the meaning of the text. For commentary on the similarity between Kripke's view and Fish's, see Yablon *above* note 5 at 628, 633-634.

[25]For further commentary on how Kripke's views might apply to law, see Yablon *above* note 5. See also Radin *above* note 5, who argues a pragmatic approach to adjudication is warranted in the face of what she sees as radical indeterminacy in law based on a Kripkean reading of Wittgenstein.

say that it is the answer.[26] Indeed, we tend to think that '125' would be the right answer even if very few people recognized this.[27]

Aside from this odd consequence, Kripke's view suffers from a serious defect.[28] It takes for granted that members of a community can be justified in judging that one application agrees with another. Given the terms of the sceptical argument, it is far from clear that this is the case. Suppose Jane says '68+57=5'. Are we justified in saying that Jane's answer does not agree with ours? The sceptic will say that, given how we used 'same' and 'agree' in the past, we ought to accept Jane's answer as agreeing with ours, because in the past, we followed the rule of quagreement, such that... well it is clear how this works by now.[29]

Determining whether two answers agree with each other, or are the same, requires following a rule for identifying relevant sameness.[30] Perhaps Kripke would respond that what we are concerned with is not whether the answers agree (the fact of the matter) but whether or not people judge that they do (thus giving rise to utility in

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[26]Cf Stavropoulos *above* note 6 at 149 ('Meaning seems like a matter of *etiquette*').

[27]Rules can often be used to make predictions about how people will behave. Wittgenstein thought this was essential to understanding how rules figure in practices. See RFM III 64 where Wittgenstein discusses how a statute book might be used to predict how people will deal with a thief. Though a statute book might be a good prediction of how people will behave, Wittgenstein notes, this is not how people within the practice use it.

[28]Perhaps I should say *at least one*. As Stavropoulos notes, for the community, there is no distinction between what seems right and what is right. Stavropoulos *above* note 6 at 49. This does away with normativity for communities, though not for individuals. Some may be willing to accept this, but the issue is inconsequential if the objection presented in the text to Kripke's solution is correct.

[29]Stavropoulos makes the same point, though he uses 'schmagree' rather than 'quagree'. As he notes, it is no defence to say that the sceptic will yield in the face of the opposition of the entire community—if this was the case, the sceptic would have yielded long ago. See Stavropoulos *above* note 6 at 149-150 for further discussion, including exploration and rejection of other possible responses on behalf of the Kripkean view.

[30]Wittgenstein indicates the close relationship: 'The word "agreement" and the word "rule" are *related* to one another. They are cousins.' (PI 224). 'The use of the word "rule" and the use of the word "same" are interwoven.' (PI 225).

See also Bix *above* note 3 at 42 ('... any attempt to justify [the conclusion that two people are going on in the same way] is likely to end up with the assertion that they are following the identical rule...')

such ascriptions). But judging that answers agree, it would seem, can only have utility if people agree in their judgements that answers agree. This, however, seems to be the beginning of a hopeless regress of 'agrees'; in order for our judgement that we agree that our answers agree to have utility, we shall have to agree in our judgements that we agree that our answers agree. (And after a few more rounds of this, our heads will certainly hurt too much for there to be much utility in the effort.) The point is this: it does not seem possible to give a satisfactory non-circular account of judging that S's answer agrees with the one I am inclined to give, an account that does not rely on a concept of agreement. Judging that answers agree presupposes a concept of agreement, that is, it presupposes the ability to follow a rule for identifying agreement. As Stavropoulos puts it, 'sameness and differences *require* a language, rather than being able to ground one.'[31] Kripke's sceptical solution to the paradox fails because it helps itself to a notion of rule-following by invoking agreement as a condition for assertability.[32] Let us now turn to different responses to Kripke's sceptic.

3. STRAIGHT SOLUTIONS

We should not lose sight of the fact that there *must* be a solution to the sceptical paradox. After all, we do communicate with language. Many writers have offered what Kripke terms a straight solution to the sceptical paradox, a solution which argues that the sceptical argument is flawed in some way. These solutions take many forms. Some are non-reductive, suggesting that Kripke's sceptic is misled because he assumes that facts about meaning and rule-following can be reduced to other facts.[33] On this view, the fact that makes it the case that I meant 'plus' rather than 'quus' is

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[31]Stavropoulos *above* note 6 at 151, citing also D Davidson *Inquiries into Truth and Interpretation* (Clarendon Oxford 1984) 280. ('... philosophers who make convention a necessary element of language have the matter backwards. The truth is rather that language is a condition for having convention.')

[32]Bill Child has suggested to me that an extra move may be needed to show this. Kripke might suggest that what matters is that X finds himself inclined to utter the sounds 'S's answer agrees with mine,' and that this inclination, rather than a judgement that S agrees (which is unavailable since the judgement requires the ability to follow a rule), suffices to make a practice useful. Of course, it is hard to see how the normativity of rules can arise from an inclination to utter these sounds unaccompanied by any judgement that answers agree. See also Stavropoulos *above* note 6 at 150-151.

[33]Eg Mcdowell *above* note 9; Baker and Hacker *above* note 9

that I meant 'plus' rather than 'quus', and though we can say something about how we know this, we cannot reduce the meaning to anything constitutive. Others offer reductive accounts, suggesting candidate facts which can account for meaning that Kripke overlooked. One such view bears similarity to Kripke's in that it relies on a community to provide the background necessary for there to be a fact about whether I mean 'plus'.[34]

We cannot examine all of the proposed solutions here. However, I shall make some general remarks about what it seems Wittgenstein thought was wrong with the sceptical argument. On my view (the view shared by most Wittgenstein scholars), Wittgenstein rejects the sceptical argument his interlocutor presents. Let us return to PI 201 and consider it in full.

> This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here.
>
> It can be seen that there is a misunderstanding here from the mere fact that in the course of our argument we give one interpretation after another; as if each one contented us at least for a moment, until we thought of yet another standing behind it. What this shews is that there is a way of grasping a rule which is *not* an *interpretation*, but which is exhibited in what we call 'obeying the rule' and 'going against it' in actual cases.
>
> Hence there is an inclination to say: every action according to the rule is an interpretation. But we ought to restrict the term 'interpretation' to the substitution of one expression of the rule for another.

The first sentence states the sceptical paradox—any action can be made to accord with a rule on some interpretation of it. The second sentence, 'the answer', is a *reductio ad absurdum* of the sceptic's position: it follows from the sceptic's position that there can be neither accord nor conflict. Since the sceptic relied on the notion of accord in articulating his position, something serious has gone awry.

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[34]Eg C Wright 'Rule-Following, Objectivity and the Theory of Meaning' in S. Holtzman and CH Leich (ed) *Wittgenstein: to follow a rule* (Routledge London 1981)

In the second paragraph, Wittgenstein diagnoses what has gone wrong: there has been a 'misunderstanding'. The misunderstanding is thinking that a rule can only be followed by interpreting it, that interpretation is necessary to bridge a gap between a rule and the action it requires. Wittgenstein says emphatically that this is not the case. Interpretation cannot bridge any such gap. In PI 198, Wittgenstein writes

> 'But how can a rule shew me what I ought to do at *this* point? Whatever I do is, on some interpretation, in accord with the rule.'—This is not what we ought to say, but rather: any interpretation merely hangs in the air along with what it interprets, and cannot give it any support. Interpretations by themselves do not determine meaning.

Wittgenstein's point here, and in 201, is that any interpretation is itself subject to interpretation (in the sense that any interpretation can be interpreted, not that all need be). Any action could be made out to accord with any interpretation, and so on for each new interpretation we offer. Interpretations 'hang in the air along' with the rule because they fail to bridge the gap to action.

So now we have identified the misunderstanding which led to the sceptical position. What do we replace it with? As is almost always the case with Wittgenstein, it is more difficult to identify what he accepts than what he rejects, and this is the point at which many critics diverge. Fortunately, for our purposes we do not need a full account of rule-following; seeing that the sceptical argument rests on a misunderstanding is enough to alleviate the concerns about radical indeterminacy in law which arise from it. Accordingly, I shall keep my remarks brief, and shall focus on the feature of Wittgenstein's view which will be most important for us—the *unreflective nature* of rule-following.

Clearly Wittgenstein thinks it is possible to follow a rule without interpreting it (though as we shall see, this is not true on all occasions, and Wittgenstein means something very specific by 'interpretation'[35]). We can follow rules because we are trained to react to rules in a specific way. Through other people's expressions of

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[35]See *below* 125-126

approval, encouragement, rejection, etc., we are trained to give responses to rules that match theirs.[36] They smile when we get it right and pat us on the back; they frown when we get it wrong and correct our behaviour. Following rules is a social practice, a custom.[37] We know how to follow a rule because we have mastered a technique, not because we have an interpretation of the rule.[38]

Training, however, does not guarantee that we will learn to follow rules. Wittgenstein writes

> For instance you say to somebody 'This is red' (pointing); then you tell him 'Fetch me a red book'—and he will behave in a particular way. This is an immensely important fact about us human beings.[39]

What Wittgenstein is driving at here is that it is a fortunate fact about humans that we tend to make the same generalizations from training; that we are trainable to follow rules. We can imagine that despite training, an individual might fail to grasp a rule to our satisfaction; Wittgenstein's point is that when this happens, there is nothing we could say to the deviant rule-follower to show her that she is not following the rule correctly. To make this more perspicuous, let us look at one of Wittgenstein's examples.

Suppose we train a student to expand the series +2. He demonstrates to our satisfaction that he grasps the rule by successfully expanding the series as far as we require from a number of starting points. If we ask him to expand the series from '5', he writes

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[36]The use of 'match' here is not problematic in the way the use of 'same' was for Kripke's view. When we are trained to follow rules for identifying sameness, other people who already can follow those rules are the arbiters of whether or not our responses match theirs.

[37]Wittgenstein PI 202. One of the dominant strands of the debate over Wittgenstein's remarks on rule-following is whether or not, in calling rule-following a practice, Wittgenstein is indicating that a community is necessary in order to follow rules. Though this issue is ultimately very important for understanding rule-following, I think it has little consequence for our present inquiry.

[38]See Smith *above* note 6 at 173

[39]L Wittgenstein *Wittgenstein's lectures on the foundations of mathematics, Cambridge, 1939* C Diamond (UChicago Chicago 1989) 182

7, 9, 11, 13 ...

and so on until we tell him to stop. Suppose further that we have never asked him to expand the series beyond 1000. Wittgenstein writes

> Now we get the pupil to continue a series (say +2) beyond 1000—and he writes 1000, 1004, 1008, 1012. We say to him, 'Look what you have done!'—He doesn't understand. We say: 'You were meant to add *two*: look how you began the series!'—He answers: 'Yes, isn't it right? I thought that was how I was *meant* to do it.'—Or suppose he pointed to the series and said: 'But I went on the same way.'—It would be no use to say: 'But can't you see ....?'—and repeat the old examples and explanations.[40]

Of course, our inability to justify how we go on when following a particular rule to the deviant pupil also means we are unable to justify how we continue to ourselves. Wittgenstein accepts this. He writes

> If I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: 'This is simply what I do.'[41]

> How can he *know* how he is to continue a pattern by himself—whatever instruction you give him?—Well, how do I know?——If that means 'Have I reasons?' the answer is: my reasons will soon give out. And then I shall act, without reasons.[42]

Rather than act for reasons, we just act; we do what comes naturally. When justification runs out, we follow rules blindly.[43] Following blindly means we do not have a reason for considering one act rather than another in accord with a rule, but

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[40]Wittgenstein PI 185
[41]Wittgenstein PI 217
[42]Wittgenstein PI 212
[43]Wittgenstein PI 219

Wittgenstein's point is that a reason is not necessary.[44] Rule-following is, on this account, unreflective; this will be of paramount importance in the discussion of easy and hard cases in law which follows. Importantly, we should note, Wittgenstein does not shown that *all* rule-following is unreflective, just that some cases are, cases like the ones he highlights where reasons run out. We shall return to this again below.

I have presented a bare sketch of Wittgenstein's remarks on rule-following. A full account of how we follow rules is unnecessary for our purposes; we know we do follow rules, and we know roughly what is wrong with the sceptical position. We can leave it to others to work out the details. We are now prepared, however, to consider our next topic—Wittgenstein and the determinacy of law—in its proper context.

4. WHAT WE CAN LEARN FROM WITTGENSTEIN

One question we might ask is: what is the upshot of the foregoing remarks about Wittgenstein's view of rule-following for law? Some theorists, Brian Langille[45] and Dennis Patterson[46] among them, have attempted to develop more or less full-blown theories of law based on Wittgenstein's remarks. Brian Bix persuasively argues that Langille and Patterson are guilty of over-reading and misapplying Wittgenstein's remarks, so persuasive, in fact, there is little reason to detail their positions here.[47] Two more recent suggestions about what we can learn from Wittgenstein are worth considering—Bix's own and Andrei Marmor's. Bix and Marmor are both aware that

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[44]We might also say that someone is following a rule blindly if she does not enquire into the reasons for having the rule. This is not the sense of 'following a rule blindly' which is being invoked here, however.

[45]B Langille 'Revolution Without Foundations: The Grammar of Scepticism in Law' (1988) 33 McGill Law Journal 451

[46]D Patterson 'Law's Pragmatism: Law as Practice and Narrative' (1990) 76 *Virginia Law Review* 937

[47]Langille aims to extend Wittgenstein's remarks to explain the 'grammar' of law. Bix argues that Langille misuses Wittgenstein's notion of grammar and that the analogy he draws between Wittgenstein's rules and law fails.

Patterson attempts to stake a middle ground between community theorists and individualists, arguing that interpretation through reference to the point of a rule can fix its meaning. Bix argues that this fails to help solve the problem for the types of cases Wittgenstein was working with, like the expansion of mathematical series. He further argues that Patterson uses a different sense of 'rule' that Wittgenstein. See Bix *above* note 3 at 50-53.

other theorists have over-zealously (mis)applied Wittgenstein's remarks on rules to problems in legal theory. I shall accuse them of doing the same, although in ways far more modest than the theorists they criticize. The goal here is not to play a philosophical game of gotcha. Rather, I hope that identifying what is wrong with Bix and Marmor's treatment of Wittgenstein will show why it is not fruitful, in general, for legal theorists to dwell on his rule-following remarks.

Confusing Clarity: Bix on Wittgenstein

Bix begins by noting that Wittgenstein chose what we might call clear or easy cases of rule following as the subject of his inquiry, cases where there is no disagreement about what counts as the correct application of the rule.[48] Wittgenstein chose the expansion of mathematical series, using a colour word correctly (though there are hard cases when applying colour words), and following a signpost as his primary examples. Wittgenstein, of course, had good reason to choose such examples. First, if he was concerned to respond to sceptical doubt about rules, it is important to formulate the scepticism to challenge the cases where we are most apt to think we are certain about what a rule requires. Second, Wittgenstein was interested in examining the normativity of rules, what makes some actions accord with them and others conflict, and it makes sense to use examples where it is uncontroversial what accords and what conflicts in order to abstract out complications which may arise in controversial cases. Last, among Wittgenstein's interests were the foundations of language and mathematics; hence, his examples were the natural ones.[49]

In the course of an excellent chapter reviewing the various uses legal theorists make of Wittgenstein's remarks about rule following, Bix writes

> While the application of legal rules in some situations may seem as easy and as obvious as the easiest cases of applying colour terms, this will not be the case with the 'hard cases'...[50]

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[48]Bix *above* note 3 at 36.
[49]Cf Stavropoulos *above* note 6 at 157
[50]Bix *above* note 3 at 52

Here, and in other places, Bix suggests that easy cases in law are akin to the easy cases Wittgenstein used as examples. Nothing is wrong with Bix's remarks per se; however, depending on how they are understood, they may be misleading. We must digress briefly to see why.

Legal theorists often talk about easy (or clear) and hard cases. Different theorists draw the distinction in slightly different ways, but we can follow Bix, who says easy cases are 'legal questions that seem so obvious there is no question as to what their proper resolution should be.'[51] As Marmor notes, the distinction between easy and hard cases does not rest on how difficult they are to decide; an easy case in tax law might require a great deal of effort to resolve. Rather, the question is whether what accords with the rules is controversial or obvious.[52] Thus, 'easy' and 'hard' may not be the best terms to use for the distinction, but we have unfortunately inherited them.

On the surface, the distinctions between easy and hard cases in law and easy and hard cases of rule-following seem the same. This may not, however, be the case. Let us use the well-worn jeep on a plinth introduced by Lon Fuller. Suppose a community has the following law

> *Vehicles in the Park Act 1993*. (1) With the exception of bicycles and ambulances, no vehicles shall be permitted to enter any state or municipal park. (2) Any person who

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[51]Bix *above* note 3 at 63

[52]Marmor attributes this insight to Raz, and indeed it has it origins in J Raz *The Authority of Law: Essays on Law and Morality* (Clarendon Oxford 1997) 182. In the relevant passage, however, Raz is discussing the difference between regulated and unregulated disputes in law, not the easy/hard case distinction. Marmor conflates the two, saying an easy case is 'a case which is wholly determined by the legal standards.' See A Marmor *Interpretation and Legal Theory* (Clarendon Oxford 1992) 127. This definition of an easy case begs the most interesting question about easy and hard cases—whether or not there is a right answer in hard cases which is determined by legal standards, as Ronald Dworkin and others claim. RM Dworkin 'Is There Really No Right Answer in Hard Cases?' in *Matter of Principle* (Clarendon Oxford 1986) 119-145. Marmor earlier offers a definition similar to Bix's, which is a more helpful way to draw the distinction, see Marmor *above* at 126. For further discussion of the problems with Marmor's discussion of easy and hard cases, see *below* 123-125. I do not know whether Raz thinks the two distinctions—regulated/unregulated and easy/hard—are the same, but we are better off keeping them separate.

> brings a vehicle into a state or municipal park shall be liable to a fine of not more than $100.[53]

Fuller asks, 'What... if some local patriots wanted to mount on a pedestal in the park a truck used in World War II, while other citizens, regarding the proposed memorial as an eyesore, support their stand by the no vehicle rule?'[54] Fuller further stipulates that the jeep is in full working order.

The case of the jeep on a plinth is a classic hard case in law. What makes it hard is that the jeep is obviously and non-controversially a vehicle if anything is. Judges might eventually construct a legal fiction that jeeps on platforms, or vehicles as part of monuments, are not vehicles, but this will be just that, a fiction (or more generously, a technical use of 'vehicle'), and it will probably be controversial as well. What makes the case hard is that though the jeep is in the extension of the prohibited class of items, some believe that the law does not really prohibit it. Perhaps some believe this because prohibition would not serve the purpose of the law, or perhaps because some believe that implicit in the law is the condition that vehicles are prohibited when used as vehicles are normally used, or perhaps some believe that the bicycle exception establishes a principle that excepts all vehicles which are not noisy, or any number of other reasons a talented advocate might concoct. Nor is it the case that everyone who thinks the jeep is not prohibited thinks that it really is prohibited, but that judges have reason not to enforce the law. Some might believe that, but others will honestly believe that the jeep is not prohibited. The upshot of this is that even though the application of the key descriptive term in a law (the term on which the case seems to turn, so to speak) may be an easy case of rule-following in the Wittgensteinian sense, the application of the law itself can still be a hard case in the legal sense. The distinctions come apart.

Now let us return to Bix's remarks about easy and hard cases. He claims, 'Some clear cases are clear—in large part—because of the (short-term) determinacy of descriptive terms.'[55] As long as we focus on the 'in large part' portion of this quote, then it is okay. It recognizes that something besides the short-term determinacy of

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[53]This formulation is from J Waldron *Law and Disagreement* (Oxford UP Oxford 1999) 124.

[54]L Fuller 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 Harvard Law Review 630, 663.

[55]Bix *above* note 3 at 61-62 (emphasis added)

descriptive terms in a law (which is what Bix takes Wittgenstein to have provided for) is necessary to constitute an easy legal case. Vehicle has a core of determinacy, and jeeps are within it, but our case is not easy.

Explaining 'the source and nature of our confidence'[56] in easy cases and identifying what distinguishes them from hard cases is a longstanding problem in jurisprudence. Bix suggests that the source and nature of our confidence in easy cases in law is something like the source of and nature of our confidence that '67+58=125'. But the nature cannot be exactly the same; otherwise the jeep on a plinth would be an easy case. At most, Bix might have reason to conclude that short-term determinacy in the descriptive term at issue is a necessary but not sufficient condition for being an easy case in law. However, it is unclear to me that easy cases in law have much to do at all with the determinacy of descriptive terms. Determinacy may play only a small part. Cases like the jeep on a plinth are not uncommon. It seems possible that the distinction between easy and hard cases may rest on nothing deeper than its definition. People disagree about some cases and not about others; perhaps there is no more we can say. I am not committed to this deflationary view of the distinction; more investigation would be required. But Wittgenstein's remarks on rules do not provide deeper insight into the legal distinction. To the extent that they tell us something about clear cases of rule-following, they do not by any immediate implication tell us anything about clear cases in law. To think so is to confuse two different types of clarity.

People come to blows over it: Marmor on Wittgenstein

Andrei Marmor also uses Wittgenstein's remarks on rule-following in an effort to ground the distinction between easy and hard cases. Marmor's discussion is wide-ranging, and Wittgenstein's remarks on rules play a limited role. The critique I present here is directed only at this use of Wittgenstein.

One difficulty in assessing Marmor's argument is that he is unclear about how he draws the distinction between easy and hard cases in law, and at times, he seems to slide between different definitions of the distinction. In opening his discussion, Marmor writes

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[56]Stavropoulos *above* note 6 at 140

> ... [legal positivism] can be said to be committed to the thesis that a distinction exists between (so-called) easy cases, where law can be applied straightforwardly, and hard cases, where the issue is not determined by legal standards. The objection I intend to examine here consists in the claim that this is in fact an illusory distinction, there being, in all the relevant respects, no easy cases as the positivist would presume.[57]

The distinction as drawn in this passage is so muddled it is useless. The definitions provided of easy (cases which can be decided straightforwardly) and hard (cases where the issue is not determined by legal standards) do not really divide cases into two exhaustive categories. What about cases which cannot be decided straightforwardly, but are determined by legal standards? Marmor seems to eliminate the possibility of there being such cases at the outset—the distinction makes no room for them.[58] Further, by 'law can be applied straightforwardly', Marmor appears to mean 'without interpretation'; if this is the case, he has built into the distinction the very contentious claim that when a case requires interpretation, it is not governed by legal standards. Finally, as Marmor has drawn the distinction here, he misidentifies the objection many would level—Ronald Dworkin, and others, would argue there are no hard cases if a hard case is one whose outcome is not determined by legal standards.[59]

Marmor slides between this definition[60] and one more in line with Bix's, on which the defining characteristic of an easy case is that 'application of the rule is obvious and unproblematic.'[61] At other times during the discussion it seems that an easy case is just one in which interpretation is not necessary, Marmor's goal being to

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[57]Marmor *above* note 52 at 124

[58]Joseph Raz has suggested to me that it could be that Marmor believes there are cases which are neither easy nor hard, thus retaining the possibility of cases which cannot be decided straightforwardly but are governed by legal standards. This strikes me as odd. If these cases are not easy or hard, what are they? In any case, Marmor's method of drawing the easy/hard distinction is rife with enough other difficulties that it needs revising.

[59]An earlier version of Marmor's essay noted that this would be Dworkin's likely objection. I do not know why he deleted this from the latter version. A Marmor 'No Easy Cases?' (1990) 3(2) *Canadian Journal of Law and Jurisprudence* 61

[60]Which is, for example, used again at Marmor *above* note 52 at 127.

[61]Marmor *above* note 52 at 126.

show that not all cases require interpretation. I am not sure that these latter two methods of drawing the distinction amount to the same, as I am not sure that cases which require interpretation are necessarily non-obvious or problematic.[62] Marmor's argument purports to show, based on ideas drawn from Wittgenstein, that not all law needs to be interpreted. Let us restrict our examination to this claim, as any inference from the need for interpretation to a claim about where a case falls on the easy/hard divide is problematic.

Before beginning, we need to note an important problem which goes largely unmentioned in Marmor's presentation. Wittgenstein, in his remarks on rules, uses 'interpretation' in a very odd way. Remember in PI 201, he writes

> Hence there is an inclination to say: every action according to the rule is an interpretation. But we ought to restrict the term 'interpretation' to the substitution of one expression of the rule for another.

This use of 'interpretation' as denoting a process of substitution or translation might make sense for Wittgenstein's theoretical purposes, allowing him to discuss the phenomena in question with a certain precision. However, Wittgenstein's use of 'interpretation' does not in any way capture what we do when interpreting generally. When we interpret a painting, we do not replace it with another painting; when we interpret a play, we do not substitute one expression of the play for another. Similarly, interpreting a law need not involve substituting one expression of the law for another. We interpret, as we saw in Chapter One, for an endless variety of aims, to find an endless variety of understandings of the objects we interpret. Perhaps Marmor thinks that because laws share much in common with rules, Wittgenstein's use of 'interpretation' is a natural one, and perhaps he is concerned to show that we need not interpret laws to apply them in the sense that we need not substitute one expression of the law for another. This, however, does not seem to be the aim of most interpretation

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[62]Is there anything non-obvious or problematic about understanding the restaurant patron who says, 'Please give my condiments to the chef.' It seems obvious and non-problematic that, barring any evidence to the contrary, the patron misspoke and intended to offer compliments.

Stavropoulos writes, 'Clarity may only be the result of interpretation; it simply consists in the report that undoubtedly, and without need for complicated justification, the law is thus and so on such and such case.' Stavropoulos *above* note 6 at 140.

of law; judges may express their interpretations by reformulating laws on occasion, but they need not. Judicial interpretation is not limited to substituting one expression of a law for another, and the theorists Marmor criticizes, like Dworkin and Fuller, are not suggesting interpretive methods which amount to substitution. The fact that Wittgenstein uses 'interpretation' as a term of art bearing significantly different meaning than the term bears generally should give us pause in attempting to extend his remarks to law. Marmor tries to do so, so we shall take up his argument with these misgivings duly noted.

Marmor musters his case that not all law needs to be interpreted by rehearsing many of Wittgenstein's arguments which we have already examined. He finds, as we did, that following rules does not always require interpretation, as supposing that it does leads to the many absurdities we identified earlier (the hopeless regress of interpretations, the meaningless of accord and conflict, etc). He concludes that positions which claim that legal rules must always be interpreted (like Fuller's or Dworkin's) violate 'the distinction between following a rule and interpreting it.'[63]

Let us return to Wittgenstein for a moment and clarify some aspects of his remarks. Wittgenstein's remarks about rules are directed towards the functioning of language and mathematics (which is like a language in many respects). What Wittgenstein shows is that language is *unreflective* in the basic case. At the most fundamental level, we apply rules without justification, without reason, based on how we find it natural to go on given our training. Further, the fact that we do not have reasons for the way we follow a rule should not lead us to doubt that we are following it correctly; it may not even be possible to doubt that we are following it correctly (perhaps this is the source of our frustration with Kripke's sceptic).[64] Wittgenstein writes

> Disputes do not break out (among mathematicians, say) over the question whether a rule has been obeyed or not. People don't come to blows over it, for example. This is part of the framework on which the working of our language is based...[65]

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[63]Marmor *above* note 52 at 153
[64]See Wittgenstein PI 212, 213
[65]PI 240

Even if Wittgenstein's picture of rule-following within language and mathematics is correct, it is not necessarily true of all rules, not even all rules within language or mathematics. Colin McGinn, in outlining Wittgenstein's position, writes

> ... where the bringing to bear of reasons *is* appropriate the possibility of doubt is correspondingly real. For when reasons are appropriately brought to bear we are dealing with beliefs and actions which are *reflective*, with respect to which reasons may be weighed and evaluated; and where the question of the goodness of a reason is appropriately raised it will be appropriate to entertain doubts about the quality of the reasons one has. But when an activity is as undeliberative as using language is it lies outside the sphere of the reason based and doubt ridden.[66]

Our question is what do Wittgenstein's remarks about rules tell us about law? If McGinn is right, and I think he is, they tell us almost nothing about legal rules.[67] Law is a reflective activity; one of our most reflective. We offer justifications and reasons for the way we apply legal rules, and we are willing to entertain doubts about whether or not we are applying them correctly. People come to blows over the right way to go on. And when doubts are raised, we almost always respond with reasons why one understanding of what the law requires is preferable to another.[68] This is not to say that the application of legal rules is on all occasions reflective; perhaps it is often not. But Wittgenstein's remarks are not directed at reflective instances of rule-following, and many applications of legal rules, especially by judges in courts, are carried out reflectively.

One might object, Wittgenstein has taught us something about law. 'We cannot think that all legal rules need to be interpreted; otherwise we would have an

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[66]McGinn *above* note 9 at 22-23

[67]McGinn is right subject to the caveat that not all language use is unreflective or undeliberative. Sometimes we do have reason for using a word one way rather than another.

[68]Cf Bix *above* note 3 at 48-49 which makes the same point. Bix also offers the injunction that 'most, if not all, of the problems in law and legal theory occur at a different level of abstraction' from the cases Wittgenstein considers. The problem is that Bix goes on from noting this to suggest that Wittgenstein's remarks might help us to understand clear cases. As we have seen, clear cases in law are different from clear cases of rule-following.

endless regress of interpretation. We must be able to apply some legal rules without interpreting them,' the objection might go. There is a element of truth here, but we must work hard to find it. When Dworkin, Fuller and others suggest that all laws require interpretation, they are suggesting that judges must interpret statutes, or precedents, or other things we typically call legal texts before they can apply them. Wittgenstein's remarks have shown us that interpretation must bottom out somewhere; we must always reach a formulation we can follow without interpretation, otherwise we get caught in a regress. But neither Dworkin, nor Fuller, nor anyone else I am aware of runs afoul of this requirement. This requirement can be met on a theory that requires all statutes and precedents to be interpreted in order to be applied, as long as the interpretive process ends with something that can be understood without interpretation. This something is the judge's decision, 'The law requires X.' If the judge's decision can be followed without further interpretation, it serves its purpose as far as Wittgenstein's concerns go. The process has bottomed out in something that does not need to be interpreted in order to be followed. Nor is it helpful here to point out that sometimes a judge's decision does need to be interpreted. When judicial decisions are unclear, or when people disagree about what they require, litigation usually continues. The process always ends with a decision people understand without interpretation (in the Wittgensteinian sense).

'Still,' one might object, 'Wittgenstein's remarks must tell us something about law because legal cases often turn on the application of simple concept words, very much like the colour words he addresses.' Sure enough, legal cases can turn on the application of simple concept words. But Wittgenstein's remarks still teach us nothing about their application in law. For in law, we can have reasons for applying even simple concept words one way or another. Whereas it generally does not make sense to ask, 'Is a jeep a vehicle?', in law, it might. The answer might be something like, 'No, because the purpose of the law was to reduce noise and promote pedestrian safety and a prohibiting a jeep on a monument does not serve these goals.'

What Wittgenstein really teaches us is something about language.[69] Law is carried on in language. Thus, we must eventually reach bedrock—formulations of rules we can follow without interpretation—if it is to be the case that we are communicating at all. But this is consistent with there being a lot of reason- and justification-based interpretation before we get there.

Now we can consider Marmor's arguments in some detail. I should make it clear that my quibble with Marmor is not necessarily with his conclusion; as we shall see, in a way, I think he is right in claiming that not all law needs to be interpreted. My disagreement with Marmor is over his suggestions that Wittgenstein's remarks about rule-following help show this and that his remarks cast doubt on interpretive theories of adjudication.

Marmor discusses Wittgenstein's rule-following remarks in order to illuminate the Hart-Fuller debate.[70] Hart argues that concept-words, like 'vehicle', have core applications and penumbral applications. An automobile is a core instance of a vehicle. Bicycles are in the penumbra; in some contexts they are vehicles, in others they are not. Hart uses this distinction, in part, to ground the distinction between easy and hard cases. Fuller criticizes Hart's distinction between easy and hard cases. He argues that laws cannot be understood except by reference to their purpose. A full consideration of the Hart-Fuller debate is not necessary here; in fact, this skeletal outline is enough.

Marmor argues that Fuller's 'assumption that one can understand a rule only in view of the purposes it is taken to advance, violates the distinction between following a rule and interpreting it.'[71] He claims that Fuller's position offends Wittgenstein's demonstration that following a rule does not necessarily require interpreting it. A

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[69]Cf F Schauer *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life* (Clarendon Oxford 1991) 64-68. Schauer makes a similar point—that Wittgenstein's remarks are instructive about how language operates, but within language, rules may operate differently. While I agree with Schauer on this point, I think his discussion suffers from a failure to appreciate the power and scope of the sceptical challenge; he brushes it aside much too quickly. Whereas Wittgenstein's remarks about rules apply only to rules at the most basic level, the sceptical argument challenges all rules.

[70]HLA Hart 'Positivism and the Separation of Law and Morals' *Essays in Jurisprudence and Philosophy* (Clarendon Oxford 1983) 49-87; L Fuller *above* note 54

[71]Marmor *above* note 52 at 153

careful reading of Fuller's argument, however, reveals that his view does not conflict with Wittgenstein's remarks on rules in any way. The reason for this is simple; in the course of his argument, every time Fuller refers to understanding rules through reference to their purpose, he is specifically speaking of laws or rules of a similar type (eg regulations within a university). Nowhere does Fuller claim that his assertion applies to rules of all types. He does not claim that one cannot apply rules in mathematics without reference to their purpose and he makes no such claim for the rules that govern language. Fuller's examples and explicit statements (eg 'is it really ever possible to interpret a word *in a statute* without knowing the aim of the statute'[72]) all concern rules that are part of reflective activities, the types of rules Wittgenstein's remarks say nothing about. Marmor frames Fuller's assertion as a point about all rules; perhaps this was Fuller's view, but nothing in his writing indicates as much. As it stands, Marmor seriously mischaracterizes Fuller's position. Wittgenstein's remarks do not render it absurd; they leave it untouched.[73]

At points, Marmor seems aware that Wittgenstein's remarks do not entail that all rules can be understood without being interpreted. He writes

> It might very well be the case that interpretation is required to determine the applicability of a rule in certain circumstances, and interpretation can, of course, be based on *reasons*.[74]

He fails to appreciate, however, that this makes Wittgenstein's position consistent with a wide range of views about the role of interpretation in law. Most importantly, it makes it consistent with views like Fuller's, on which all laws have to be interpreted.

Marmor does not just limit his discussion to Fuller. He aims to reject any view which holds that all laws need to be interpreted. Marmor overstates his conclusion. He writes

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[72]Fuller *above* note 54 at 664 (emphasis added)

[73]Marmor offers other criticisms of Fuller's position in the debates. As they do not draw on Wittgenstein's remarks on rule-following, they are beyond the scope of our inquiry. See Marmor *above* note 52 at 124-154.

[74]Marmor *above* note 52 at 153 (emphasis original)

> Hence, the thesis that one always needs to determine the purpose of the rule in order to be able to specify which actions are in accord with it, amounts to contending that the application of the rule always requires its translation into another rule, which is an obvious absurdity.
>
> Thus, unless it can be shown that there is something unique to adjudication which requires this constant translation procedure, as it were, we have no reason to doubt that legal rules *can* often be simply understood, and then applied, without the mediation of interpretive hypotheses about the rules' purposes.[75]

Marmor is right in the first paragraph of this passage, as long as he is using 'rules' to refer to all rules, rather then specifically legal rules; it is then just a restatement of the Wittgensteinian conclusion. Marmor's next claim, that this implies something about legal rules, is as we have seen false. The Wittgensteinian conclusion is compatible with all legal rules needing to be interpreted. Marmor does leave the door ajar slightly; he says his conclusion holds unless someone can show there is 'something unique to adjudication.' I question where the burden of proof lies—Marmor is suggesting that Wittgenstein's remarks give us insight into law, even though, as we have seen, they are compatible with any number of views of interpretation's role in law. Fortunately, however, we can meet his challenge. I shall suggest two ways.

The first story is simple. Law, we might say, is not an assemblage of individual rules unrelated to each other. Laws are part of a system of rules. Though we might ask what does *this* rule require, and consider a rule individually, this is not what judges are supposed to do in adjudication. Adjudication is about determining what *the law* requires, not just a particular law. To this end, any law must be considered as part of the system of laws, and this requires forming an interpretation of what role it plays in the system. Context can change meaning, and a law located in the context of a legal system may have a different meaning that we might attach to it individually. Interpretation is required to discover this.

The second story is slightly more ambitious. We need to interpret laws (statutes and precedents) when doubt arises[76] as to what their application requires (as

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[75]Marmor *above* note 52 at 153-154

[76]We do not need to interpret to remove all *possible* doubts—just the doubts we actually have.

Marmor agrees[77]). Our adjudicative procedures are only used when a doubt has been raised; indeed adversarial and advocacy-based legal systems invite the expression of doubt during adjudication. Thus it is not surprising that interpretation is an integral part of adjudication. Interpretation in adjudication is based on reasons; it is a reflective activity. The end product, the interpretation, must be something which can be followed without further interpretation. In practice, this means that no doubts have been raised about how the interpretation applies in the instant case.[78] When a decision is issued, we understand what it requires; it resolves the question.[79] Where no doubts have been raised, it is possible to apply a law without interpretation. But how often are judges asked to make decisions of law where no doubts have been raised, no competing arguments offered about how a law applies? When Dworkin and others suggest that every decision at law, every decision made by a judge, involves interpretation, their case is buttressed by the fact that an adjudicatory decision is required only because doubts have been raised and competing arguments offered. Further, nothing about the claim that all judicial decisions of matters of law offer interpretations offends against anything in Wittgenstein.

Marmor, on this story, is half-right: it is possible to apply legal rules without interpretation when no doubts have been raised about how they apply, and perhaps the vast majority of applications of laws outside of courts are clear and unreflective. But to the extent that Marmor's conclusion is one about adjudication, and it seems to be so, we can meet his challenge. What is unique about adjudication is that it occurs when there is doubt and it proceeds based on reasons and justifications; in short it is a reflective activity. I hasten to add that I do not think the account I have just offered in any way follows from Wittgenstein's remarks, though it is consistent with them. My

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[77]Marmor *above* note 52 at 154

[78]It is no problem that in the future doubts might arise about how to apply the interpretation. No further interpretation is required until doubt is actually raised.

We should also distinguish two types of doubt we might have about the interpretations offered in decisions. People might have doubt, as we have been discussing, about what the decision requires—'Did the judge order me to pay $10 or $15.' If they have these types of doubts, the decision will not serve its purpose. Alternatively, they might have doubts about whether or not the right interpretation has been reached—'The judge ordered me to pay $15, but I think he should have ordered me to pay $10.' Legal decisions can serve their purpose, even if they are subject to such doubts. I am indebted to Dale Smith for helping me to see the two different types of doubt possible here.

[79]Where it fails to, the litigation inevitably continues.

point here is that Wittgenstein's account is consistent with any number of accounts of the scope of interpretation in law, expansive ones and restrictive ones. Thus, it is an error to think Wittgenstein's remarks instruct us as to the scope of interpretation in law.

Wittgenstein's remarks were directed primarily at the unreflective activity of using language; an activity where reasons and justifications for applying rules in the manner we do often run out. Law is nothing like that. Law is reflective. People come to blows over whether laws are being followed. Further, the constraints imposed on law due to the fact that it is carried out through language are minimal. To be sure, the end result of the interpretation of a law must be able to be followed without further interpretation. Interpretation, however, can still play a large role in law. Indeed, given that we have adjudication precisely because people raise doubts about how laws apply, interpretation is a constant feature of adjudication.

We can now see why it is misguided to apply Wittgenstein's remarks to law. The arguments Bix and Marmor offer are undermined by the fact that law is a reflective activity, while Wittgenstein's remarks are directed at unreflective instances of rule-following. Wittgenstein's remarks occur at too basic a level to advance debates within jurisprudence

Conclusion

In the end, Wittgenstein's remarks tell us little about law. The sceptic has a flawed picture of what is required to follow a rule, and therefore cannot sustain an argument that law is radically indeterminate. Nor can Wittgenstein's remarks give us insight into what makes easy cases easy; nor do they tell us anything interesting about the scope of interpretation in law. Wittgenstein's remarks were directed at something wholly different. In the end, we should follow his frequent caveat, and avoid transferring conclusions we have drawn about one domain (language) to another

(law). We have seen that Wittgenstein's remarks on rules have very little to offer legal theory.[80] We have exorcised the phantom menace.

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[80]Stavropoulos suggests that Raz's and Fish's objections to Dworkin's interpretive theory suffer from a defect similar to that which afflicted the sceptic's argument. See Stavropoulos *above* note 6 at 125-164. I have no opposition to using Wittgenstein's remarks in this sort of project. Moreover, Wittgenstein's remarks on rules throw up challenges to some tasks that legal theorists might take up. For example, Jules Coleman attempts to explain how a societal convention can project what we should do into the future. A project like this *must* overcome the sceptical argument; incidentally, I am not sure that Coleman succeeds. J Coleman *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Clarendon Oxford 2001). The point remains, however, that Wittgenstein's remarks on rules do not have direct implications for law, even if they provide insight or present hurdles which must be met in taking on certain projects within jurisprudence.

CHAPTER FIVE

RAZIAN AUTHORITY AND LEGITIMACY

Joseph Raz has developed a highly detailed analysis of the nature of authority which accounts for its structure, the role it plays in practical reasoning, and the conditions under which it is legitimate.[1] Raz's analysis, which has been evolving over the last few decades, is impressive in both scope and insight; with it, Raz dissolves many of the paradoxes and conundrums which have traditionally puzzled students of authority. Raz's analysis also forms the basis of many arguments about legal interpretation we shall encounter in the following chapters. Therefore, it is important that we get a handle on its main features. In this chapter, we will explore Razian authority in some detail, but the presentation will by no means be exhaustive. We will gloss or skip entirely many interesting and important features of Raz's work. Moreover, we shall focus on competing analyses of authority only insofar as they conflict with Raz's, and even then very little. This is perhaps unfortunate, but it is appropriate given the role Raz's analysis plays in the arguments of following chapters.

The first sections of this chapter explain the structure authority has on Raz's analysis, and the presentation will be almost entirely expository. I shall simply present features of Raz's analysis which will be subject to criticism later. The concluding sections of this chapter raise significant questions about Raz's account of legitimacy. Legitimacy figures centrally in the arguments of subsequent chapters.

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[1]Citations to the works of Joseph Raz in this chapter will use the following abbreviations. AL: J Raz *The Authority of Law: Essays on Law and Morality* (Clarendon Oxford 1997); EPD: J Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Oxford 1995); MF: J Raz *The Morality of Freedom* (Clarendon Oxford 1988); PRN: J Raz *Practical Reasons and Norms* (2nd Edition OUP Oxford 1999). Extensive reference also warrants an additional abbreviation, LD: J Waldron *Law and Disagreement* (Clarendon Oxford 2001).

While I do not aim to provide an exhaustive treatment of the subject, I do aim to raise concerns about Raz's approach and suggest an important alternative.

1. PRELIMINARY ISSUES

Types of Authorities

To start, we should take note of some helpful distinctions. The first distinction is between theoretical and practical authorities. *Theoretical authorities* are authorities about what to believe. A meteorologist is a theoretical authority about what we should believe the weather will be like. *Practical authorities* are authorities about what to do. A police officer directing traffic is a practical authority about how drivers should move their cars. Some authorities are both theoretical and practical authorities simultaneously; the Pope is a theoretical authority regarding what Catholics should believe on theological questions and a practical authority about how they should lead their lives. Theoretical and practical authority likely share much in common, and some believe drawing a distinction is unnecessary if not problematic. We shall leave this aside, however, as our goal is to understand Raz's analysis, which is an analysis of practical authority. Hereafter, 'authority' should be taken to mean practical authority unless otherwise noted.

The second important distinction is between *de facto* authorities and legitimate or justified authorities. *De facto* designates that an authority is effective. People follow its orders. A *de facto* authority may or may not be legitimate. A legitimate authority is one which people have an obligation to obey. It is an open question whether or not *de facto* authority is a necessary precondition for legitimate authority. For some types of authorities, like political authorities, efficacy might be a precondition of legitimacy.

An account of authority must answer two questions. First, what is it that people have when they have authority, or what does it mean to be an authority? Second, what makes an authority legitimate; that is, what obligates people to obey it? These questions require distinct answers, as we are familiar with illegitimate *de facto* authorities. Nevertheless, many students of authority confuse these questions,

prompting mistaken claims such as 'authority is the right to be obeyed.'[2] Of course, authority cannot consist in the right to be obeyed. If it did, we would be unable to make sense of the idea of an authority which we have no obligation to obey. We must first say what authorities are and then outline criteria which make them legitimate.

Importantly, we can learn about merely *de facto* authorities from examining the nature of legitimate authorities. This is because the concept of *de facto* authority is parasitic, in a way, on the concept of legitimate authority. As Raz notes, all *de facto* authorities either claim legitimacy or are acknowledged by others to have it.[3] Part of being an authority is claiming that subjects are obligated to obey, or at a minimum, taking advantage of the fact that they believe so. Because of the close relationship between *de facto* and legitimate authority, we may be able to extend some insights garnered from examining legitimate authority to authority generally. We should be careful, however, to make sure we answer each of our questions in turn. We shall begin with Raz's answer to our first question: what does being an authority consist in? Answering this requires a brief digression into the world of reasons.

Types of Reasons

Practical reasoning is the reasoning we engage in when deciding what to do. Practical authorities impact practical reasoning by guiding behaviour. In order to understand how practical authorities guide behaviour, we need to learn a little bit about reasons and how they work. Raz's analysis of reasons and practical reasoning is nearly as comprehensive as his analysis of authority, but we shall consider even less of it here. Some features of his analysis, however, are essential for our task.

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[2]The source of the confusion is apparent. Often when we say things like, 'John has no authority over the matter,' what we mean is that John does not have legitimate authority over the matter. Indeed, when we encounter statements of this sort, we are often wise to understand them as claims about legitimate authority. Here we must be more precise than ordinary language, as it is important to explain how people can accept an authority which is not legitimate. This requires maintaining a distinction between what authority is and the conditions of its legitimacy.

[3]MF 26 ('... they are *de facto* authorities because they claim a right to rule as well as because they succeed in establishing and maintaining their rule.') See also MF 46. Importantly, it can be true that all authorities claim legitimacy, yet false that they claim legitimacy of the Razian sort, that is fulfilment of the normal justification thesis.

Raz distinguishes between first-order and second-order reasons. *First-order reasons* are reasons for action, or for refraining from action. That it is raining is a reason to carry an umbrella. That it is snowing is a reason not to wear a bathing suit. These are examples of first-order reasons. *Second-order reasons* are reasons to act for reasons or to refrain from acting for reasons. This is a confusing notion. In order to understand it, we first need to understand what it means to act for a reason. We will say that a person acts for a reason if the reason is part of her motivation for acting. If I carry an umbrella because it is raining, then I act, in part, for the reason that it is raining. Further, we will follow Raz and say a person *conforms* with a reason if she does what the reason requires, whereas a person *complies* with a reason if she acts for it.[4] Last, a person refrains from acting for a reason if it is not part of her motivation, even if she conforms with it; refraining from acting for a reason does not necessarily require refraining from the action the reason requires.[5]

What does it mean to have a second-order reason, a reason to act for or not act for another reason? An illustration will help. Suppose Aaron's grandmother is in the hospital and that this provides Aaron reason to visit her. Suppose further that Aaron goes to the hospital and visits his grandmother, but only because he was hoping to run into Michelle, whom he has a crush on. In this case, Aaron conforms to his reason to go the hospital to visit his grandmother, but he does not comply with it. Does Aaron have reason to comply with his reason to visit his grandmother, rather than just conform with it? Raz suggests he does and I agree.[6] Because Aaron went to the hospital to see Michelle and not his grandmother, his actions do not embody appropriate respect for his grandmother. Aaron had a reason to comply with his reason to visit his grandmother, that is, he had a second-order reason to act for a reason, which was that only through visiting his grandmother for the sake of visiting her could he show her proper respect.

Similarly, we might have reasons not to act for reasons. Indeed, in this example Aaron might have such a reason. That he may run into Michelle is a reason for him to go to the hospital. But, let us again assume, going to the hospital to see

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[4]PRN 178

[5]PRN 185

[6]Raz offers a relevantly similar example at PRN 178-179. Importantly, Raz argues that cases like this are special, that in general reasons are reasons for conformity and not compliance. See PRN 179-182.

Michelle fails to display appropriate respect for his grandmother. Thus, even though Aaron has a reason to go the hospital to see Michelle, he has reason not to comply with this reason, not to act for it. He has a second-order reason not to act for his first-order reason to go the hospital to see Michelle. We will be primarily concerned with this type of second-order reason, reasons not to act for reasons. Raz calls these *exclusionary reasons*.[7]

One potential source of confusion is to think that an exclusionary reason is a reason to act for no reason at all. This is not the case, as exclusionary reasons are reasons to refrain from acting for a specific reason or set of reasons. Exclusionary reasons are not reasons to refrain from acting for any reason whatsoever. Another potential source of confusion is to think that an exclusionary reason is a reason not to think about other reasons, to exclude them from consideration. This is mistaken. It is acceptable to think about an excluded reason, but not to act for it. As long as one does not allow it to affect what one does, there is nothing wrong with thinking about it.[8] Last, we should note, nothing is wrong with conforming to an excluded reason, as long as one does not act for it. Suppose a mother tells her child, 'I do not trust Ms. Smith; do not mind her instructions.' She is not telling the child never to do what Ms. Smith instructs; rather, she is telling her child not to do what Ms. Smith instructs simply because Ms. Smith instructed it. If there is independent ground to do what Ms. Smith instructs, then the child may do so; her mother has given her a reason not to comply with Ms. Smith's orders, but conformity may still be warranted.

One last type of reason will be important for understanding Raz's analysis of authority: *content-independent* reasons.[9] Content-independent reasons are facts which achieve their status as reasons in virtue of features other than their content. As any parent who has ever uttered the words, 'because I said so,' will attest, parental edicts are reasons for their children to act independent of what the parent requires. This general truth is not without limits. If a parent instructs her child to do something that will cause her great harm, the instruction may be no reason for the child to do so. Nevertheless, within a great range of activities, the fact that a parent has ordered an act is a reason to perform it regardless of what the act is (perhaps not a conclusive

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[7]Raz responds to objections to his account of exclusionary reasons at PRN 178-199.

[8]PRN 184

[9]MF 35

reason; there may be weightier countervailing reasons, but a reason nonetheless). This is exhibited poignantly by cases in which a parent can order diametrically opposed actions ('go with your brother to the store' or 'do not go with your brother to the store') and provide a reason for the child to act through both.

2. RAZIAN AUTHORITY

Let us put aside our analysis of reasons for a moment and return to authority. Many describe authority as the ability to change what other people do. On this view, if I can make you eat bean sprouts, I have the authority to make you eat bean sprouts. This conception of authority is too broad. Perhaps I get you to eat bean sprouts by blackmailing you, or bribing you, or just by telling you about the positive effects of eating them. It would hardly seem correct to say that I exercised authority over you. This view of authority confuses it with power and influence.[10]

Nevertheless, authority is closely related to power and influence. Some suggest that authority is the power to change what people *ought* to do, or more accurately to change the reasons which apply to them, to change their normative situations. This suggestion comes closer to capturing our concept of authority. When a mother orders her daughter to take out the trash, the daughter has a reason to take out the trash that she did not have beforehand; her normative situation has changed. This analysis of authority is still too broad, however. It encompasses a variety of activities which we do not consider instances of authority. For example, you can often change what someone ought to do by requesting something of them. If I request that you help me carry my groceries, I have given you a reason for action which you did not have before: my request. The ability to issue a request, however, does not indicate that one has authority over the addressee. Requests are often issued precisely because one lacks authority to order the requested action. Authority is something narrower still than the power to change people's normative situations.

Raz highlights the difference between ordering and requesting to draw out the structure of authority. It will help to summarize his remarks briefly.[11] When one makes a request one gives the addressee a reason for action that she did not have before. However, the individual making the request recognizes that it is not an

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[10]See MF 23-28 for criticism of such views.
[11]For further discussion of the difference see AL 15-16, 23.

exclusionary reason to refrain from acting for other reasons. Countervailing reasons may outweigh the request. If I request that you help me carry my groceries, I expect you will consider my request along with all the other reasons you have for action. I expect you to act upon my request only if it tips the balance of reason in favour of doing so.[12]

Ordering is different. An order is intended to exclude other reasons as a basis for action.[13] Suppose Mary tells her son Patrick to wash the dishes. Patrick, prior to the order, may have had reasons to wash the dishes, and he may have had reason to do many other things as well, perhaps mow the lawn or play tennis with a friend. Does Mary intend for Patrick to consider her order as a reason alongside all the other reasons he has for acting and comply only if it tips the balance as to what he should do? If she did, she would not have issued an order. Mary's order to Patrick is intended to exclude and replace the reasons he had previously.

Mary's order to Patrick is a first-order reason to wash the dishes and an exclusionary reason not to act for reasons he had about what to do previously. Raz calls reasons which are both first-order reasons for action and exclusionary reasons *protected reasons*. Authority over others, according to Raz, is the power to change their protected reasons.[14] To avoid confusion, we need to revise this slightly. Legitimate authorities change protected reasons; merely *de facto* authorities do not (though they purport to change or are taken to change protected reasons). Legitimate orders are protected reasons to act as the order requires and not to act for (some) other

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[12]Someone who requests may believe that their request is conclusive reason to perform the requested action; they may think the request outweighs all other considerations. Nevertheless, one who requests does not intend to exclude other reasons from consideration.

[13]Some contend that the difference between ordering and requesting is not one of kind, as Raz asserts, but rather is a difference of weight. Orders are simply weightier reasons than requests, on this view, and though they may be intended to outweigh other considerations, they are not intended to exclude them. Raz points out that valid requests do not necessarily carry less weight than valid orders. There are weighty requests and orders which exclude little. I think Raz is correct that the difference is one of kind and not degree, but it will be of little consequence for our inquiry. See AL 23.

[14]AL 19. We can also change protected reasons for ourselves through promising.

reasons for or against the required action.[15] Requests are not exercises of authority because they are first-order reasons only and not protected reasons.

What reasons are excluded by legitimate orders? Raz suggests that orders exclude all reasons within the jurisdiction of the authority issuing the order.[16] That is to say, reasons which the authority was able to base its decision upon are excluded, whether they are reasons for or against the action the order requires. Orders which are clearly mistaken, however, may fail to exclude reasons at all.[17] In order to understand and evaluate this suggestion fully, we will have to wait until we have the concept of legitimacy in place, as the scope of an authority's jurisdiction is closely related to its legitimacy. We will revisit the question of what reasons are excluded by legitimate orders in subsequent chapters as well.

Authorities do other things besides issue orders. They grant permissions and confer powers. Both actions can be helpfully elucidated in terms of the power to change protected reasons. When an authority grants permission for an action, it either cancels protected reasons against performing the action or excludes some reasons against doing the action from a subject's deliberation.[18] Suppose Hans tells his daughter she may go outside. In doing so, Hans may cancel existing protected reasons which excluded his daughter from acting for reasons she might have had to go outside, or he might exclude from her consideration reasons she had not to go outside.[19] Conferring power on someone does not itself change protected reasons, but it allows those the powers are conferred on to change protected reasons themselves.[20]

Raz captures the different phenomena we have been examining in his *preemption thesis*

> The fact that an authority requires performance of an action is a reason for its performance which is not to be

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[15]PRN 191
[16]PRN 192
[17]MF 62
[18]The latter Raz calls an exclusionary permission. For a full account, see J Raz 'Permissions and Supererogation' (1975) 12(2) *American Philosophical Quarterly* 161. See also AL 18.
[19]Additionally, sometimes permissions merely serve as indications that no order against an action will be issued.
[20]AL 18

> added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.[21]

The *preemption thesis* is, of course, true only of legitimate authorities, because the directives of authorities lacking legitimacy may fail to create reasons at all.[22] As an interesting aside, Raz notes that this view of the nature of authority is captured in the legal doctrine of *res judicata*.[23] Once a binding judgement has been issued by a court, the original cause of action cannot be relied upon for any purpose. The judicial decision is a new reason for action for the participants which excludes and replaces the reasons they had previously.

We now have a sufficient grasp of Raz's view of the structure of authority. In the next section, we shall fill out our examination of Raz's analysis by turning to our second question. We shall examine the *normal justification thesis*, Raz's answer to the question of what makes an authority legitimate.

3. RAZIAN LEGITIMACY

Earlier we said that, if an authority is legitimate, its subjects are obligated to conform with its directives.[24] One of the most important tasks in analysing the nature of authority is to delineate the conditions under which an authority is legitimate. Under

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[21]MF 46

[22]See MF 46. Raz presents the *preemption thesis* as a consequence of the *normal justification thesis* and the *dependence thesis*, which will be discussed below. Raz argues if the *dependence thesis* were true of legitimate authority and the *preemption thesis* false, certain reasons would be double counted. See also EPD 215. I have changed the order of presentation for ease of exposition. I do not think that it affects the substance of Raz's views to do so. Raz's analysis is an interlocking whole whose parts mutually reinforce each other. See MF 55.

[23]MF 42

[24]A common misunderstanding of the nature of authority results from failure to observe HLA Hart's distinction between being obligated and being obliged. One is obligated when one has a duty to perform the required act. One is obliged when one believes one has good reason to perform an action based on perceived future harm associated with not performing it. A private in an army is obligated to carry out her superior's orders, whereas the victim of robbery at gunpoint is merely obliged to empty her wallet. Legitimate authority obligates, though it often obliges as well. HLA Hart *The Concept of Law* (2nd Edition Clarendon Oxford 1994) 82-83.

what circumstances are we justified in accepting someone else's order as a protected reason for action? Raz claims that we might have any number of reasons for accepting an authority as legitimate[25], but that one criterion captures the normal and most important way of justifying an authority. He presents the *normal justification thesis*

> The normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with the reasons which apply to him (other than the alleged authoritative directive) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.[26]

That is a mouthful. The idea is simply that if we will do better by following an authority than by working out what to do on our own, the authority is legitimate for us. Let us illustrate the normal justification thesis in action.

Suppose Andy is ill. Andy has reason to take the medication that will best aid his recovery, if he has reason to take medication at all. Since Andy knows nothing about medicine, he will be more likely to take the best medication if he consults Eboo, a doctor. Eboo is a legitimate authority for Andy regarding what medicine he should take, because Andy will be more likely to comply with the reasons which antecedently apply to him (reasons about what medication to take) by following Eboo's orders than he would were he to choose which medicine to take on his own.

Contrast this with the case of Dave. Dave is also ill, but he is a doctor. Dave's mother has no medical training but likes to dispense folk remedies she learned long ago. Dave also has reason to take the medicine which will best aid his recovery, but given his medical knowledge, it is likely that Dave will do better by considering which medicine to take on his own than he would simply following his mother's orders. Dave's mother is not a legitimate authority for Dave regarding what medicine he should take.

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[25]See MF 53-56, 75 for discussions of other reasons Raz suggests might justify authority.

[26]MF 53

Suppose however that Eboo is telling Dave what medicine to take, instead of his mother. Remember, Eboo is a doctor too. Whether or not Eboo is a legitimate authority for Dave depends in part on who has greater expertise regarding the illness in question. But it does not depend solely on that. Perhaps Dave knows slightly more than Eboo, but Eboo will be better able to make a decision free from bias due to Dave's emotional involvement in his own illness. If this is so, Eboo will be a legitimate authority for Dave regarding what medicine he should take despite Dave's superior expertise.

Two things are apparent. First, the justification of authority is personal in the sense that an alleged authority may be justified for one person and not another. Eboo is an authority for Andy, but perhaps not an authority for Dave. Second, one of the main ways an authority can fulfill the normal justification thesis is through superior expertise to its subjects in the domain it is supposed to have authority over, though as we have seen, this is not the only way the normal justification thesis can be fulfilled.

Another way the normal justification thesis can be fulfilled which legal theorists have found particularly important is when an authority is in a position to provide and enforce a solution to a coordination problem. Following Raz, we will define a coordination problem as 'a situation in which the vast majority have sufficient reason to prefer to take that action which is (likely to be) taken by the vast majority.'[27] A classic example of a coordination problem is which side of the road people drive on. Considerations of safety and efficiency demand that people drive on the same side of the road, but it does not matter much if it is the left or the right.[28] An entity which has the ability to enforce a solution may be a legitimate authority regarding which side of the road people drive on despite its lack of expertise or any claim to better judgement. It is legitimate because following its directives allows people to comply with reasons they have (driving on the same side of the road as everybody else) better than they would if they tried to arrive at a decision on their own.

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[27]MF 49

[28]I have been told, but have not confirmed, that it matters a little. Supposedly studies have shown that driving on one side is better suited to our reactions and reflexes, but which side the studies have shown seems to correlate with the nationality of the person reporting the result.

The normal justification thesis helps Raz to resolve one of the most perplexing problems for students of authority—why it makes sense to 'surrender one's judgement' to an authority. Raz deals with this problem at length[29], but we will mention it only briefly here. Though Raz correctly takes issue with the phrase 'surrender one's judgement'[30], there is a sense in which one who follows the directives of an authority does just that—they accept that they should act on the authority's directive even if they disagree with it. This has led many to question whether or not submitting to authority is necessarily irrational, as it can require one to take action one's deliberations reject. If an alleged authority fulfills the normal justification thesis it is clearly not irrational to follow its directives. Indeed, doing so is the most rational course of action.[31]

The dependence thesis

Closely related to the normal justification thesis is Raz's *dependence thesis*. The dependence thesis regards how authorities ought to make decisions. Raz writes

> All authoritative directives should be based on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstances covered by the directive.[32]

Raz calls reasons which already apply to subjects *dependent reasons*, in part to contrast them with content-independent reasons, because they are often, thought not

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[29]See MF 38-42

[30]Raz is correct to take issue with the phrase because one never really surrenders one's own judgement. The decision to accept an authority as legitimate and follow its directives is itself the result of one's own judgement. Accepting a doctor as an authority regarding what medicine you should take is not surrendering your own judgement; it is exercising it wisely.

[31]This is a minor oversimplification, as the normal justification thesis is only a threshold requirement for the justification of an authority. A complete justification must also show that no countervailing reasons defeat the justification (eg the importance of making certain types of life-defining decisions on one's own may trump claims to greater expertise). See MF 56-57.

[32]MF 47

exclusively, reasons for a person in virtue of their content, as opposed to their pedigree.[33]

We do not require a detailed examination of the dependence thesis here. It is easy to see how it is intertwined with the normal justification thesis. An authority's role, on Raz's analysis, is to assist a subject in better complying with the reasons which apply to her; this necessitates basing decisions on dependent reasons.

The dependence thesis is often taken to lead to a corollary, which Raz calls the *no difference thesis*.

> The exercise of authority should make no difference to what its subjects ought to do.[34]

The argument from the dependence thesis to the no difference thesis is simple. If an authority is supposed to base its decisions on reasons which apply to its subjects, then 'it ought to direct them to do what they ought to do in any event.'[35] Were the no difference thesis true, legitimate authority would be unable to change the normative situation of individuals, the very activity we identified as a defining characteristic of authorities.

Raz rejects the claim that the dependence thesis entails the no difference thesis for three reasons.[36] First, he notes that sometimes what we should do is not determined uniquely by reasons. For example, I might have reason to buy a pair of trousers, but no reason to buy either pleated or flat trousers. An authority over what trousers to buy, were there such a thing, could make a difference in what I ought to do by giving me a reason to buy pleated or flat. Raz's second objection to the suggestion that the no difference thesis is entailed by the dependence thesis rests on coordinating conventions. As noted earlier, we have reason to drive on the same side of the road as everybody else, but no reason to drive on either side of the road. Here again, an authority can issue a directive (based on dependent reasons) which makes a difference. Last, Raz cites Prisoner's Dilemma situations, noting that the participants

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[33]Not exclusively because the directives of a different authority may be dependent reasons that an authority can base its decisions upon.

[34]MF 48

[35]MF 48

[36]MF 30-31, 48-49

have reason to change the character of the situation, though no ability to do so themselves. In such situations, an authority can issue a directive (based on dependent reasons) which changes what the participants ought to do.

A Service Conception of Authority

The three theses of Raz's analysis which we have examined together create what Raz terms a *service conception* of authority. Legitimate authorities serve their subjects by mediating between them and the reasons which apply to them. This is important, because an argument we shall examine in Chapter Seven suggests that certain methods of interpretation do not allow the law to play the mediating role it should be able to on Raz's service conception of authority. In order to be fully prepared for the arguments of the following chapters, however, we need to examine Raz's account of legitimate authority more critically.

4. RETHINKING LEGITIMACY

Remember that Raz holds that the normal justification thesis is only one way in which an authority can be justified, though he thinks it the normal and most important way. In this section, I argue that Raz's service conception of authority is inadequate for understanding important features of law in democratic societies, because the normal justification thesis does not represent either the normal or most important way of justifying political authorities in such communities. Both Roberto Unger and Jeremy Waldron have suggested that the 'dirty little secret' of modern jurisprudence is that it is uncomfortable with democracy.[37] I am not sure that 'uncomfortable' is the proper adjective, but less attention has been paid to what I will argue is the special character of law in democracies than is warranted. Indeed, contemporary legal theorists devote little attention to the legislative process; they focus mainly on the activities of judges. Waldron's *Law and Disagreement* and its companion volume *The Dignity of Legislation*[38] are, in part, conceived as an attempt to redress this defect. The lack of attention to legislation and to the distinctive character of law in democracies is partially explained by the desire many theorists have to engage in general

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[37]RM Unger *What Should Legal Analysis Become?* (Verso London 1996) 72-73, 115; LD 8-9 (*above* note 1 for full citation).

[38]J Waldron *The Dignity of Legislation* (Cambridge UP Cambridge 1999)

jurisprudence, to say what is true of law wherever and whenever it is found.[39] The project of general jurisprudence is certainly worthwhile. However, in searching for commonalities among all legal systems, we may overlook features of law in certain political communities that contribute more to the shape of what law is for those communities than the features they share in common with law across the board. I believe, along with Waldron, that just this has happened in regard to democracy.

> An important part of what we have neglected about law in modern democracies is that it is the mechanism people use to make collective decisions about their governance, and that these decisions are (ideally) the result of participatory procedures. Below I shall discuss the implications this has for our understanding of law and its legitimacy, but I want to begin by placing the issues in context. Near as I can tell there are a few reasons the special character of law in democracies is often overlooked (aside from the desire to do general jurisprudence). Modern jurisprudence developed prior to the rise of statutes as the most significant source of law, and it is the modern statute produced in an elected legislature (along with law enacted through referendum) that among the various types of laws lays the greatest claim to participatory development. Further, much of modern jurisprudence has been a reaction against John Austin's command theory of law. In one important respect, it seems that the discipline is still held in its sway. On Austin's view laws are commands backed-up by threats. Jurisprudence has moved far beyond Austin.[40] Raz's theory of the authority of law is light-years ahead of Austin's in sophistication. Nevertheless, Raz's analysis, our most advanced, still conceives of law as telling us what we may and may not do. This, in turn, affects how Raz understands legitimacy.[41] We can see this clearly if we look at the questions Raz finds relevant at the outset of one of his many discussions of legitimate authority: 'What can justify holding some people duty-bound to obey others? Under what conditions can some have a right to

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[39]As Waldron notes, Raz has suggested that a legal system need not have a legislature. See LD 34 and PRN 139-141. Waldron discusses general jurisprudence and what he considers its misguided aim for institutional neutrality at LD 45-48.

[40]Hart assailed Austin's command theory because it neglects the normativity of law. He also showed that Austin's theory lacks the nuance necessary to understand law. Law does more than issue commands; it also grants permission, creates powers, and regulates its own development and application. Hart *above* note 23.

[41]Cf LD 100

rule others?'[42] Let me say clearly, these are important questions any account of legitimate authority must answer. Yet, in a way they seem vaguely unsatisfying as questions about the legitimacy of democratic authorities, because they presuppose a division between rulers and subjects—a division between the duty-bound and the binders—that many deny can be drawn in a suitable democracy.

An ideal (perhaps not the only one) of democracy views government action as collective action, as the action of the community taken through various procedures and decision functions which operate on the preferences or views of its members. The idea behind this view of democracy is that *we are binding ourselves* through acts of legislation. Contrast this with the view expressed by Raz: 'Governments decide what is best for their subjects and present them with the results as binding conclusions that they are bound to follow.'[43] This is no doubt true generally, and yet, an adherent of the view I am expounding will deny that it is true of well-constructed democracies. Rather, in democracies, people decide together what they shall be bound to do. Law in a democracy does not merely tell us what we may and may not do—though it does that. Law is how we decide what we may and may not do.

Does the idea that we are binding ourselves make sense or is it just happy rhetoric obscuring the brute fact that in all political systems one group of people rules over another? We might think so, because we believe all actual democracies fall short of the ideal. I want to set this aside, however, and focus on the ideal itself, asking whether there are theoretical reasons to believe a group cannot bind its members through collective action. Taken out of the political context, it is clear that a group can collectively make decisions which bind its members. A football team can decide which tournament it wants to enter, a husband and wife can decide together where they shall settle, a corporation can decide to introduce a new product, and so on. All of these collective decisions, in the right circumstances and subject to limitations, can bind the individual members that compose the group. Though there are interesting philosophical issues regarding the relationship between collective action and individual action, and between collective decision-making and individual obligation, no one doubts that we can make decisions in concert with others which bind us. Why should a political community be any different?

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[42]EPD 356
[43]EPD 359

I raise all this only to suggest that Raz's questions are misleading when applied to democracies. Democratic governments, as I am conceiving them, may have different criteria of legitimacy than non-democratic governments precisely because of the fact that one group of people is not ruling over another, because of the fact that people are binding themselves. Clearly, I can bind myself in ways others cannot bind me, through promising and such. Though I would not suggest that law-making involves any sort of promising on the part of an individual (the analogy may not be so bad when it comes to the polity as a whole[44]), a law that I enact in concert with others may have greater claim on me, or a different sort of claim, than one promulgated by a government I play no role in.

I do not want to minimize the difficulty in specifying the conditions of legitimacy for democracies. Here are some of the important questions we must confront.

> (1) What types of decisions are properly made collectively and what types of decisions are properly reserved to individuals?
>
> (2) What counts as a collective decision?
>
> (3) What procedures should be used to reach a collective decision?
>
> (4) How does a person become a part of, or cease to be a part of, the community which is binding itself?
>
> (5) How far does the obligation of an individual extend if she disagrees with the collective decision reached?

Answers to all of these questions, and to many more, would be necessary parts of a theory of the legitimacy of democratic authorities. The last is particularly important; we might call it *the problem of losers*, and it exists because consensus is not a realistic method of making decisions in modern political communities. Under any decision procedure which is serviceable, some will lose out. Their favoured outcome will not be selected. There are serious questions as to (1) whether the losers can be said to

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[44]It might be fruitful to think of laws as promises or undertakings and explore how this view would differ from the standard view of laws as a system of rules. This project lies far beyond the scope of this thesis.

have bound themselves; and (2) how far their obligation extends. The answers would of course depend on the nature of the group and its decision-making process, and even a general attempt to tackle the questions is too large a project to take on here. For now, I shall simply note that the aspiration of democracy on the ideal I am presenting is for people to make decisions together through fair procedures, and we need to consider the normative implications of this aspiration for law's authority. Moreover, how close actual democracies on their grand modern scale do come or can come to achieving this aspiration is a further question, one which will hover in the background of the considerations here, but will certainly not get the treatment it deserves. My aim in the following sections is simply to raise doubts that the normal justification thesis is an adequate test of legitimacy for democratic communities.

Varieties of legitimacy

The normal justification thesis is a *substantive theory of legitimacy*. A theory of legitimacy is a substantive theory if it confers legitimacy on the basis of the directives an authority issues. The normal justification thesis assesses whether or not an individual better complies with the reasons she antecedently has by following the directives the authority issues than she would by following her own reasoning on the matter. No assessment is made of how the directives are reached; the thesis judges only the content of the directives themselves.[45] We might also have *procedural theories of legitimacy*. A procedural theory of legitimacy assesses how the directives an authority issues are arrived at. Such a theory might judge, for example, whether the process was fair, or open, or public. Last, a theory of legitimacy could be a *hybrid* theory, partially judging the substance of a directive and partially judging the procedure which produced it.

Procedural theories of legitimacy play an important role in our thinking about the legitimacy of democratic governments. We critique governments based on the degree to which people have access to the political process and equal efficacy within it. We often think, for example, that decision-making made behind closed-doors is

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[45]Of course, the method of reaching the directives may be relevant in helping us to determine whether or not the directive fulfills the normal justification thesis. If we believe that the authority's method of deciding a question helps it to reduce bias that would afflict our own reasoning, we may believe their directive will help us to better comply with the reasons we have for action.

inappropriate even if the decisions reached are good ones. Notice that we do not oppose decisions made behind closed-doors only because we think that open decision-making processes produce better decisions; on some occasions we recognize that a better decision might be reached without the process proceeding publicly. We support open government partially because we think it disrespectful of the dignity of citizens as agents in their own self-government to make important decisions affecting their lives without allowing them to witness, and hence contribute if only indirectly (through public comment and protest), to the debate shaping the outcome.

We do not always have reason to care how an authority reaches its decisions. It makes no difference to me whether or not my doctor reads all the relevant literature herself or instead consults an expert as long as she is making the best decisions regarding my care possible. Likewise, I do not care whether my guitar instructor has studied methods of teaching music extensively and suggests exercises in accord with an academic theory, or whether she has developed her expertise in teaching through years of experience, as long as her instructions helps me to progress as efficiently as possible toward my goals. Judging the directives of a doctor or a music instructor solely on the basis of the substance of their directives makes a lot of sense. This is because we regard the doctor and the music instructor as experts; how they became experts is of no consequence as long as they truly are experts.

Political authority is different. We do care how governments reach the decisions they make. A full accounting of why we care is far too large a task to tackle here, though I shall make some exploratory remarks about the reasons for being concerned with procedure, specifically reasons for preferring the procedures of government to be democratic ones. I shall not focus on any specific conception of democracy, much less any specific democratic procedures. Controversy of course surrounds most questions about the nature of democracy and what it demands. Here I conceive of democracy simply as a class of political systems which are participatory, where each citizen has the ability to participate (preferably, at some foundational stage, equally) in the creation of government and policy. All democracies in some sense embody the ideal expressed by the word's Greek ancestor, *demokratia*, meaning 'rule by the people.' Democracies stand in opposition to political systems which display rule by one, a few, and so on. We probably ought to think of political systems as being democratic in degrees, ie more or less democratic, but even this modest point extends deeper into a discussion of democracy than appropriate for our task here. I want merely to call attention to reasons for preferring democratic decision-procedures,

whatever form we ultimately decide best, whatever other values might mitigate against them to some degree.

The values of democracy

We might believe that democratic methods of reaching decisions will produce better decisions than individuals can produce on their own, and this applies equally well to legislators and citizens. On this view, that a decision is the result of democratic procedures marks it as having a claim to expertise. An element of this line of thought partially underlies some theorists' attraction to democracies as forms of government; there is a sense that, by throwing our ideas into the public arena, vigorous debate will allow us to reach better decisions than we would otherwise. The value of democratic procedures, on this reasoning, is instrumental; it serves the goal of improving the substance of our decisions.

There are further reasons to be concerned with procedure, reasons which do not view procedure merely as a proxy for judging substance. One of these is the value we place on autonomy. People are better off, we believe, if they are able to organize their own affairs and develop and pursue their own conceptions of the good. Since governments play a pervasive role in organizing our lives, denying people the opportunity to participate in the process of government closes off opportunities to organize one's own life autonomously. Democratic procedures afford people opportunities to participate in life-defining decisions.[46]

We also value democratic procedures because we believe they show proper respect for the dignity of people as rational agents. It is harder to pick out experts in moral and political matters than it is in medical or musical matters. Indeed, some argue that there are no moral experts. Since we believe that none of us are (generally) better situated than others to discover moral truth, when there are moral decisions to be made which affect us all, nobody (generally) has a claim to be better able to make those decisions than anyone else. We are equals and respecting this requires that we

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[46]I do not intend to invoke what Raz calls the 'least persuasive argument for democracy' which is, according to him, 'one which regards it as the nearest we can get to self-determination.' J Raz 'Disagreement in Politics' (1998) 43 *American Journal of Jurisprudence* 25, 45. The value of people participating in decisions which have an important impact on their lives can be grounded without any suggestion that self-determination, whatever that might be, is required or desirable.

participate in the decision-making process which orders much of our moral universe as equals.

Further, democratic procedures may be demanded by concerns of distributive justice. Robert Dahl argues that the procedures a community uses to make governmental decisions allocate authority and power, and that citizens have an equal entitlement to both.[47] If he is right, concerns of justice provide another reason for valuing democratic procedures.

In addition to the intrinsic values democracy instantiates that we just canvassed, there are further consequentialist reasons to support democratic decision-making procedures aside from any positive impact they may have on the substance of the decisions reached. People who can access their political system are empowered to take control of their lives. Those who feel that they have no voice in their governance, no efficacy in the political process, may experience alienation and resignation.[48] Often it is little comfort to be assured that important decisions which will affect your life, but are being made without your input, will be good ones.

The foregoing paragraphs encompass an embarrassingly short account of the reasons we have for supporting democracy. Articulating a full defence of democracy would be a significant undertaking, but fortunately, the world does not lack for good ones.[49] Though short, hopefully the foregoing discussion has reminded us of some of the important reasons we have for being concerned with the procedures political authorities use to make decisions as well as with the substance of those decisions. We can now turn more explicitly to questions of legitimacy.

Legitimacy and democracy

Our discourse about the legitimacy of governments indicates that we believe a government can fail to be legitimate on procedural grounds. If a government's

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[47]R Dahl *Democracy and Its Critics* (Yale UP New Haven 1989) 164

[48]I have in mind here phenomena like adaptive preference formation, in which people define their goals by what they believe is reasonably available to them, as well as much of the research on the importance of what sociologists and historians call 'social capital'. On adaptive preference formation, see J Elster *Sour Grapes: studies in the subversion of rationality* (Cambridge UP Cambridge 1983).

[49]Eg Dahl *above* note 47.

electoral system favours some interests in society, or appears corruptly financed, or if portions of the population are marginalised and voiceless, we are quick to judge it illegitimate, or at least less legitimate than it might be otherwise. Where these deficiencies are present, it counts for little that a government may produce substantively good decisions, decisions which the normal justification thesis would hold authoritative. Non-democratic governments which rule well are tolerated only as second-best options when we see no opportunity for democratic reform. This shows us one way in which the normal justification thesis is incomplete as a theory of legitimacy for political authorities: governments which fulfill it may fail to be legitimate on procedural grounds. They fail to be legitimate because even though they produce good law, they do it without showing proper respect towards their citizens, without allowing them appropriate opportunity to participate in the structuring of their own lives, without regard for a just allocation of political power, and perhaps in ways that breed resentment and alienation.

We ought to ask whether the normal justification thesis might be incomplete in the other direction as well. Can governments which fail its test still be legitimate on procedural grounds? In *Law and Disagreement*, Jeremy Waldron argues that democratically enacted laws deserve respect even if they fail the test of the normal justification thesis, and it seems that his argument accords legitimacy (of sorts—it is unclear how the demand for respect differs from an obligation to obey) solely on procedural grounds.[50] Waldron, like many before him, bases his argument in part on

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[50]LD 85-118

the normative importance of the fact that people disagree about the principles which should be used to order society.[51] I shall canvass Waldron's argument briefly.

Waldron suggests that the *circumstances of politics* are marked by

> ... a felt need among the members of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be.[52]

Waldron believes democratically enacted laws achieved in the circumstances of politics demand a certain sort of respect. He writes

> When something is enacted as law or as a source of law, I believe it makes on us a demand not to immediately disparage it, or think of ways of nullifying it or getting around it, or mobilizing the immune system of the *corpus juris* so as to resist its incorporation... It is a demand for a certain sort of recognition and, as I said, respect—that *this*, for the time being, is what the community has come up with and that it should not be

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[51]Raz has responded in a number of forums to Waldron and other theorists (including, most prominently, John Rawls) who accord normative importance to disagreement. He argues that disagreement cannot ground either the neutrality of the sort that Rawls seeks nor an obligation to submit to fair decision procedures Waldron might be taken to argue for. In part, Raz objects because, he claims, arguments from disagreement undermine themselves. People will inevitably disagree over the implications of disagreement, and thus attempts to ground political theories in the fact of disagreement crumble in an endless regress. The debate over what disagreement implies for democracy is one of the most important and challenging in political theory. It is also one that I believe can be avoided entirely for our purposes here. I should point out, however, that if one could successfully show that disagreement over the principles which should be used to order society grounds an obligation to participate in fair democratic procedures, one would also have shown that political authority can be legitimate at least in part on procedural grounds. See J Raz 'Facing Diversity: The Case of Epistemic Abstinence' in EPD 60-96; J Raz 'Liberalism, Scepticism and Democracy' in EPD 97-124; J Raz 'Disagreement in Politics' (1998) 43 The American Journal of Jurisprudence 25. A promising response to Raz's view is outlined in C Bird 'Mutual Respect and Neutral Justification' *Ethics* 107 (October 1996): 62-96.

[52]LD 102

> ignored or disparaged because some of us propose,
> when we can, to repeal it.[53]

This respect, Waldron argues, 'is in part an acknowledgment of the need for a common solution and respect for the conditions of fairness in which a common solution was arrived at among those who disagreed about what it should be.'[54] Importantly, it is the pedigree of the law which demands this respect of us, and not its substantive merit. Waldron claims, 'Once voted on in the legislature, [a law] is entitled to whatever respect this communitarian status confers on it, without regard to—indeed bracketing away from—the substantive merits of its content.'[55]

I agree with Waldron. Democratically enacted law demands our respect because it 'stands for the time being in the name of the whole community,'[56] and represents how we have bound ourselves through fair procedures in the face of disagreement (of course, this is true only where the procedures are fair). Yet the fact that law is achieved in a democratic community in the circumstances of politics is not the only claim it has on our respect or obedience. The values canvassed in the last section—the value of autonomy, the importance of respect for persons as rational agents, and the consequentialist value realized through democratic procedures—place demands on us as well. To my thinking these values are so important that they demand democracy and can overwhelm concerns about substantive legitimacy. Simply put, making decisions together can be more important than getting them right. If this is true, the most important tests for justifying political authorities may be procedural in nature, or at the very least, hybrids of substance and procedure. Of course, I have not shown any of this to be true. I have not shown that these values demand that we submit to fair democratic procedures—that is a task left for others or perhaps another day. I hope simply that I have made it plausible, that I have reminded us of reasons democracy is important and shown how our discourse about legitimacy assumes its importance, so that my conclusion can play a conditional role (if we have reason to be committed to the results of fair democratic procedures, then...) later in our inquiry.

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[53]LD 100
[54]LD 85
[55]LD101
[56]LD101

I hasten to add the caveat that the obligation to obey the results of fair democratic procedures can only go so far. We can tolerate just so much deviance from good decision-making. A fair procedure which consistently produced disastrous results might undermine the very value of the autonomy and respect which led us to seek fair procedures in the first place. Democracy may in some instances be a luxury too expensive to afford. We should also not underestimate the degree to which we want decisions made by people with expertise. Indeed, part of the rationale for representative government over referendum is that we delegate authority to make decisions to a group of people we expect to engage in the extensive study and consideration we do not have time to engage in ourselves.

We cannot (and need not) here reach any final conclusions about the proper balancing of substantive and procedural legitimacy. It is important to recognize, however, that the normal justification thesis leaves out important tests we ought to apply in determining whether or not our political authorities are legitimate. This is not an objection to Raz's analysis. He never claims that the normal justification thesis is the sole test for legitimacy nor does he claim that it is not defeasible as a criterion. Indeed, Raz indicates some sympathy with the view I have expressed here. He writes

> First, because participation is valuable in itself, providing opportunities for it through democratic constitutional arrangements is a value which may justify putting up with some shortfall in other dimensions of performance.[57]

I suspect that I am willing to put up with more shortfall than Raz. He follows this passage with the suggestion that '[democracy] relies, for its legitimacy, on its ability to deliver sound decisions.'[58] Democracy, in my view, draws some of its legitimacy from its ability to deliver sound decisions, but the main source of its legitimacy lies elsewhere. The normal justification thesis is neither the normal nor most important test for legitimacy in democracies, though its importance should not be underestimated. Most importantly, we have reason to be concerned with the procedural legitimacy of political authorities, and it may be reasonable to regard some

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[57]EPD 117
[58]EPD 117

political authorities which fall short of fulfilling the normal justification thesis as legitimate on procedural grounds.

A misguided objection

One might object to this discussion by claiming that the normal justification thesis is flexible enough to accommodate the procedural concerns I have been addressing. The test it offers for determining the legitimacy of an authority is whether by complying with its directives I will comply better with the reasons which apply to me than I would otherwise. The objector might say that where I have reason to comply with the results of a fair democratic procedure, complying with its directives will help me to follow the reasons I have better than I might otherwise. We should reject this strategy because it makes the normal justification thesis empty. So conceived the normal justification thesis would accommodate all theories of legitimacy which turned out to be true; hence, it ceases to be a competitor with other candidate theories of legitimacy.

Raz does not appear to understand the normal justification thesis in this way. He suggests that the need for certain life-defining choices to be made autonomously by individuals (like choosing one's career or religion) is an exception to the normal justification thesis. Raz recognizes that some might do better complying with the reasons which apply to them if the government chose their career; nevertheless, he claims, it would be illegitimate for governments to prescribe careers. If Raz was open to the strategy we are exploring here, he might have argued that there is no way an individual could ever do better complying with a government's directive because of the importance of making the decision autonomously. He did not do this for good reason; it would make the normal justification thesis empty. In order for the normal justification thesis to be a competitor with other theories of legitimacy, it cannot be the case that it subsumes or gives way to any theory which on its face conflicts with it but turns out to be true.

This objection misconstrues Raz's analysis in another way as well. According to the normal justification thesis, we have reason to treat a directive as an exclusionary reason when following it helps us better to comply with the reasons we have for acting *on the matter the directive regards*. Thus, if a directive concerns the use of prescription drugs, the test for its legitimacy is whether or not it helps us to make better decisions about prescription drugs than we would on our own. The test is not whether or not by following it we make our decision the way we have reason to

decide such questions, as it would have to be in order to sustain the objection under consideration. If something like that were part of the test of the normal justification thesis, then we would need on all occasions a further (and different) criterion of legitimacy to assess whether or not the normal justification thesis was fulfilled, whether or not following the directive amounted to making the decision the way we have reason to make it. All this is just another way of saying the normal justification thesis is offered as a candidate theory of legitimacy which competes with others. It is a substantive test which cannot be stretched to account for procedural concerns.

Conclusion

In subsequent chapters, the questions of why we have law and under what circumstances we are obligated to obey law will take centre stage in our inquiry. Though we have not established the proper balancing of substantive and procedural elements of legitimacy, or really even begun to make headway, we have seen that procedural legitimacy is important for political authorities. The normal justification thesis on occasion needs to be supplemented by procedural tests of legitimacy, and in some circumstances may take a backseat to them. I shall proceed on this basis with the recognition that much work remains to be done.

CHAPTER SIX

AUTHORITY, INTENTION AND INTERPRETATION

One can hardly write about interpretation without discussing intention. In literature and law much of last century's debate about interpretation was over how closely it ought to track the intentions of authors. So much has been written about intention and interpretation in fact that it scarcely seems worth adding to the debate, yet there are two reasons for doing so. First, our exploration of interpretation has put us in a position to evaluate some of the arguments offered about intention free from the metaphysical confusion which often complicates the debate. Second, after a long period in which legal theorists tended to be dismissive of the importance of intention in legal interpretation, the tide may be turning. Joseph Raz has offered innovative arguments suggesting that we cannot make sense out of the authority of lawmakers unless we afford their intentions at least a limited role in our interpretations.

The first section of this chapter deals with some metaphysical issues surrounding intention and interpretation. We shall begin by examining the assertion that interpretation does nothing but seek intentions. This mistaken view is familiar from Chapter One, but we shall explore it in greater detail here. Afterwards, we will turn our attention to an intriguing, yet ultimately unhelpful, methodological suggestion Brian Bix offers for investigating legislative intent. Once these preliminaries are dispensed with, we can move on to the main event. We shall explore Raz's arguments to discover if law's authority requires interpreting in accord with the intention of law-makers.

1. METAPHYSICAL MUSINGS

Monkeys on typewriters

Some theorists, Andrei Marmor and Stanley Fish among them, hold that all interpretation seeks intentions. Of course, as we saw in Chapter One, this is an empty claim unless one holds that interpretation seeks the actual intentions of authors (in which case, we shall see, the claim is just false). As long as interpreters are free to seek counterfactual intentions or the intentions of counterfactual authors, such a claim is prescriptively irrelevant. It recommends nothing to interpreters and provides no basis for evaluating interpretations.

Some theorists avoid vacuity by restricting the claim that all interpretation seeks intentions to the actual intentions of actual authors. Larry Alexander writes

> All texts are attempts by their authors to communicate, usually to other people, but occasionally to the authors themselves at a later time. Legal texts are attempts by authorities to communicate their determinations of what ought to be done to those they govern. Novels are attempts by novelists to communicate details of plot and characters to readers. Scientific texts are attempts by scientists to communicate their scientific findings to their intended audience. And so on.[1]

We shall call this view the *communicative view* of interpretation. Alexander concludes from it that 'If texts are attempts by their authors to communicate, then *texts mean what their authors intend them to mean*.'[2]

The communicative view makes some intuitive sense, but when subjected to scrutiny, it falls apart. First, not all objects of interpretation are created intentionally. We interpret dreams, data sets, the entrails of chickens, and so on, endlessly, and none of these objects have creators who could have intended them to communicate anything. We could attribute communicative intentions to counterfactual authors,

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[1]L Alexander 'All or Nothing at All? The Intentions of Authorities and the Authority of Intentions' in A Marmor (ed) *Law and Interpretation* (Clarendon Oxford 1997) 357-404, 361

[2]Alexander *above* note 1 at 361 (emphasis original)

but this just returns us to the empty version of the claim. Not all interpretation aims at discovering the intention of authors, but what about the interpretation of texts? Texts, after all, are generally produced intentionally (except in deviant cases we shall look at shortly). Nevertheless, Alexander's assertions that texts mean what their authors intend them to mean and that interpretation properly seeks an author's intentions are unjustified. First, the claim that texts mean what their authors intend them to mean is dubious; if this was so we could never fail to say what we intended to say. Moreover, interpretation, as we saw in Chapters One and Two, does not always seek communication intentions. I may read your letter to find out what you wanted to communicate to me, but I may equally well read it to find out if you are happy in your job, a fact that I believe you are unlikely to tell me directly and may even try to obscure. The reasons we have for interpreting texts are endless. Perhaps some give us reason to seek authorial intention—we shall return to this question below—but it is clear that not all do.

Alexander tries to buttress his case with a thought experiment. Suppose a bunch of monkeys are cavorting on a typewriter and in the process produce something which superficially resembles what we know as Yeats's 'The Second Coming' (Alexander's monkeys are more prolific, they produce *Moby Dick*). Alexander asserts that the marks do not constitute a text, and that it is incoherent, for example, to ask what 'gyre' means. Since nobody intended to communicate anything with 'gyre', he believes, it cannot mean anything. Indeed, Alexander says we cannot even ask what language the marks are in, because there are innumerable possibilities. It could be in Shmenglish, in which 'gyre' means 'the combination of hair and cream left over after shaving.' Alexander concludes that only the intentions of an author can fix the language of a text and the meaning of its words.

The first thing we should note is that even if intention is necessary to fix the language, it may not be necessary to fix the meaning of words. It seems reasonable to suppose that if I intend to speak in English and I use the word gyre, the word means 'a circular oceanic surface current'[3] whether or not I intend to communicate something else by it (though I may succeed in communicating something else by it). I shall not resolve exactly how intention figures in determining the meaning of what we say. This would require a greater competency in the philosophy of language than I possess

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[3]Or one of a small number of other meanings one might find in a dictionary.

(or, for that matter, than most of the legal theorists who write about these issues possess). Despite this, we can note some general problems with Alexander's view.

First, there seems nothing wrong with asking the following: can we understand these marks as an English text, and so understood are they useful in any way? If we answer in the affirmative, as we would for the fortuitous monkey poem, then we have nothing to lose by regarding the marks as a text. Nor do we have to imagine a counterfactual author in order to do so sensibly. I could recognize that the text was the product of cavorting monkeys, but still say 'reading this as an English text helps me to put a finger on what I think is wrong with our society.' A text does not need an author to be a proper object of our wonder, nor to be used for our purposes. That this is true is further evidenced by the fact that we interpret texts when we have little or no information about their authors. For all I know, many of the texts I read might be the product of cavorting monkey (sometimes I suspect this). True, some interpretive questions we might ask are complicated by lack of knowledge about authors, but not all are.

Oddly, in an Appendix to his article, Alexander indicates that he shares the view I have just expressed regarding the monkeys on typewriters, even though the main body of his article relies on the thought experiment to support his case that we have to seek the intentions of actual authors.[4] He contends in the Appendix that we could only ask about the dictionary meanings of such unintentionally created texts, and not inquire about them any further. I remain unconvinced. If our monkeys produce *Hamlet*, can we not wonder whether Hamlet and Ophelia are lovers? Why suppose that the answer to this question is a matter of what an author, Shakespeare or our monkeys, intended? Many theories of literary criticism hold that Shakespeare's answer is irrelevant, so too our monkey's. The purposes of the literary endeavour may be such that an interpretation need not reflect an author's intention in order to be a good interpretation. Indeed, literary criticism would be greatly impoverished by a single-minded focus on the actual intentions of actual authors (we would have startlingly little to say). Of course, these issues are the subject of vibrant debates within literary theory, and we cannot resolve them here, nor can Alexander win them by fiat.

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[4]Alexander *above* note 1 at 403-404

Alexander further asserts that if we interpret a text in a way that differs from the intentions of its author, then we rewrite the text (or perhaps in the monkey case write it for the first time).[5] This is just a retread of Fish's idea that interpretations create texts, and it suffers from all the deficiencies discussed in Chapter Two. Alexander's ontological confusion comes across clearly when he writes, '...a text is always some author's text. It is whatever the author intended to communicate through the marks or sounds.'[6] Whatever they are, texts are not what their authors intended to communicate. Texts are physical objects or sounds and though they bear relationships to an author's communication intentions, they are distinct from them. Further, what they express can come apart from what the author intended to express. Interpreting a text never amounts to creating it, or recreating it, writing it, or rewriting it. Instead, interpretation produces understandings of texts, and relative to many purposes, these understandings will properly diverge from the understandings held by the text's author. Alexander's view of legal interpretation—that it ought always to reflect the intentions of the text's authors—may be correct, but if so, it will be for reasons different than those he cites. Nothing about the nature of interpretation nor the nature of texts requires that we remain faithful to an author's intentions.[7]

The place-holder approach

Brian Bix offers an eminently sensible approach to legislative intent in legal interpretation, but ultimately one I shall not adopt here.[8] Coming from a Wittgensteinian perspective, Bix cautions against understanding uses of 'legislative intent' in law as meaning the same thing 'intention' does in other contexts, like in individual action or conversation. Further, Bix cautions against assuming that 'legislative intent' must refer to a single thing and the same thing in all legal systems. Rather, Bix argues that we ought to look to the circumstances in which 'legislative

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[5]Alexander *above* note 1 at 363

[6]Alexander *above* note 1 at 363

[7]In a confusing note to his article, Alexander admits that his notion of interpretation may be parochial to legal concerns and may not encompass all types of interpretation. Whether or not it is parochial, it is wrong even for law. Nevertheless, it is unclear given this admission why in the main text Alexander presents his case as a general truth about the nature of texts. See Alexander *above* note 1 at 397n107, 403-404.

[8]B Bix 'Questions in Legal Interpretation' in A Marmor (ed) *Law and Interpretation* (Clarendon Oxford 1997)137-154, 142-146.

intent' is used within legal systems and see what practitioners do with it. Legislative intent, on this view, is kind of a place-holder for different practices in different communities. Bix explains that, in his view, legislative intent meant something different in England prior to *Pepper v. Hart*[9] than it does in its aftermath. Now that judges can make recourse to the legislative record, the conditions under which it is appropriate to make claims about legislative intent have changed. I am not convinced of Bix's claim; it may just be that the evidence of intent judges are allowed to appeal to has changed, and not what intent refers to. Nevertheless, Bix's proposed methodology does have merit, and his warnings are appropriately heeded.

The reason we cannot adopt Bix's place-holder approach to legislative intent is because of the role legislative intent plays in argument. Many theorists arguing on behalf of fidelity to legislative intent as a standard for evaluating interpretations are referring to something akin to individual intentions. Legal practice is criticized (or lauded) for the role it accords intention in interpretation, and if we define 'legislative intent' solely by its use within this practice, we shall be unable to engage these arguments. We shall only be able to say things like, 'she is arguing for changing what we mean by legislative intent,' yet critiques are not often offered in this spirit. Much might be learned through careful attention to how legislative intent figures in legal practice, but what will be learned will not help us to resolve the normative debates over the proper role of intention in legal interpretation, and these are precisely the debates which interest us.

How to proceed

If we cannot find answers to questions about the proper role of legislative intent in interpretation by investigating the nature of interpretation or the nature of texts, how can we answer our questions? When people argue that interpretation must reflect legislative intent, they are claiming that we ought to judge interpretations by their fidelity (or lack thereof) to legislative intent. Our question, then, is the question we ought to ask of all proposed standards for judging interpretations: do the purposes of legal interpretation justify using fidelity to legislative intent as a criterion for evaluating success? The main focus of this chapter are arguments offered by Joseph Raz which purport to establish that we do have reason for assessing judicial

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[9] *Pepper v. Hart* [1993] AC 593

interpretations by their fidelity to legislative intent, at least in a limited sense. The next section puts in place the proper background for evaluating Raz's arguments.

2. INSTITUTIONS AND INTENTIONS

One of the most significant challenges facing any theory of legislative intent is explaining whose intentions count. Meeting this challenge requires confronting head on the questions of if and how institutions can have intentions. This section investigates these issues in order to prepare us for assessing the arguments to follow. No answers are in the offing, however, just explorations of different approaches to keep in mind as we proceed.

Modern legislation is almost always the work of institutions rather than individuals, and sometimes legislation is the work of multiple institutions (eg in the U.S. legislation is the result of actions by two institutions and one individual: the House of Representatives, the Senate, and the President). This raises a number of vexing questions: can institutions have intentions separate from the intentions of their members? If not, are the members' intentions the intentions of the institution? If so, which members' intentions count? How are they aggregated into a legislative intent? What happens when they conflict? In addition to these questions, we shall have to worry about which institutions count as authors when multiple institutions are involved. Moreover, some argue that we ought to defer to the intentions of institutions which have no claim whatsoever to authorship—institutions which have the power to amend a law, yet refrain from doing so. Failure to amend, it is suggested, indicates support for the interpretation currently in force.[10]

Now one might be disposed to argue that these issues, perplexing as they are, can safely be bracketed off for the purposes of general jurisprudence. After all, it is possible that legislative power can be vested in an individual. That is, a legal system can instantiate what Jeremy Waldron calls the unitary model of legislation.[11] Clearly individuals can have intentions and. one might suggest, whatever is true about the proper role of an individual legislator's intentions from a general jurisprudential

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[10]W Eskridge *Dynamic Statutory Interpretation* (Harvard UP Cambridge 1994) 241-252

[11]J Waldron *Law and Disagreement* (Oxford UP Oxford 1999) 42-45

perspective should hold true across all legal systems regardless of whether legislative power is vested in an individual or an institution.

If we aspire to general jurisprudence, it may be true that whatever we conclude about the proper role of legislative intent should hold across all legal systems. Nevertheless, it is important to begin by considering multi-member legislative institutions, since these raise special challenges. We cannot assume that what is true in unitary systems is true for all systems. Indeed, it seems unitary systems ought to be regarded as a limiting case exhibiting special features. I raise this issue not because I think many theorists believe that we ought to reason from the unitary system to the general case, but because many of their arguments tacitly assume that this is so. We must confront the issue of institutional intent head on, without helping ourselves to arguments which only seem plausible under a unitary model. Waldron argues that jurisprudence has often failed to do this, and below we shall look at his proposed remedy.

The questions of if and how institutions can have intentions are unavoidable, so we ought to get on with them. There are at least three possible ways to go. First, institutions might have intentions of their own, intentions that are separate and distinct from the intentions of their members. Second, an institution's intentions might be some function or aggregation of the intentions of its members. Last, institutions might not have intentions at all. Importantly, different institutions might be capable of having different types of intentions, and some institutions might be capable of having intentions while others are not. That is, perhaps corporations and football teams have intentions, but legislatures and families do not. More likely perhaps is that institutions can have intentions when engaged in certain types of behaviour, but not others. It seems plausible that a family has intentions when purchasing a home, but perhaps not when having a fight ('The Smiths intend to purchase a house,' sounds appropriate, but 'The Smiths intend to fight among themselves' sounds odd). I do not want to investigate what types of institutions can have what types of intentions when doing what actions, but I do want to suggest that our argument ought to be specific to legislatures and the act of legislation. We cannot assume that because other institutions can act intentionally legislatures can. Nor, for that matter, can we assume that the intentions of different institutions are similarly constituted.

So our question now is: do legislatures have intentions and, if so, how are they constituted? Let us begin with the first possible answer, that legislatures have

intentions which are separate and distinct from the intentions of their members. There are two ways this might be true. First, legislatures might instantiate a group mind of some sort. I am not really sure what to do with this suggestion; it is fairly mysterious and seems only to multiply our difficulties (what are the minds? how are they constituted?). Few put forth such an answer, so we shall press on. The second possibility is not mysterious; indeed it is plausible. We might have rules or principles by which we assign an intention to a legislature based on aspects of its behaviour. To illustrate, the student judicial system at the University of Georgia has rules regarding when a fraternity will be held to have violated a rule intentionally. Intention will be attributed, for example, if officers of the fraternity were aware of the violation yet took no action to prevent it. Similarly, legal systems can set up rules for construing a legislature's intentions, and indeed many legal systems have such rules. This returns us to Brian Bix's suggestion that 'legislative intent' is just a place-holder which means different things in different legal systems, because different legal systems have different rules for attributing intent to legislatures. Again, I think this may be a valuable way to understand how legislative intent operates in legal communities, but it is unhelpful in understanding normative arguments that we ought to interpret in accord with legislative intent for the reasons outlined earlier. True, we can argue about whether we ought to have this rule or that rule for imputing intention (and we could do so even if we believed as a matter of metaphysics that institutions did not have intentions), but this sort of debate is different from the one we are currently engaged in. We can safely move on to other possibilities.

The second possible answer is that legislatures have intentions which are a function of the intentions of their members. Raz suggests such a view. He argues that the intentions of the members through whom a legislature acts, in most cases a majority, are properly attributed to the institution. Raz's view is a common one, and yet is fraught with difficulty. Legislators composing a majority might diverge in their intentions, and to the extent that they do, we shall need a method of resolving which of their intentions are properly attributed to the whole body.[12] Raz's suggests that legislators enacting legislation generally share a minimum intent which can safely be attributed to the legislature as a whole; we shall examine his suggestion in depth shortly. It may be a way out, but the view has other difficulties as well. First, it seems

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[12]A helpful outline of the difficulties is found in R Dworkin *Law's Empire* (Hart Oxford 1998) 313-327

unnatural in a way: acts of legislation are entitled *Act of Congress* or *Act of Parliament*, and they claim their legitimacy on behalf of the entire institution.[13] Indeed, a common rhetorical strategy for delegitimizing a legislative act is to claim that it was an action taken only by a partisan majority. Now we probably ought not to conclude much from either the rhetoric or the labels applied to legislation—both may be superficial—yet I suspect there is a deep intuition at work behind both.

The intuition is that the actions of members of the majority when legislation is passed are distinct from the action of the legislature. Legislators vote; legislatures enact. If we assign the intentions behind the individual act of voting to the collective act of enacting, then we are transferring intentions which accompany one act to another. There may be justification for doing so from time to time, but in this case, it is troubling for reasons we shall examine below in the context of Raz's arguments. Importantly, I am not denying that there is reason to look to the intentions of certain legislators (eg committee chairs, leaders, members of the majority) when interpretive puzzles arise. Perhaps there is.[14] But I do want to call attention to the transfer of intentions from one act to another, as later I will suggest that it is problematic. We shall return to all of these issues in subsequent sections.

The third possibility is that legislatures may have no intentions at all. Waldron has recently argued that this is true of modern legislatures. He claims that though legislation in a modern democracy is the result of the intentional actions of legislators (ie voting), legislation is not an action accompanied by intentions. He prosecutes his case with a thought experiment making use of a Wollheim machine.[15]

> *The Wollheim Machine*: Suppose that our legislature operates as follows. Each legislator fills out an optical scan card selecting from a menu of options whenever a law is needed. The cards are fed into a machine which, according to predetermined rules, aggregates the votes and produces a decision. The decision is considered enacted law.

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[13]Cf Waldron *above* note 11 at 128

[14]Dworkin believes judges ought to take account of certain aspects of legislative history, not because they are evidence of intent, but because they are political events which ought to be accounted for. See Dworkin *above* note 12 at 342-343

[15]Waldron *above* note 11 at 126-127

Now the machine, in Wollheim's words, 'comes up with what may be called a "choice" of its own.'[16] Waldron argues that though there are many intentions involved—the intentions of the programmers of the machine and the intentions of the legislators making the inputs—there are no particular intentions to enact whatever law the machine produces. Indeed, the machine's product may reflect no individual legislator's intentions at all. The legislation may differ, in each of its provisions, from the intentions of every legislator.

Now our legislatures do not function like this. Or do they? We certainly do not use Wollheim machines to legislate, but neither, argues Waldron, is our legislation 'produced exactly as the product of one person's coherent intention.'[17] Waldron contends that our actual legislative procedures, which involve 'compromise, logrolling, and last-minute amendments,'[18] make the machine picture more helpful in understanding modern legislation than the unitary model on which laws are the product of an individual's intentions. As it so happens, our parliamentary procedures obscure this. Most legislatures have a third-reading and vote on a final product after an amendment stage. This may make it appear that legislators voting for the final text share the same intention, but even if this is so (we shall turn to Raz's arguments about the minimum intent soon), it is a contingent fact about our legislatures that they use such procedures. They could use a Wollheim machine. Or they could have an up-or-down vote on amendments and consider the resulting text law without a third-reading and final vote. In the case of legislatures using those procedures, we would have a great deal of difficulty saying that the legislature had an intention. Legislation would simply be an unintentional outcome of a function of legislators' intentional actions. And even with our third-reading procedures, legislation may be better understood this way.

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[16]R Wollheim 'A Paradox in the Theory of Democracy' in P Laslett and WG Runciman (eds) *Philosophy, Politics and Society* Second Series (Blackwell Oxford 1969) 71-87, 76

[17]Waldron *above* note 11 at 127

[18]Waldron *above* note 11 at 127

Legislatures, Waldron cautions, are artificial actors.[19] It is a mistake, he suggests, to assume that because we attribute agency to legislatures their actions share all of the features of personal action. He notes, for example, that 'few would say that legislatures... have motives as well as intentions.'[20] In light of this, Waldron asks

> ... why insist on a correlate intention at all? Why not simply say that the act of a legislature is an artificial resultant of the acts of individual legislators, structured and related to one another through certain procedures, decision functions and perhaps machines? Why not say that while each of the latter actions—the individual actions—is of course the product of an intention, the resultant action—the action of the legislature itself—need not be?[21]

I am partial to Waldron's view that there is no intention accompanying a multi-member legislature enacting law. Each of our other alternatives, that legislatures have intentions distinct from the intentions of their members, or that the intentions of members are the intentions of the legislature, faces grave difficulty. Moreover, adopting the unintentional view of legislation has, in my view, no theoretical cost, but this is an issue we shall return to later. In any case, our goal here is not to resolve if and how legislatures have intentions, but simply to put the possibilities on the table. This task is complete, so we can turn to Raz's arguments.

3. RAZIAN AUTHORITY AND LEGISLATIVE INTENT

Raz argues that fidelity to legislative intent is an important standard for evaluating judicial interpretations, because of the nature of law's authority.[22] Raz proposes and rejects the *radical intention thesis* (hereafter RIT):

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[19]Waldron *above* note 11 at 128

[20]Waldron *above* note 11 at 128

[21]Waldron *above* note 11 at 128

[22]J Raz 'Intention in Interpretation' in R George (ed) *The Autonomy of Law: Essays on Legal Positivism* (Clarendon Oxford 1996) 249-286. Andrei Marmor offers a similar argument in *Interpretation and Legal Theory* (Clarendon Oxford 1994) 155-184.

> An interpretation is correct in law if and only if it reflects the author's intentions.[23]

Raz rejects the RIT with little more than an appeal to other theorists' rejections of it. He replaces it with the *authoritative intention thesis* (hereafter AIT):

> To the extent that the law derives from deliberate law-making, its interpretation should reflect the intentions of its law-maker.[24]

The AIT is vague, and it is unclear how it differs from the RIT. One important difference is that the AIT adds the condition that interpretations need only reflect intent insofar as the law is created deliberately. This condition might seem to open the door to arguments that judicial interpretation need not reflect legislative intent, because as Waldron argues, legislation is unintentional. Raz rejects Waldron's arguments, and thus the deliberate-creation condition in the AIT is differently motivated.[25] Raz is driving at an exception for customary law, and perhaps for common law and constitutional law as well; he maintains agnosticism as to whether or not common law and constitutional law are more like legislation or customary law as pertains to the appropriate role for intent in interpretation.[26]

Raz's argument for the AIT is both simple and powerful. He argues that in order to make sense out of the fact that a person or body has authority over the development of the law, it must be the case that the law they make is the law they intend to make. He writes

> To give a person or an institution law-making power is to entrust them with the power to make laws by acts intended to make law, or at least undertaken in the knowledge that they make law. It makes no sense to give any person or body law-making power unless it is assumed that the law they make is the law they intended to make. Assume the contrary. Assume that the law made through legislation bears no relation to the law the legislator intended to make. For this assumption to be

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[23]Raz *above* note 22 at 257
[24]Raz *above* note 22 at 259
[25]Raz *above* note 22 at 282n10
[26]Raz *above* note 22 at 259-260

> at all imaginable the legislator must be unaware of what law will be made by his actions. If he can predict that if he does one thing tax will be raised by a certain amount, and if he does another thing tax will be cut by a certain amount, for example, then he will take the action which will have the effect he wants to have—that is the law he makes will be the law he intends to make.[27]

Raz's point is simply that it makes no sense to give a person or institution the authority to change the law unless the changes the person or institution makes are the ones they intend to make. If the law does not bear this relation to the intentions of its creators, Raz asserts, the identity and method of selection of legislators would be entirely irrelevant.[28]

The AIT plays a legitimating role on Raz's analysis. Only insofar as legislation is interpreted in accord with the intentions of the law-maker can its validity rest on the law-maker's authority. Law may be legitimated in other ways, and thus it may sometimes be proper to interpret in ways that do not reflect legislative intent. However, where legislatures are given authority over the development of the law, the AIT provides a rationale for interpreting in accord with legislative intent.

We can understand Raz's argument (though this is probably not his understanding) as claiming that the purposes judges and others in the legal system have for interpreting statutes justify evaluating their interpretations based on fidelity to legislative intent. A judge, on this view, interprets law to find out what changes the legislature intended to make in the law Only if a judge does so can the legislature make the law it intends to make, and we must assume that the legislature can make the law it intends to in order to make sense out of its authority. This type of argument is precisely the type necessary to justify an evaluative standard for interpretations. It argues that judges ought to have a certain purpose in interpreting because of their role within a legal system and that this purpose justifies evaluating interpretations for their

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[27]Raz *above* note 22 at 258

[28]Raz *above* note 22 at 258-259. Raz is wrong about this because, as I argue below, we can justify our legislative procedures in another way—by showing that they are good procedures to use to make law, even if the law so made is not the product of an intent to make that particular law. The inputs to the process are in no way irrelevant, nor are the identity of the legislators. The identity of the legislators may be an important part of the justification of the procedure. See *below* 183-189.

fidelity to legislative intent. In the sections to follow, I shall raise many doubts about Raz's argument, but first, we must investigate its content and conclusions further.

The minimum intent

So far we have said only that the AIT suggests that to the extent that the validity of a law rests on the authority of its law-maker it ought to be interpreted in accord with the law-maker's intention. It is time to flesh out what Raz means by 'in accord'. The AIT provides a rationale for deferring to the intentions of the law-maker, and in most modern legal systems, the law-maker is a multi-member legislature. Remember Raz argues that because legislatures operate through portions of their memberships, usually majorities, the intentions of the members they act through are properly attributed to the legislature as a whole.

Raz argues that legislators typically have a minimum intent when they are legislating. He describes the minimum intent attributable to a legislator as

> an intention that the text of the Bill on which he is voting will—when understood as such texts, when promulgated in the circumstances in which this one is promulgated, are understood in the legal culture of this country—be law. [29]

The circumstances referred to include the interpretive conventions of the legal community.[30] The idea is that any legislator, when voting on a bill, must intend to enact as law whatever the text of the bill communicates according to the reigning interpretive conventions. Judicial deferral to the minimum intent is sufficient to satisfy the legitimating role of the AIT, as it allows the legislature to make the law it intends to make.

How does a judge defer to the minimum intent? Raz argues that the AIT, while not providing a full method of interpretation, 'refers the courts to the conventions of interpretation prevailing at the time of legislation.'[31] The AIT provides a meta-interpretive convention of sorts that picks out a particular set of interpretive

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[29]Raz *above* note 22 at 267
[30]Raz *above* note 22 at 269
[31]Raz *above* note 22 at 271

conventions, but places no limits on their content. In a note, Raz points out one possible exception: the conventions of a legal community may be that all laws are to be interpreted according to the currently prevailing conventions and not according to the conventions in force at the time of enactment. This, Raz argues would be 'inconsistent with the rationale of the doctrine of authority,'[32] and hence in legal communities with such a convention, the validity of law could not rest on the authority of the legislature. In the normal case, judicial interpretation is consistent with the doctrine of authority if it defers to the minimum intent by interpreting laws in accord with the interpretive conventions in force at the time of enactment. Now that we have seen how Raz supports the AIT and what it requires of judges, we are ready to turn to questions about his argument.

The minimum intent, part two

The AIT is a result of the need for agents with authority over the development of law to be able make the law they intend to make. The minimum intent Raz suggests legislators normally have when voting on a bill is that its text, as it will be understood in the legal community, become law. This intent is only sufficient to guarantee that legislators can make the law they intend to make if they are able to predict how the text of a bill will be understood in the legal community. Raz recognizes this and suggests that legislators with the minimum intent can do so. He says, 'All they have to do is establish the meaning of the text in front of them, when understood as it will be according to their legal culture assuming that it will be promulgated on that occasion.'[33] I want to raise a number of doubts about legislators' ability to do so, doubts I will argue undermine the legitimating function deference to the minimum intent is supposed to serve.

As William Eskridge notes, legal scholars who have participated in the legislative process are scornful of the idea that legislators are familiar with the prevailing judicial conventions of interpretation.[34] He quotes Abner Mikva, who served as a member of the U.S. House of Representatives, as a federal judge, and as

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[32]Raz *above* note 22 at 285n25

[33]Raz *above* note 22 at 267

[34]Eskridge *above* note 10 at 231. Eskridge argues against Justice Scalia's assertion that the belief that legislators are aware of judicial interpretive conventions is a benign fiction which legitimates Scalia's brand of textualism.

White House Counsel, as reporting, 'When I was in Congress, the only "canons" we talked about were the ones the Pentagon bought that could not shoot straight.'[35] Further, Eskridge writes

> Members of Congress and their staffs are not omniscient about legal rules, and the nature of the legislative process often gives them incentives to focus on particular problems and not on future issues of interpretation. A member cutting deals in order to gain enough votes to secure enactment of her bill is relatively uninterested in how that will be 'integrated' into the larger corpus of law, or in the wisdom of prior judicial interpretation of a provision she is borrowing. Often she has a positive incentive to suppress these facts, since they may raise problems with her bill which could defeat it.[36]

All of this leads Eskridge to conclude that the view that legislators are aware 'of the canons of statutory construction (including grammar and punctuation rules) that might be applied to the statute, and of the surrounding legal terrain into which the statute must be integrated'[37] is at best a fiction, and perhaps not a benign one. Of course, Eskridge's point is only that legislators are actually unaware of such conventions, not that they cannot become aware of them should they try. Arguably, possibility is all Raz's argument requires. However, it is hard to see how the minimum intent plays its legitimating role if legislators do not actually know what law they are making on most occasions. Should we say, 'we ought to defer to the legislature's intent, because legislators could have known what law they were making?' That strikes me as odd, but as it turns out, even the possibility of legislators establishing how the text they are voting on will be understood is in question.

At few times, if any, in the history of any legal community, have interpretive conventions been either generally settled or comprehensive. While some conventions may be repeatedly invoked, and thus achieve the status of canons, many others are the subject of vigorous debate. Moreover, canons are frequently ignored, and they often

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[35]Eskridge *above* note 10 at 231, quoting A Mikva 'Reading and Writing Statutes' (1987) 48 *University of Pittsburgh Law Review* 627, 629

[36]Eskridge *above* note 10 at 231

[37]Eskridge *above* note 10 at 231

conflict with each other.[38] Where a community's method of interpretation is contested, as it likely has been at most times and places in history, legislators will have difficulty predicting how laws the legislature enacts will be understood.[39] What is the upshot of this for Raz's argument? Deference to the minimum intent allows a legislature to make the law it intends to make. To the extent that legislators lack the capability of obtaining the requisite knowledge in order to justify forming the minimum intention, it will not make sense to refer to that intention. Hence, the legislature will be unable to make the law it intends to make in such circumstances, and the validity of law so created cannot rest on the authority of the legislature.

The minimal intent, part three

Another problem with attributing the minimum intent to legislators is that it is clear that law often gets made without it. This is because enacting legislation is often not what legislators are aiming at through their actions. I may know that if I do perform an act, something is a likely consequence, but this does not make it the case that bringing about that consequence is part of my intention. For example, I may know that if I tell you your breath smells, it will offend you. Still my intention may be to prevent you future embarrassment. The offence would be but a side-effect, and I may hope that you not take offence. An extreme case: If a legislator intends to force (in the American system) a Presidential veto which he thinks will be valuable in the next election, he is precisely intending that the bill he is voting on not become law. He

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[38]The classic exposition of the flexible nature of canons is K Llewellyn 'Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed' (1950) 3 *Vanderbilt Law Review* 395. Llewellyn may have overstated the degree to which canons are flexible. See A Scalia *A Matter of Interpretation* (Princeton UP Princeton 1997) 26-27. Eskridge *above* note 10 presents a useful discussion of canons and their resurgence in the Rehnquist court.

[39]The difficulty will vary in degree. In some cases, it might be nearly impossible to predict how judges will interpret a text; in others the uncertainty may be less radical. Certainly legislatures can receive advice from professional draftsmen or lawyers as to how bills are likely to be interpreted, and this may mitigate the difficulty. Moreover, controversy within a legal system over interpretive conventions may take a form which allows legislators to predict how their laws will be understood provided they are able to draft texts robust enough to retain the same meaning no matter which of the competing conventions is adopted. In some cases, however, this will not be possible because the conventions will be in tension, and in other cases, there may be no conventions at all.

knows that it might become law, but this does not means he intends it. A less extreme case: A legislator votes for bill X in order to secure somebody else's vote for bill Y. He knows that a possible consequence of his act is that X will become law, but must he intend it? Must I intend you to be offended, just because I am doing something that might offend you? Of course not. Legislators may know that as a result of their action a certain bill might become law contingent upon the actions of many others, but this does not require that they intend it to become law.

Indeed, because of the fact that a member's vote only serves to enact law contingent on the actions of many others, individual legislators in multi-member bodies cannot sensibly have intentions to enact laws. They have intentions to vote for bills, knowing that their vote may contribute towards them becoming law, but this is not the same as having an intention to enact law. In order sensibly to have an intention to do something, one ought to have the causal efficacy to bring it about.[40] No legislator, on her own, has the causal efficacy to enact legislation. This calls into question the attribution of the minimal intent to legislators across the board. Though a legislator voting for a bill may hope to make law, it is not clear that she can intend it; it is simply beyond her capability.

In any case, the minimum intention, if it is coherent, is lacking in many cases—cases in which a legislator is hoping that the text she is voting on not become law. Such cases are not unimportant; much law gets made through compromise and vote-trading. If there is reason to believe that legislation has been made despite the absence of the minimum intent on the part of many legislators (how many is a difficult problem Raz must confront), then on Raz's analysis its legitimacy cannot rest on the authority of the legislature.

The big picture

So far we have seen a number of problems with Raz's recommendation that judges meet the AIT by deferring to the minimum intent. First, legislators may not possess, or even be capable of acquiring, the knowledge necessary to justify deference to the minimum intent. That is, they may not be able to know how the text they are voting

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[40]One may intend something one does not have the causal efficacy to bring about because one mistakenly believes that ones does; however the intention in this case is not a sensible one.

on will be understood by their legal community. This does not undermine Raz's argument, but it does mean that whenever legislators lack the capability to acquire this knowledge, the legitimacy of the law cannot rest on their authority, at least if Raz is right. Second, many legislators lack the minimum intent when voting for a bill, and such instances are too common to be dismissed as deviant. It is hard to ascertain the consequences of this for Raz's argument. The imputation of the intention of members of the majority to the legislature depends on a shared intention. Without a shared intention to impute to the body, we are returned to an aggregation problem. Raz's minimum intent is meant to circumvent this, because it is supposed to be shared. But in any legislative majority enacting legislation, it is conceivable that some members, perhaps many, lack the minimum intent. True, these members will be intentionally voting for the bill, but they can do so without the intent that it become law, hoping perhaps that it does not. How many in a majority can lack the minimum intent before it ceases to be acceptable to impute it to the legislature as a whole? No easy answers are forthcoming, and this is a problem an advocate of Raz's view must solve. The last problem with Raz's argument is potentially more serious than the first two, and again it involves the transfer of the intention attendant the individual act of voting for a bill to the collective act of enacting it. The transfer is worrisome, because the minimum intent which Raz attributes to legislators, and hence to legislatures, may not be one that legislators can sensibly form. Legislators do not generally have the causal efficacy to enact legislation. They can vote for a bill, and thus contribute to it becoming law. But it can become law contingent only upon the action of others. Thus, there is reason to doubt that legislators can form the minimum intent at all.

Collectively these problems ought to give us serious pause about Raz's arguments. What seemed at the outset simple and powerful grows ever more confusing, and ever less persuasive, the further into the details we get. So let us return to the big picture and see if we can figure out what has gone wrong. We shall begin by looking again at Raz's argument for the AIT. He writes

> To give a person or an institution law-making power is to entrust them with the power to make laws by acts intended to make law, or at least undertaken in the knowledge that they make law. It makes no sense to give any person or body law-making power unless it is assumed that the law they make is the law they intended to make. Assume the contrary. Assume that the law made through legislation bears no relation to the law the

> legislator intended to make. For this assumption to be at all imaginable the legislator must be unaware of what law will be made by his actions. If he can predict that if he does one thing tax will be raised by a certain amount, and if he does another thing tax will be cut by a certain amount, for example, then he will take the action which will have the effect he wants to have—that is the law he makes will be the law he intends to make.[41]

Raz's argument seems reasonable at first blush, yet there is a significant flaw. The argument only seems persuasive because it focuses, in the crucial latter half, on a *legislator* and not a *legislature*. That is, it presumes a unitary model of legislation.[42] If I know that if I do one thing, taxes will go up, and if I do another, taxes will go down, I will take the action that will have the effect I desire. But suppose I am one among many legislators, that is I am part of a legislature. Now the calculus changes. I may know that if I do one thing, my action will contribute towards taxes going up, and if I do another, it will contribute towards taxes going down. I may vote for a bill I think will have the impact I desire, or I may simply feed my preferences into a Wollheim machine, depending on the particular legislative procedures. In any case, my action is not fully determinative of the result. In order to make sense of my role within the legislative process, we need not assume that the law which gets made with my input is the law that I intend to make, just that my action contributes to the result as I expect it will. Interestingly, under certain legislative procedures I may contribute towards the outcome I desire by *not* voting for it, by voting strategically for another, perhaps more extreme, option. In such a case, I would not intend the result I voted for, but would instead intend to bring about a different result, further confounding the argument for the minimum intent. All this makes clear that we need not assume that the law which gets made reflects the intentions of any legislator; it can simply be a function of their intentional actions.

What about legislatures? Need we, in order to make sense of the authority of a legislature, assume that it can make the law it intends to make? Only if we assume

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[41]Raz *above* note 22 at 258

[42]One might think that 'legislator' is ambiguous between individuals and institutions—that Congress, for example, is the legislator in America. Even if this is true, Raz uses the pronoun 'he' in referring to the legislator in question, and thus it does not seem that he is making an argument about legislatures. Nevertheless, Raz's argument does not work as an argument about legislatures, and this is all that matters.

that the legislature has intentions to make law, and we need not. We can justify a legislature's authority by justifying making decisions as a function of the intentional actions of legislators. We have no need of recourse to a legislature's intent. This issue is the subject of the next section.

4. THE LEGITIMACY OF UNINTENTIONAL LEGISLATION

Raz argues that we cannot make sense out of according authority to a legislature to control the development of the law if the legislature cannot make the law it intends to make. The assumption here, of course, is that legislatures have intentions when they legislate. As we saw earlier, this assumption is eminently contestable. My goal in this section is to show that we can make sense of according authority to legislatures, even if their actions are not accompanied by intentions.

Waldron offers three arguments aimed at showing that legislation produced as a function of legislators' intentional actions can fulfill Raz's test for legitimacy, the normal justification thesis, even if the legislature lacks an intention. He offers an argument from utilitarianism; an argument based on Condorcet's jury theorem; and two versions of an argument based on Aristotelian Synthesis.[43] Remember, the normal justification thesis is fulfilled for an individual if following the directives of a putative authority will help her better to comply with the reasons which apply to her than she would otherwise. Briefly, the idea behind Waldron's utilitarian argument is that voting in a legislature can aggregate people's preferences and judge utility better than any individual could on her own. Condorcet's jury theorem shows that if a group of people all have a better than even chance of reaching the right answer to a question with binary options, then a vote will be more reliable, will have a greater probability of reaching the right answer, than any individual deliberating on her own. Waldron presents an individual and group version of the argument from Aristotelian Synthesis. On the individual model, the idea is that by participating in the deliberations of the legislature each individual forms better opinions than she could have otherwise, opinions then reflected in the resulting legislation. The group model, which most clearly establishes satisfaction of the normal justification thesis if true, asserts that the group achieves a better opinion through deliberation which is reflected in legislation, though the opinions of members may not be improved. Raz does not discuss

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[43]Waldron *above* note 11 at 133-138

Waldron's three arguments, but he indicates in a note that he finds them all implausible.[44] This is unfortunate, because if any of Waldron's arguments go through, then we would have reason to accord authority to legislation regardless of whether or not it was accompanied by an intention.

Nevertheless, I do not want to focus on Waldron's arguments. Whether or not they are all implausible, as Raz claims, each faces significant challenges. To my thinking, Waldron takes the wrong approach. As we saw in Chapter Five, authorities can be legitimate even when they fail the test the normal justification thesis sets out, because they can be legitimate on procedural grounds. To make sense of the authority of legislatures, we need not assume, as Raz contends, that they make the law they intend to make, but only that the way they make law is a good way to make law. We need only justify the procedure of legislation as a method of making collective decisions about what we ought to do. It follows that if we have reason to treat the results of fair democratic procedures as binding, and if we believe that our legislatures embody such fair procedures, then we have reason to hold the resulting legislation as authoritative irrespective of whether or not the institution has an intent. I am tempted to stop here, but shall instead present a number of examples which further buttress the case that it can make sense to regard unintentional results of people's intentional actions as legitimately authoritative. I should make clear that none of the following examples are examples of legislative procedures. They are, however, examples in which decision functions operating on people's intentional actions create protected reasons for action. Exploring them will help to show that authority can be legitimated by justifying a process even where the outcome is not intended by anyone.

(A) The Colours of M & Ms

The makers of M & M candies are rumoured to apportion the contents of each bag according to the preferences of consumers. Each bag contains a percentage of brown, green and red M & Ms in proportion to the percentage of people who claim that colour as their favourite. Imagine that the company holds a vote online, allowing consumers to register their favourite colour M & M in an effort to reapportion the contents of each bag. I would vote for brown. In voting brown, I register my favourite M & M colour as brown, and I expect that my vote will count towards

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[44]Raz *above* note 22 at 282n10

including a proper percentage of brown M & Ms in each package. But the result of the vote—say that 53 percent chose brown, and hence the bags will contain 53 percent brown M & Ms—was not intended by either me or any of the other voters. But assuming there is good reason for the M & M manufacturers to make their decision this way as opposed to any other, they have reason to regard the result as authoritative. That is, they have reason to treat the results as providing them a protected reason to apportion M & Ms according the resulting percentages, irrespective of the fact that no person or institution intends the specific outcome reached.

(B) Cumulative Voting

Lani Guinier argues that the fairest method of electing representatives to the United States Congress is a system she calls cumulative voting.[45] Under a cumulative voting system, if a state is electing 11 representatives, each voter in the state has 11 votes to cast. A voter may apportion them in any way she wishes, voting 11 times for one candidate, or once each for 11 candidates. She may even vote for one candidate twice, one candidate three times and another six times. The eleven candidates with the most votes are elected. Let us assume for the sake of argument that Guinier is correct in claiming this is the fairest system to use. Under a cumulative voting system, it is possible that the slate of representatives chosen will not be identical to anyone's ballot, that is to say no one may have apportioned one vote apiece to each winner. No one went to the poll with the intention of bringing about the actual outcome of the election. Yet, if this system is the fairest to use, we have reason to regard the result, an unintentional function of people's intentional action, as authoritative. Further, even if one voter, a few, or many did vote for the slate of winners, this is inconsequential. The result of the election would still be an unintentional function of people's intentional actions.

One might object that this example is misdescribed. The objector would say that there were 11 outcomes to the election and that each one was intended by the people that voted for that candidate. While plausible, this objection fails. First, I find it hard to believe that any voter participating in a large election *intends* a particular outcome, rather than merely hoping for or expecting one. Intending a candidate to

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[45]L Guinier *Tyranny of the Majority: Fundamental Fairness in Representative Democracy* (The Free Press New York 1995) 149

win by your vote is like intending a baseball team to win by your cheer; you may have a small impact, but it is too negligible to intend your cheer to bring about a victory sensibly. The intention to contribute to an outcome is not the same as intending the outcome. As we have seen before, it makes no sense to intend what one has no causal efficacy to bring about.

There is a minimal intent we might be tempted to attribute to voters. Suppose I vote for Mike under a cumulative voting system choosing 11 representatives. I might be said to intend that, if Mike is tied for eleventh place after everyone's vote but mine has been counted, my vote elect him. Yet, I might not. I might be dubious of my judgement and intend that Mike only be elected if a lot of other voters agree with me. I might not want the responsibility of being the tie-breaker, though I do desire to express my opinion that Mike would do a good job. I might have promised Mike that I would vote for him, but be hoping that he loses. Again, we have a case where I do not have to intend something just because it is (in this case an almost im)possible outcome of my action. It might be sensible for me to have this minimal intent; perhaps it is wrong to vote if I do not. Nevertheless, this is a far cry from it being the case that I must have it. More importantly, this intent, that my vote should break a tie, is not the intent that Mike win, which is what would be needed to show that someone intended the result. The intention that one contribute to someone's winning an election is not the intention that she win. Nor is there any reason to regard my intention and the intention of the like-minded voters as the intention of the entire electorate. Despite the fact that no one intends the result of the election, if the system is the fairest available, we have reason to use it.

The M & M election and cumulative voting examples, I think, are sufficient to illustrate that we can have reason to treat an unintentional result of intentional actions as legitimately authoritative. However, we can do even better. The following story takes advantage of a mathematical puzzle that allows people under certain circumstances to vote on a question about which as individuals they have no better than a random chance of being right and to achieve the correct answer with a high degree of accuracy.

(C) The Case of the Swingers' Convention[46]

Swingers, to my understanding, are married people who share sexual partners. Swingers' conventions are gatherings of such people. This tawdry social scene forms the setting for our last example.

> Suppose a group of swingers at a convention is trying to decide whether or not to retire for the evening's sexual activity. They only want to retire if an even number want to retire, because they do not wish anyone to be left without a partner (and, we assume, our swingers are only interested in one-on-one encounters). If there are an even number in the group who want to retire, that subset will (let us also assume, for the purposes of this example, that all our swingers are bisexual). If there are an odd number of people who want to retire, nobody will. Let us also assume that each person in the group is present with their spouse, but that spouses are generally not honest with each other about whether or not they want to begin a sexual liaison with someone else. Spouses try to anticipate what their partner might say and adopt that as their answer when queried by their partner, though they will be honest with people they are not married to. Spouses will also not answer honestly to a non-spouse, if they believe their answer will be revealed to their spouse before a decision is made. Let us further suppose that our group has no writing implements available, so that people's preferences cannot be written down and counted anonymously (nor do they have any other means of doing so). It follows that there is no one in the group who can poll everyone to decide if there is an even number who are ready to retire, because no one can trust their spouse's answer. Is there any way to decide the question?

Due to a peculiar mathematical result, yes.[47] First, each member of the group should poll every member of the group aside from their spouse. Now notice, after they have done so, no one has gained any information about whether or not there are an even or odd number of people who want to retire. The answer depends on each spouse's preference, and since nobody has information about their spouse's

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[46]I am grateful to quantum information theorist Patrick Hayden for introducing me to this mathematical phenomena, though I must sheepishly accept responsibility for developing the swingers' convention interpretation of the insight.

[47]J Aspnes, R Beigel, ML Furst and S Rudich 'The Expressive Power of Voting Polynomials' in *ACM Symposium on the Theory of Computing* (1991) 402-409

preference, no one has improved their chances of guessing the right answer beyond the chance of guessing randomly (after the poll, they still have just a 50% chance of guessing right). But through a peculiar voting procedure, they can solve the problem together. First, each person assumes that his or her spouse is in the majority based on the poll he or she conducted. If one adds one's spouse to the majority and this produces an even number of people who want to retire, one should vote even. If not, one should vote odd. Now it so happens that if everyone votes in this manner, the correct answer (whether or not there are an even or odd number of people who want to retire) will almost always be reached (it only fails when the group is actually tied).

This is the best way our swingers have of making a decision, and they have reason to treat the result as authoritative. Yet, no one intends the result when they vote. They intend to make their contribution to the mathematical function which will determine the right answer with a great degree of accuracy. They intend the right answer to be reached, not the one they voted for. The results of the vote are legitimately authoritative for the members of the group, even if we hold the decision to the strict standard of the normal justification thesis. Each will do better following the results of this procedure than by making the decision on their own. Granted, this is a highly contrived example, but it shows clearly that a decision made as a function of people's intentional actions can be legitimately authoritative though no one intends the outcome.

Now the point here is not that we face game theory problems which democratic procedures help us to resolve. I am aware of no such reason to be committed to democratic procedures. The reasons we have to be committed to democracy are those canvassed in Chapter Five—autonomy, respect, and the consequential value of such procedures. All I have been trying to show here is that regarding unintentional functions of people's intentional actions as authoritative is not always a silly thing to do. I think it is far from silly when the values at stake are the ones which motivate democracy.

In a way, I am turning conventional wisdom on its head here. The standard (and bad) argument offered about legislative intent and democracy is that it is

undemocratic not to interpret statutes in accord with legislative intent.[48] I am arguing almost the opposite—that the values which support democracy give us reason to regard legislation produced through democratic procedures as authoritative irrespective of whether or not there is an intent accompanying the legislation.

Where does this leave Raz's arguments for the AIT? His premise is wrong. In order to make sense of the authority of legislatures, we need not assume that the law they make is the law they intend to make. They may have no intent. All we need to do in order to make sense of the authority of legislatures is show that the procedures they use are good ones for making the types of decisions they make. That we can do. Thus we need not defer to legislative intent in order to make sense of the authority of legislatures.

5. DISTRIBUTED AUTHORITY

Raz argues that legislatures must be able to make the law they intend to make in order to make sense of their authority. I have argued that we can make sense of their authority in another way, by justifying the procedures they use to produce legislation. I want here to focus on a different reason for doubting that the AIT is true, for doubting that law has to be interpreted in accord with the intention of the legislature which wrote it. Authority to control the development of the law may not be vested entirely with a legislature. Authority may be distributed across institutions in a legal system. Incidentally, I believe Raz agrees with this, but nevertheless it undermines his conclusions about legislative intent.

Some political systems have a separation of powers. The normal description of how powers are assigned designates law-making functions to legislatures; however, this description has always been naive and may obscure the real locus of law-making authority. In Anglo-American legal systems at least, the authority to make law appears to be distributed across different institutions. I am not just making the banal

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[48]The argument is bad, in part, because of the unwarranted assumption that only legislatures are representative institutions. In many communities judges are elected, and where they are not, they are often selected by elected officials. Representativeness is probably a matter of degree. The relationship between judges and electorates warrants further investigation, and the nature of the relationship in any given community would certainly play some role in determining how judges ought to interpret in that community.

point that sometimes legislatures make law and sometimes courts do, as in the case of common law. I am making the stronger point that it is conceivable that in some legal systems, and it is perhaps the case in ours, that legislatures only play a partial role in making any law and that judges complete the job.

Let me elaborate. The legislature has a role to play in the making of law, an important role, but a limited one. It fixes the text that the courts will then interpret and apply. The courts have a role to play in law-making too. In exercising authority over the application of a statute, they contribute to the meaning that statute bears in the legal system. There is nothing to prevent a legal system for distributing authority in this way. Even though the authority is distributed across institutions, what is going on is analogous to the distribution of authority within a legislature.

Committees often have the authority to introduce a text for consideration and to promulgate the rules under which it will be considered by the whole body. This authority limits what the whole body can do, but the resulting legislation may not represent the intentions of the committee (assuming here that multi-member legislative committees have intentions). Make no mistake, this is a sort of authority. The committee's promulgation of a text, under the rules of the legislature, often provides a protected reason to begin debate over that text as opposed to beginning debate over another text. This exercise of authority shapes significantly the resulting legislation. In many systems, it is difficult to change substantially a committee's proposal. Though a committee, say the Agriculture committee, does not have full authority over the development of agricultural law in a community, it may nevertheless have partial authority. Likewise, the legislature promulgates a text, and this limits what judges can do (because texts constrain their own interpretations). But the story does not have to end with the legislature or its intentions, as judges may have partial authority over the law making process as well.

Recall that Raz's strategy in arguing for the AIT is to offer a reductio of sorts. He suggests we, 'assume that the law made through legislation bears no relation to the law the legislator intended to make,'[49] and argues that if we do so we cannot make sense out of giving the legislature authority over the development of the law. This assumption is a questionable starting point, as the options are not binary. The legislature can make the law it intends to make, the law it makes can bear no relation

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[49]Raz *above* note 22 at 258

to what it intends to do, or the law it makes can bear some relation to what it intends to do, without being fully determined by it. Of course, I do not find this talk of legislative intention attractive for the reasons outlined above and would put the point somewhat differently. Texts constrain their interpretation, and the ability to enact texts affords significant authority over the development of the law, even if it does not afford full authority.

We can draw a helpful analogy with literature. An author has control over what her text will be—she writes it. Her text constrains what interpreters can do with it, but it does not fully determine the understandings readers can justifiably have of it, nor should it. Readers' understandings will appropriately be sensitive to all kinds of factors outside the control of the author. Importantly, we need not interpret in accord with an author's intentions to justify reading their work; there are all kinds of good reasons to read literature other than discovering the understanding an author wished us to have. I care much about Shakespeare's plays, and they enrich my life, though I care little about how he intended his readers to understand them. The very same can be true of law. There may be other reasons for reading legal texts besides finding out what law a legislator or legislature intended to make. One possible reason is that democratic legislative procedures are a good way to produce legal texts. Believing this, and believing that judges ought to interpret these texts, and hence be constrained by them, does not entail believing that judges ought to regard fidelity to legislative intent as a criterion for success in interpretation.

Conclusion

The debate over the role of legislative intent is unwieldy and often confusing. We have examined only a small corner of it here. Raz argues that, in order to make sense of the authority of legislatures, judicial interpretation ought to reflect at least the minimum intent he outlines. We have seen a number of reasons to doubt this. First, legislatures might not have intentions. Second, we can make sense of the authority of legislatures by justifying the procedures they use, rather than assuming that they make the law they intend to make. Last, authority over the development of the law may be distributed across different institutions. Raz fails to establish a conceptual link between the authority of legislatures and the use of fidelity to legislative intent as a criterion for judging interpretations. This does not mean that fidelity to legislative

intent, if such a thing exists, is not an important criterion for judging interpretations. Other arguments may show this, but Raz's do not.

CHAPTER SEVEN

CONSTRUCTIVE IDENTIFICATION AND DWORKIN'S BEST LIGHT

Some theorists argue that what the law is depends in part on what the law should be. Moreover, they believe the identification of valid legal norms partially depends on their merit. If this is true, in order to figure out what the law is, we have to think about what would be good law. We will adopt Andrei Marmor's terminology, and say that any interpretive method which, in any way, makes the identification of law dependent on evaluative considerations engages in *constructive identification* of law.[1] Interpretive methods may differ in the degree to which they make the identification of law dependent on evaluative considerations. In the extreme, we could interpret legal texts as promulgating whatever legal norms it would be best to have. On this view, a strong natural law view, the law is whatever it should be. The hard or exclusive variety of legal positivism occupies the other extreme, holding that evaluations of merit play no role in the identification of law. According to hard positivists, law cannot be constructively identified. There are also views in the middle, views on which the identification of law partially depends on evaluations of merit. Ronald Dworkin, for example, ascribes an important role to evaluative considerations without holding that they alone determine what counts as law. This chapter examines Dworkin's approach to interpretation and objections to it, but it can equally well be understood as an exploration of the compatibility of constructive identification with law's authority. Though we shall focus on Dworkin, our conclusions will hold for all interpretive methods which occupy the middle ground.

To start, I shall present the interpretive method Dworkin introduces in *Law's Empire*, paying special attention to his suggestion that an interpreter is required to show an object in its best light. This requirement is what makes Dworkin's

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[1] A Marmor *Interpretation and Legal Theory* (Clarendon Oxford 1992) 105

interpretive method an instance of constructive identification. After we have examined Dworkin's method, we shall turn our attention to a series of objections to the constructive identification of law which, if successful, would undermine Dworkin's approach and others like it. The first objection purports to show that the constructive identification of art is ruled out by conceptual concerns and hints at an analogy with law. The second argues that the constructive identification of law is inconsistent with law's role as an authority. I shall argue that both objections fail, but considering them in detail will help us to sharpen our understanding of the relationship between authority and interpretation.

1. DWORKIN'S CREATIVE INTERPRETATION

I shall describe the process Dworkin calls 'creative interpretation', which he maintains is the type of interpretation we engage in when we interpret works of art, literature, and music, and when we interpret social practices.[2] This is in opposition to what he calls 'conversational interpretation', which is the type of interpretation we use when deciding the meaning of what someone says. There are difficulties with drawing the boundary this way, and I am not sure there is reason to draw any boundary at all, as we have seen in earlier chapters that we can have a unified account of interpretation. Nevertheless, on this model, legal interpretation is an instance of creative interpretation.

Dworkin uses the social phenomenon of courtesy to introduce his theory of interpretation, and it will help us to use it as an illustration as well. Imagine people debating about what courtesy is and what it requires in their society. Such debates are familiar. Does courtesy require that we tip bartenders? Hairdressers? Does it require that we yield right of way on sidewalks to elderly pedestrians? If so, does it also require that we yield right of way on highways to elderly drivers? When we debate such questions, we are not just arguing over what people do, but what it is appropriate for people to do. Further, our conceptions of what courtesy requires change. Dworkin argues that the concept of courtesy itself gives us guidance in determining what it requires apart from what we currently do in its service; courtesy can require actions we do not currently recognize or accept as required by courtesy.

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[2]The following account is distilled from RM Dworkin *Law's Empire* (Hart Oxford 1998), hereafter LE.

Dworkin explains these features of courtesy by arguing that courtesy is an interpretive concept. Before we begin, we should note that Dworkin's explanation of these phenomena is not the only explanation. Conventionalists, for example, would offer a different explanation. Our goal here is to evaluate how Dworkin's account fares on its own, so we shall leave other explanations aside. An interpretive concept is defined by an attitude people take towards it, which Dworkin calls the *interpretive attitude*. The interpretive attitude has two components. Dworkin writes

> The first is the assumption that the practice of courtesy does not simply exist but has value, that it serves some interest or purpose or enforces some principle—in short that it has some point—that can be stated independently of just describing the rules that make up the practice. The second is the further assumption that the requirements of courtesy—the behaviour it calls for or the judgements it warrants—are not necessarily or exclusively what they have always been taken to be but are instead sensitive to its point, so that the strict rules must be understood or applied or extended or modified or qualified or limited by that point.[3]

Dworkin sees debates over what courtesy actually requires as indicative of the existence of an interpretive attitude towards courtesy. Participants are concerned not just to do what has been done before but to do what is required by the practice. Thus they form an interpretation of what courtesy is in order to answer questions about what it requires. How do they form these interpretations?

Dworkin's creative interpretation (henceforth, I shall drop 'creative' unless necessary for clarity) consists of three stages. We shall track the development of an interpretation of courtesy through each of the three stages. The first stage is the preinterpretive stage in which the interpreter picks out the object to be interpreted. In order to develop a theory of what courtesy is, a 'philosopher of courtesy' will identify the activities that she takes to constitute courtesy. She might, for example, identify the offering of seats on crowded buses to the elderly, the removal of hats when entering places of worship, and the practice of standing when in the presence of someone of higher social class among many other examples as activities which exemplify courtesy. In doing so, she will be guided by what actions people (including

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[3]LE 47

herself) believe they take in service of courtesy, and her judgements will be localized to a particular time and place. She will be identifying what exemplifies courtesy here and now, without claiming that the same activities must always be a part of courtesy wherever it is found. Further, Dworkin notes that a significant amount of overlap must exist in what different people would identify as the preinterpretive material in order for an interpretive community to form. If there is broad disagreement about what actions are representative of courtesy, it will be hard to view different people as interpreting the same phenomenon. This requirement is almost certainly met, however, for both courtesy and law. We have broad agreement that the activities of the courts, legislatures, attorneys, etc form the social phenomenon we call law.

Having identified the activities she takes to be courtesy, our philosopher is ready to begin the second stage of Dworkin's interpretive method, the interpretive stage. In the interpretive stage, the interpreter develops a general justification for the main elements of the practice and forms a conception of what its purpose is. Our philosopher of courtesy aims to go beyond a list of activities which are considered courteous and develop an account of what courtesy itself is. Perhaps she would generate the following as a justification for the main elements of courtesy: courtesy is the means through which people show respect to those in a position of superiority. Forming such an account tells us not what courtesy is constituted by (that was the aim of the first step), but why it exists and why its various components are members of the same phenomenon. According to Dworkin, the account adopted in the interpretive stage need not account for all features of the practice, but it must account for enough of them to be seen as an interpretation of the practice. This requirement is the requirement of *fit*.

Fit shall not be our primary concern in this chapter, but we need a rudimentary understanding of how it works. Let us make a crude first pass. Suppose that in the first stage, our philosopher identified 103 activities that seemed representative of courtesy. Perhaps she will not be able to develop an account that describes all 103 activities; she might then look to form an account that will cover less, say 96 out of the original 103. Generally, the greater the number of activities accounted for, the greater the fit of the account. Now this is an oversimplification, as whether or not an interpretation accounts for a given activity may not be an all or nothing proposition, but might admit of degrees. Perhaps an account which describes 80% of the activities in question may have a higher degree of fit than one that describes 86% if the degree of success of the descriptions in the former is high enough to compensate for the

smaller number covered. Further, some activities may be considered more central to a practice, and thus more important to fit than others. The most important problem with this explanation, however, is that our judgements of fit are almost certainly not quantitative, but are rather more impressionistic.

There is controversy over how to understand fit in Dworkin's scheme. Sometimes Dworkin seems to present fit as a threshold requirement an interpretation must pass through in order to be successful. At other times it seems to work in tandem with the second dimension interpretations are judged on, *justification*, such that the better the justification, the lower the fit need be. Recently, some theorists have suggested that it is unwise to understand Dworkin as proposing two separate evaluative dimensions. Instead they argue we ought to understand fit as a component of justification, that what counts as fit in any given instance (and what requires that we fit at all) is determined by the justificatory aim of interpretation. In lectures, Dworkin has indicated that this is his view and that the threshold description of fit was merely intended as a heuristic. There is no need to explore these alternatives in detail here, however. First, we saw in Chapter Two that objects constrain their own interpretation relative to certain types of evaluation, and thus the notion of judging interpretations by their fit to the object of interpretation has already been given significant treatment. Second, our aim here is to explore objections based on the second component of evaluation, justification.

The main feature of justification is the aforementioned requirement that interpreters show an object in its best light. I shall do no more than mention this requirement now, as it is the subject of a major portion of this chapter. In one of the outlined ways, our philosopher of courtesy balances up concerns of fit and justification, and produces an interpretation of the practice of courtesy. The discussion of the best light requirement to follow will provide more insight into the second stage of Dworkin's interpretative method.

With an account of the purpose and justification of the social practice in hand, our philosopher is ready to enter the third stage in Dworkin's interpretive method, the postinterpretive phase or reforming phase. Here the interpreter adjusts her conception of what the practice is to serve the justification she adopted. Requirements may be added to or removed from the list of what courtesy requires. For example, our interpreter might conclude that the elderly are not social superiors and that it is inappropriate to continue offering seats to elderly people on buses in the

name of courtesy. Or she might conclude that we should offer seats on buses to those of official rank, even though this has never been the practice before, because the justification which was selected at the second level would also justify, and perhaps even demand, this practice as well. This adjustment is once again subject to constraints of fit—if the justification requires too much change in the understanding of what the practice requires, it will not be a successful interpretation. The philosopher of courtesy ends with an account of what the practice of courtesy is, why it exists and what it really requires. The requirements she arrives at may (but need not) differ from the requirements she identified in beginning her project. If they do differ, it will not be disturbing, because her aim was to find out what the practice really required, not just what people had taken it to require in the past.

2. THE BEST LIGHT

We are now ready to focus on the best light requirement, the most controversial feature of Dworkin's account of interpretation. Dworkin writes, 'interpretation strives to make an object the best it can be, as an instance of some assumed enterprise.'[4] This claim has both descriptive and normative force in Dworkin's work; it is what interpreters do and what they should do. The difficulty Dworkin faces is that this claim is also clearly false—that is, if one interprets it as many of his critics have.

Many understand the best light requirement as a universal requirement applying to all interpreters. So understood, it also provides a universal standard for judging interpretations. If one is interpreting, one should show the object in its best light. Andrei Marmor provides an insightful discussion of interpretation in Dworkin's legal theory which is based on reading Dworkin in this way. Marmor's discussion is helpful, because he demonstrates that the best light requirement does not apply across the board to all instances of interpretation, at least not in the same way.

Marmor argues that many of the purposes people have for interpreting do not justify the best light requirement. He invites us to consider a staging of *The Merchant of Venice* set in modern London with Shylock as a yuppie merchant banker. Marmor asks, would the director staging the play *have* to think that she was presenting *The Merchant of Venice* in its best light? Now in order for this example to cut against the best light requirement, we must add to it. We have to suppose that portraying Shylock

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[4]LE 53

as a Yuppie merchant banker impacts the value of the play, that it shows the play as having less value than it might otherwise. Not all choices that a director makes impact the value of a play. To use of one Dworkin's examples, it is plausible that it makes no difference whether Shylock sleeps on his side as opposed to his back; the play is not more or less successful because of a directorial decision one way or the other. So let us suppose that showing Shylock as a yuppie merchant banker does in some way reduce the value of the work, perhaps because it shows its theme as parochial instead of timeless. We can now return to the pertinent question: would the director staging such a play *have* to think that she was presenting *The Merchant of Venice* in its best light, showing it as the best play it could be? Of course not. As Marmor writes, 'One would probably say, "I'm inviting you to see *The Merchant of Venice* in this possible light—better than some, worse than others—but interesting, nevertheless."'[5] It seems that we can and do offer all kinds of interpretations which do not aim to show objects in their best light, but in an interesting light, or a surprising light, or in some other light appropriate for our purpose. Before we try to figure out just what this means for Dworkin's argument, let us look at another example.

Noam Chomsky has famously offered an interpretation of the role sports play in our society. He argues that the primary purpose of sports is to distract the masses, so to speak, from attending to matters more important. I have no desire to discuss the merits of Chomsky's interpretation, but for the sake of argument, let us assume that such an interpretation shows sports in a less good light than alternative interpretations which fit at least as well. One such alternative interpretation might show sports in a better light by calling attention to the sense of self-confidence children gain from participation and from the transmission of values such as courage, responsibility, and honour implicit in much of sport. Last, let us assume that when these interpretations are articulated fully, they are incompatible, that is to say they both cannot be true of sports. The problem is this: despite the fact that there is an interpretation of sports which fits the practice at least as well, or perhaps better, and shows sports in a better light, we do not think that the Chomskian interpretation violates any fundamental rule of interpretation, or fails to be an interpretation, just because it fails to show its object in its best light. Nor is it clear that Chomsky's interpretation is inferior to the one which shows sports in a better light. If Chomsky is aiming to call our attention to unfortunate features of our society we are unlikely to notice, then his interpretation of

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[5]Marmor *above* note 1 at 53

sports may be better than the alternative. Remember, the standards appropriate for judging interpretations are sensitive to the purposes for interpreting. Relative to Chomsky's purposes, he might have no reason for showing sports in their best light.

Examples such as these lead Marmor to conclude that nothing in the nature of interpretation universally requires one to show an object in its best light, and he is correct. Moreover, Marmor is not the first person to raise this concern about Dworkin's method of interpretation. Many have asked, 'do we have to interpret Nazi law to show it in its best light?' It seems odd that we should be required by the nature of interpretation itself to strive to offer an interpretation of Nazi law that shows it in its best light (even if this light is a horrid one); it is natural to wonder why this is the appropriate interpretive task, rather than, perhaps, trying to show Nazi law in the worst light possible based on the evidence.

All this suffices to show that the best light requirement is not a universal requirement which interpreters must always follow or against which interpretations should always be assessed. However, I do not think Dworkin ever intended the best light requirement to be understood as a universal requirement, and there are better ways to understand it. Let us deal with the exegetical question first. Dworkin writes

> Imagine this sequence: a critic insists that, although Fellini himself did not realize this as he was filming, the right way to read *La Strada* is through the Philomel story. The critic adds that the film, so understood is particularly banal. We are left with no sense of why he claims the reading he does. *I do not mean that every kind of activity we call interpretation aims to make the best of what it interprets*—a 'scientific' interpretation of the Holocaust would not try to show Hitler's motives in the most attractive light, nor would someone trying to show the sexist effects of a comic strip strain to find a nonsexist reading—but that it is only so in the normal or paradigm cases of creative interpretation. Someone might set out to discredit a writer, of course, by showing the latter's work in the worst, not the best light, and he will naturally present his case as an interpretation, as a claim about what the writer's work 'really is.' If he really does believe that no more favorable interpretation fits equally well, then his argument falls under my description. But suppose he does not, and is suppressing a more attractive reading that is also

> eligible given the text. In that case his strategy is parasitic upon normal description, because he will succeed only if his audience is unaware of his true aims; only if they believe he has tried to produce the best interpretation that fits.[6]

There is a lot going on in this passage, and not all of it is clear. What is clear from the highlighted portion is that Dworkin does not believe the best light requirement is a universal feature of all activities we call interpretation.[7] He gives two examples of interpretive activities to which the best light requirement would not apply—a 'scientific' interpretation of the holocaust and an attempt to show comic strips as sexist. Dworkin seems to be drawing a line between 'normal or paradigmatic' cases of interpretation, to which the best light requirement does apply, and cases to which it does not. There is a further distinction drawn in the passage between honest and deceitful interpretation. Dworkin notes that deceitful interpretation is parasitic on the normal case, because its success depends on people believing that it is honest, ie normal.

Rather than try to tease out exactly what distinction Dworkin is drawing when he distinguishes normal cases of interpretation, I shall present my own way of understanding the scope and application of the best light requirement. I believe everything I shall say is consistent with Dworkin's presentation, though I am unsure if it is entailed by it. For the moment, I shall restrict my remarks to the interpretation of social practices, like law or courtesy, and we shall return to interpretation more generally below. We saw in earlier chapters that the standards appropriate for judging interpretations vary with the purposes one has for interpreting. The best light requirement, a normative claim about what interpreters ought to do, is a standard for judging interpretations. Our question then is this: what purposes, if any, justify using the best light requirement as a standard for judging interpretations? The answer I think Dworkin gives is that one should adhere to the best light requirement when it is appropriate to have the interpretive attitude towards the object of interpretation.

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[6]LE 421-422 (emphasis added)

[7]Nicos Stavropoulos has suggested to me that in this passage Dworkin may just be suggesting that not all interpreters are good interpreters, nor may they be striving to be good. This is a possible way to understand this passage, but given that elsewhere Dworkin has indicated that what counts as good interpretation varies with the endeavor one is participating in, I think there are better ways to understand it.

Remember the interpretive attitude has two parts. First, one believes that the practice in question is valuable and serves some principle or has some point. Second, one believes that what the practice requires is sensitive to the point of the practice and is not necessarily what it has always been taken to be. The interpretive attitude is a trigger for Dworkin's creative interpretation. Where it is not present, interpretation might proceed differently, governed by different standards. This explains why not all interpretive activities are governed by the best light requirement. Sometimes we interpret with the interpretive attitude Dworkin describes, sometimes we do not. There are many important questions to ask about when it is appropriate to have the interpretive attitude, and about what makes a concept interpretive, but we shall leave these aside. Though a more robust understanding of the interpretive attitude would be helpful, it is unnecessary for our purposes here.

Does the interpretive attitude justify using the best light requirement as a standard for assessing interpretations? I believe that it does. When one has the interpretive attitude towards a practice, one believes that the practice has value, and that what it requires is sensitive to its serving that value. Thus, one's interpretation of what the practice requires is only correct to the degree that it is appropriately sensitive to the value which justifies the practice. What the practice requires is determined in part by evaluative considerations about how well different putative requirements serve that value and is not a matter of simply looking to what the practice has been taken to require in the past. Looking to what the practice has been taken to require in the past is certainly a part of determining what it requires—otherwise we could not fix the object of our interpretation. But the current state of the practice does not fully determine its scope if one has the interpretive attitude towards it. Everything can be revised or jettisoned, though not everything at once.

We should return briefly to the question of how the best light requirement applies to objects of interpretation apart from social practices, like art or literature. Clearly the specification of the interpretive attitude Dworkin gives in regard to courtesy is inadequate to explain what interpretive purposes might trigger the best light requirement for objects like these. After all, Dworkin's passage refers to the requirements of a practice, and this has no obvious analogue in the case of art or literature. I do have a proposal consistent with what Dworkin says, but I do not want to belabour the point, because it is secondary to our inquiry. When one believes that a work of art or literature has value and that its value is the result of fulfilling certain standards of excellence implicit in the enterprise it is a part of, and one wants to show

how well the work meets those standards (or that it fails to meet them), it will make sense to interpret in line with the best light requirement. This is because, once one believes that the work has value, it makes no sense to show it as having less value than it can be shown to have. This is why Dworkin says we are left with no sense why a critic who says *La Strada* is best read through Philomel, but so understood the film is particularly banal, offers the interpretation he does. Unless the critic thinks that the best that can be made of *La Strada* is a reading through the Philomel story, why not offer an alternative reading (which, remember, must fit) showing it as a better film? Critics are generally in the position of assessing the merit of works, and it is instructive that Dworkin chose them as his example. Marmor's director staging *The Merchant of Venice* is in a different position. He is not assessing the play, but using it to bring about a desired result in his audience. The purpose he has for interpreting the play gives him no reason for showing it in its best light; he ought to show it in the light most appropriate for his goals.[8] Many interesting questions remain about the application of the best light requirement to objects other than social practices, but we shall leave them unasked and unanswered as they are not the primary object of our inquiry.

So, to recap, the best light requirement is triggered any time one has the interpretive attitude towards a practice one is interpreting. Dworkin asserts that law is an interpretive concept, a concept we have the interpretive attitude towards. He believes that this best explains many features of law, especially the substantive disagreement lawyers have about the grounds of law. Whether Dworkin is right about this is unimportant for our purposes. Once again, we are concerned with whether or not Dworkin's account works on its own, and now that we have a clearer picture of how his account is best understood, we can turn to two important objections to it.

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[8]We might not think that the best light requirement is inoperative when we interpret without the interpretive attitude; perhaps it just operates differently. Thus, we might evaluate the director's interpretation of the play by how well he brings about the desired reaction in his audience, and we could understand this as applying a best light requirement of sorts, a 'best light for the given purposes' requirement. I think we should resist this view, because it amounts to saying the obvious—that an interpreter should always strive to interpret well. Further, relative to some purposes, the appropriate standards for judging interpretations will have little to do with showing an object well. We can imagine a literary practice (which is perhaps becoming ours) in which what is prized is originality, offering an interpretation no one has thought of before. In what way would success at this endeavour amount to showing an object in its best light?

3. THE CONSTRUCTIVE IDENTIFICATION OF ART

> Can an object be called a work of art if it can also be used to clean a stove?
>
> —Woody Allen[9]

If Dworkin is right, if law is an interpretive concept, then determining what the law is requires considering the merit of any alleged legal norm. That is, part of what counts for (or against) a norm being a legal norm is its merit. Thus a judge adhering to the best light requirement constructively identifies law. Marmor issues a general challenge to the possibility of the constructive identification of law. Marmor begins his critique not directly by attacking interpretive methods which constructively identify law, but rather indirectly by arguing that interpretive methods which constructively identify art are misguided. We constructively identify art when we classify an object as art partially on the basis of a judgement that it would make a good work of art were it one, that is, partially on its merit. Marmor hopes to show that 'the value dependence of the interpretation of works of art does not entail the possibility of constructive identification. The latter is undermined by a conceptual constraint.'[10] He aims to argue by analogy that, even if the interpretation of laws is value dependent, this does not entail that laws are constructively identified. As we shall see, Marmor fails to rule out the possibility of constructive identification in art, and thus there is no fruitful analogy to draw.

Marmor asserts that art must (in normal circumstances) be created intentionally; let us call this the *intentional creation thesis*. Marmor is careful to say that he does not mean that intentional creation is a necessary or even sufficient condition for the identification of an object as art; it is a defeasible criterion (hence, the above parenthetical disclaimer). I shall return to this aspect of Marmor's presentation shortly, as it alone dooms him to fail in discrediting the constructive identification of art.

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[9]W Allen 'My Apology' *The Complete Prose of Woody Allen* (Picador London 1997) 335-343, 346

[10]Marmor *above* note 1 at 114

Marmor notes that for the most part, we only identify something as an object of art if it was created with the intention that it be art. Marmor suggests we consider the following two statements and asks if we can make sense of them.

> (1) This was meant to be a work of art, but in fact it is not.
>
> (2) This was not meant to be a work of art, but it is.

Let us take these one at a time.

Marmor asks about statement (1), 'could it mean anything other than, "It was meant to be a work of art, but it is a very bad one?"'[11] He suggests that the statements have the same meaning 'in the normal circumstances.'[12] Marmor asserts that such a statement can only be made sense of when viewed as hyperbole. If the creator intended it as art, then it is art, and no consideration relating to its merit could change its identification as art. This assertion forms half the challenge to the constructive identification of works of art, because if true it means that evaluative considerations cannot be used to exclude objects from the category art.

The problem for Marmor's argument is that statement (1) clearly can mean something besides 'it is a very bad work of art.' Indeed, Marmor provides us an excellent example to see how this is so. In a note, Marmor writes

> Indeed it was characteristic of Dada, at some point, to employ this strategy of turning such banal objects into works of art, as it were, simply by presenting them as such. Marcel Duchamp's *Fountain*, an ordinary urinal,

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[11]Marmor *above* note 1 at 110

[12]This is a very odd argumentative strategy for Marmor to adopt, given the positions he endorses elsewhere in *Interpretation and Legal Theory*. He argues that interpretation is not the normal mode of understanding language and that in most cases language has a plain meaning. It would seem that, if any sentence were a candidate for being a sentence with a plain meaning, 'This was meant to be a work of art, but in fact it is not' would be a prime one. Yet Marmor asserts that in 'normal circumstances' this statement has a meaning nothing like what we would likely identify as its plain meaning. This debate is beyond the scope of this paper, but it is worthwhile to ask, how did Marmor decide that this sentence requires interpretation and should not be understood in the plain meaning mode? Marmor's argumentative strategy here calls into question his previous assertions about language having a plain meaning under normal circumstances. Marmor *above* note 1.

> exhibited at a New York gallery in 1917, is a famous example.[13]

Many that filed past that urinal must have said, 'this is not a work of art.' And by that many of them did not mean (though some might have) that it was a bad work of art, but that it was none at all. Such a judgement would be sensible if one's conception of what art's role is in society and how art can be valuable excludes the possibility that an unaltered urinal can be a work of art. Indeed, such a judgement was not out of the ordinary in 1917. Duchamp is widely credited with altering the boundaries of our conception of art.

Certainly part of the reason Duchamp's intention resulted in *Fountain's* being accepted by the art community as a work of art was due to his status as a respected artist, and with it the assumption that, if Duchamp produced it, it must have value. Additionally, he presented it at an art gallery, and this fact, certainly relevant to its being accepted as art, is a fact over and above his intention that the urinal be art; the mode of presentation and not the intention may have done some of the work in making the object art. Even though Duchamp successfully extended the boundaries of art, I imagine that if I presented a urinal as a work of art, many would say 'this is not a work of art' and by that mean 'this is not a work of art.' Part of what distinguishes my urinal from Duchamp's is the value people attribute to it; because people attribute value to his, it is art, and conversely mine might not be.[14] Regardless of whether people would regard my urinal as art, it would be intelligible for them not to, even though I intended that it be art. We would have no reason to reinterpret a critic's statement that my urinal was not art at all as a claim that my urinal was bad art.

Now it is important to note that Marmor claims the statements 'This is not a work of art' and 'This is a bad work of art' only have the same meaning in 'normal circumstances.' Marmor says the criterion of intention is defeasible. Perhaps the circumstances outlined are not normal in this respect. But how do we know whether

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[13]Marmor *above* note 1 at 110n9

[14]Perhaps people that would say my urinal is not art would be wrong, that is to say, perhaps this example is inadequate for demonstrating my point. This would not weaken my argument, as Marmor admits that sometimes people may intend to create works of art and fail. I believe my urinal would be just such a case, but Marmor provides no example of what he has in mind. You could substitute any instance where someone intends to create a work of art and fails and the rest of the argument would be unaffected.

or not they are the normal circumstances? The intention itself is no guide, as it is present throughout. If a criterion can be defeated, it must be defeated by considerations other than itself. Marmor provides us no reason to believe that one of these considerations may not be the value placed on the object, and the burden is his to do so, as it seems value would be a prime candidate in classifying an object as art. He does provide a list of other criteria which play a role in the identification of art: public acceptability, institutional support, etc. Everything on Marmor's list is in a sense value-neutral, that is to say everything on the list is not directly dependent on evaluations of merit[15], and if the criteria for the identification of art were limited to these criteria, there would be no room for constructive identification. However, Marmor gives us no argument in support of limiting the list of criteria to value-neutral considerations. It seems reasonable that a criterion for the identification of an object as art may be whether or not it instantiates any of the multitude of values art holds for society. Marmor introduces the notion of defeasibility because it is clear that intention is not sufficient to make an object art, but in doing so, he has opened the door to consideration of evaluative merit in the identification of art.

Let us turn to statement (2), 'This was not meant to be a work of art, but it is.' Marmor says that although we can make sense of this statement, it could only be true in a degenerate or parasitic case. He asks us to consider whether one could vote without intending to vote. We could, he notes, manipulate someone who was unfamiliar with the practice of voting into performing the requisite actions without knowing what they were doing. This person might be said to have voted without the intention to vote, yet, Marmor argues, this case is parasitic upon our normal understanding of voting. If art is created without intention, it is created is a similar degenerate fashion, according to Marmor.

There is a problem for Marmor's position which he recognizes: we are familiar with labelling things works of art when it is unlikely that they were intended as such or even clear that they were not. Primitive art, as it has come to be known, has entered the world's most prestigious art museums, including the Louvre. Marmor's

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[15]Some items on the list are indirectly related to evaluative considerations of merit, eg, institutional support. Though institutional support or other criteria may track merit, they will do so imperfectly, and their status as criteria, on Marmor's analysis, is not dependent on their being a proxy for evaluations of merit.

discussion centres on African warrior-masks. Marmor notes that it is very unlikely they were created with the intention that they be art. He continues

> The contention that the warrior-mask was a work of art would be utterly perplexing [if we presume that it was not created with the intention that it be so]. It would require explanation of what justifies the mask's classification as a work of art on the basis of its appearance alone. One could justifiably claim that it *resembled* a work of art in various respects, or that it could have been one had it been created as such, but not the fact that it was one. ... classifying it as a work of art would be a distortion.[16]

Marmor offers no compelling reason to believe that when such masks are displayed in a museum of art, they are there by mistake, that we err or speak only metaphorically when calling them art. He gives us no reason to believe that 'an explanation of what justifies the mask's classification as a work of art based on its appearance alone' is not available. Indeed, that is just what most people would offer if asked why they display them in art museums or go to view them there. African warrior-masks instantiate many of the values that art instantiates for us, and for this reason we identify them as art.[17]

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[16]Marmor *above* note 1 at 110

[17]This value is not just aesthetic value, though that is certainly a part of it. Marmor is correct in noting that art is often classified as such despite apparent lack of aesthetic value (understood narrowly here as beauty). It is a poor conception of the value of art which limits its modes of value to the aesthetic. Art is valuable in a variety of other ways; for example sometimes it is communicative, sometimes it represents great craftsmanship, sometimes it jars viewers into thinking about the world differently, and sometimes it comments on the works of other artists or art itself. This helps us to see one way in which Marmor has been led astray. Just because we identify some objects as art which lack aesthetic value, it does not mean that they lack value. Dada, for example, had value because it challenged our understandings of art. Further, recognition of multiple modes of value also allows us to understand why not all aesthetic objects are considered art. Of course, we can have a wider conception of what aesthetic value is than Marmor does, such that it encompasses all of the values I have mentioned here. If we do, and rephrase Marmor's point in terms of beauty, then it becomes even clearer that he underestimates the way in which art can be valuable.

In the case of the warrior-masks, it is just unlikely that the creators considered them art. In some cases, we consider an object art even though its creator intended it not to be art. Vincent Van Gogh's *Avenue of Poplars in Autumn* is displayed in the Van Gogh Museum in Amsterdam. As the display card next to the painting notes, Van Gogh did not consider it a work of art. Rather, he referred to it in a letter to his brother Theo as a 'rather large study.'[18] Are we constrained by Van Gogh's intention to create a study rather than a work of art? Must we say, 'This is in an art museum because it is like a work of art; if Van Gogh had intended it as art, then it would have been art?' Does the painting require a disclaimer, lest people err in considering it art? Rather than act as a disclaimer, the display card illustrates the irony—Van Gogh did not consider it art, but we consider it art of the highest quality. Without the display card referencing the letter to Theo, patrons of the museum would be unable to distinguish *Avenue of Poplars in Autumn* from the paintings surrounding it in its qualifications as art; indeed there is no distinction.

Perhaps Marmor would say these are cases 'outside normal circumstances' so that we should not be concerned that we identify African warrior-masks and *Avenue of Poplars in Autumn* as art even though they were not created with that intention. However, we have so much experience with considering such objects art (another example: displays in art museums of clothing made long before there was a concept of high fashion) that it hardly seems parasitic. Further, merely calling these cases parasitic, if we choose to do so, does no work. Marmor points to no divide between objects which allows him to distinguish when intention is necessary to classify an object as art and when intention is not because the object is deemed art in some parasitic sense; merely asserting that some cases are parasitic is of no help.

If Marmor was able to demonstrate that intention is the sole criterion for identification of an object as art, he would eliminate room for constructive identification. But in offering intention as a defeasible criterion, he leaves room for

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[18]Letter from Vincent Van Gogh to Theo Van Gogh, Late October 1884, available at http://vangoghgallery.com/letters/383.htm. Ronald Dworkin has suggested to me that in calling the painting a 'study', Van Gogh might not have been denying it was art. Dworkin may be right, as we generally consider studies art. I am relying on the interpretation the curators of the museum gave the letter in preparing the display card. Even if the curators are wrong, even if Van Gogh did consider this painting art, the point still remains that an intention to make art is not a necessary condition for creating art.

evaluative considerations of merit to play a role in art's identification. Marmor's analogy fails to cast doubt on the possibility of constructive identification. Before concluding, we should also note that Marmor's analogical suggestion that all law need be created intentionally is odd. Most theorists, including most positivists, recognize that some law is customary. This is not a problem for positivist views, as long as such law can be identified by reference to social facts alone without recourse to evaluative considerations about the merit of an alleged law. I imagine that Marmor accepts that customary law is created unintentionally as well, and thus it is unclear what the purpose of trying to establish the intentional creation thesis for law would be; it is simply false. So much for the suggestion that interpretive methods which constructively identify their subjects are generally implausible. Constructive identification is plausible, indeed common, in art. Nevertheless, it may not be an acceptable method of identifying law.

4. THE CONSTRUCTIVE IDENTIFICATION OF LAW

Joseph Raz and Andrei Marmor have separately argued that constructive identification is inconsistent with law's authority.[19] They base their objection on the assertion that, since law claims authority, it must be the type of thing capable of possessing authority.[20] I am unsure that either Raz or Marmor establishes this satisfactorily, but

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[19]J Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Oxford 1995), hereafter EPD; Marmor *above* note 1. Raz never uses the term 'constructive identification', but he argues against the phenomena Marmor uses it to denote. For the most part, I shall follow Raz's argument as Marmor's is ambiguous at a key point. Marmor says that what he objects to is using evaluative considerations to identify law, not using evaluative considerations to establish law's content or meaning. However, it is not clear that this distinction makes sense. Is the identification of law the identification of legal texts or the identification of operative legal norms? If it is the latter, then determining the meaning of legal texts is necessary to identify the law. In any case, I do not want to belabour this issue, as Raz's objection to constructive identification does not raise this difficulty. As we shall see, Raz objects to a subject's having to consider what an order should require her to do in order to find out what it does require her to do. This is clearly a matter of determining the meaning or content of a law, not just identifying a text. See *below* note 215n34.

[20]EPD 215

we can grant its truth for the sake of argument.[21] Raz argues that in order for law to be capable of being authoritative, its directives must be capable of being authoritatively binding. He explains two authority-capacity features that legal directives must have because of this requirement

> First, a directive can be authoritatively binding only if it is, or is at least presented as, someone's views of how its subjects ought to behave. Second it must be possible to identify the directive as being issued by the alleged authority without relying on reasons or considerations which the directive purports to adjudicate.[22]

Let us examine the potential problems each poses for the constructive identification of law.

Authorship and authority

Marmor asserts that the first feature is patently in conflict with constructive identification. This is so, he says, because the first feature 'reflects the idea that only an agent capable of communication with others can have authority over them.'[23] Marmor asserts that 'nothing can be more straightforwardly opposed to the constructive identification thesis than the idea that law must be the product of communication, or at least presented as such.'[24] I fail, however, to see why this is so. First, constructive identification is alive and well in communicative interpretation. Donald Davidson's radical interpretation, a method for interpreting communicative utterances, requires that to a certain extent we identify a person's utterances as meaning what it would have been good for them to have meant. We have no need to investigate radical interpretation in detail, but given that it is one of the major

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[21]A Marmor 'Authorities and Persons'(1995) 1 Legal Theory 337, 352-359 considers this issue in light of Hart's objections to Austin's command theory.

[22]EPD 218

[23]Marmor *above* note 1 at 115. Note that Marmor is not strictly correct in this. Raz claims that directives can fulfill the requirement by being *presented* as someone's view of how subjects should behave. So on Raz's analysis something besides an agent capable of communication could issue authoritative directives if those directives were presented as the views of an agent capable of communication. Marmor recognizes this but for some reason overstates his case.

[24]Marmor *above* note 1 at 115

alternatives for understanding how language works, it hardly seems that constructive identification is *straightforwardly* opposed to law's being the product of communication. Second, Raz's requirement includes the stipulation that a directive need only be presented as someone's view; it need not actually be someone's view. This opens the door fairly wide. Certainly we can present constructively identified law as someone's view, perhaps as the legislature's view, or as a previous judge's view, or to borrow from Dworkin, as the view of 'the community personified.'[25]

Even if, for some reason, these options for presenting constructively identified law as someone's view as to how subjects ought to behave turn out to be unsatisfactory, Raz's first authority-capacity feature may still not be a decisive objection against the constructive identification of law. Jeremy Waldron claims that this feature of Raz's analysis reflects too strong an identification between authority and authorship.[26] He argues that we have reason to hold certain texts authoritative, even if no one intended to communicate their content, even if they represent no one's view about how we ought to behave. Authority, Waldron argues, can be systemic instead of deriving from a person (natural or artificial); to put it in the terms of the argument from Chapter Six, authority can emanate from a procedure, the outcome of which need not reflect the intentions of those making inputs. Waldron provides an alternative version of Raz's normal justification thesis, [J], on which it is clear that we can have reason for holding a text authoritative even though it reflects no one's view about how we ought to behave.

> [J]: A statute (or any text) S has authority over person Y only if person Y is likely better to comply with reasons which apply to him by following the provisions of S, than if he tries to follow those reasons directly.[27]

If a text fulfills [J], Waldron asserts, whether or not it has an author makes no difference for its authority.

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[25]LE 172. The personification Dworkin alludes to is fairly deep. He writes, 'the community can adopt and express and be faithful or unfaithful to principles of its own, distinct from those of any of its officials or citizens as individuals.'

[26]J Waldron *Law and Disagreement* (Clarendon Oxford 2001) 130

[27]J Waldron *above* note 26 at 131

Marmor objects to Waldron's alternative conception of legitimacy, holding that authors are necessary to make sense out of authority. First, Marmor claims, authorities provide *content-independent* reasons for action, and a text which passes the test set out by [J] will be accorded authority only for content-based reasons.[28] Moreover, Marmor claims, 'having a reason to believe a text contains the truth, so to speak, does not render the reason content independent.'[29] To illustrate his point, Marmor suggests that a roadmap can pass [J], because, if we are in an unfamiliar locale, following it will help us to get where we are going better than we might on our own. However, Marmor contends, a roadmap is not an authority, because our reasons for consulting it are entirely content-dependent. If we come to believe that the roadmap is inaccurate, we will no longer have reason for consulting it.

The problem for Marmor's argument is that the same might happen if we are following the directions written by someone we consider an authority. Suppose that George is making a delivery for his boss Leslie, who, owning a delivery company, is an expert on the road system. She writes out detailed instructions for George on how to drive to the drop-off point. Suppose also that she issues these as orders, not as advice. She wants him to travel efficiently to save gas and time, and both he and she understand her directions as providing protected reasons for action. George begins to follow the directions, but at some point in his trip, he begins to doubt that they are accurate. Perhaps a road referred to by Leslie's instructions is not where she said it would be. George will have reason to be suspicious of the directions, and if things continue to look wrong, he will have reason to stop considering the directions authoritative. The directions remain authoritative only insofar as their content serves their purpose.

Thus content-dependent reasons can disqualify an otherwise valid order from being authoritative. Specifying the circumstances under which content can render an authoritative order invalid is notoriously difficult.[30] If any mistake made by an authority can render its order invalid, then an authority cannot make a difference in what we ought to do (except perhaps in coordination cases). In some cases, we have

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[28]For an explanation of content-independent reasons, see *above* 139-140.
[29]Marmor *above* note 22 at 346
[30]Marmor *above* note 22 at 349-352

reasons for following authoritative orders even when we believe they are mistaken.[31] Yet clearly some mistakes can render an authoritative order invalid, as the last example shows. We do not need to settle, for the purposes of this discussion, the circumstances in which content-dependent reasons for disobeying an order are sufficient. The point is simply that Marmor's objection applies equally well to instances where there is an author of authoritative directives and thus cannot be used to drive a wedge between texts with authors and texts without.

Another problem for Marmor's argument is that a roadmap is an inapt example for assessing [J]. Likely, if following a roadmap, I have content-independent reasons for doing so, reasons related to the authors. More importantly, we can have content-independent reasons for treating a text as authoritative which are not based on authorship. In Chapter Six, we looked at the example of The Swingers' Convention, where the members of the group have reason to believe that following a certain decision procedure will produce a decision better than any decision they could reach through other means, yet no one intends the result, no one authors it. Further, if we follow Waldron in thinking that legislation is such that no author exists, that legislation is an unintentional result of intentional actions of legislators, we can still have content-independent reasons for following the directives of legislation. The reasons are the ones canvassed in Chapter Five, the reasons we have to be committed to the results of democratic procedures. If I am right, we have reason to follow the directives of legislation for the content-independent reason that they are the result of democratic procedures, even if we regard them as having no author. To conclude, authorship is not the only possible content-independent reason for believing that a text is legitimately authoritative; we can believe it is legitimate because it is the outcome of a process which we have reason to be committed to. Texts which pass [J] may qualify as authoritative texts based on their aspects other than their content.[32]

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[31]Marmor argues that there are often auxiliary reasons for continuing to follow authoritative directives, eg maintaining the efficacy of the authority or a coordinating convention it established. Marmor *above* note 22 at 349-352.

[32]Marmor asserts that [J] is a legitimacy condition only for theoretical authorities. He says this is so because 'Only practical authorities can be regarded as yielding content-independent reasons for action.' Marmor *above* note 22 at 347. This is mistaken, as we can have content-independent reasons for believing [J] to be fulfilled.

Waldron is right; Raz's first authority-capacity feature reflects too strong an identification between authority and authorship, at least in its first clause, which requires that a directive be the view of an agent as to how subjects ought to behave. We can have content-independent reasons other than authorship to hold a text legitimate.[33] Nevertheless, if these arguments turn out to be insufficient, we can always fall back on the first strategy proposed in this section, presenting constructively identified law as the view of an agent as to how its subjects ought to behave. Thus, Raz's first authority-capacity feature is either unnecessary, as Waldron argues, or it can be fulfilled by constructively identified law. In either case, it presents no problem for interpretive methods like Dworkin's.

Do the right thing

While the first authority-capacity feature does not pose a challenge for constructive identification, constructive identification does straightforwardly conflict with Raz's second authority-capacity feature. Remember, the second feature is that an authoritative directive must be able to be identified without reference to the considerations it is meant to settle. Raz explains, '[Subjects] can benefit by [an authority's] decisions only if they can establish their existence and content in ways which do not depend on raising the very same issues which the authority is there to settle.'[34] To use the technical terminology of Raz's analysis, to be authoritative, an order must be able to be identified without reference to the dependent reasons it is meant to pre-empt. When we constructively identify law, we consider, in part, what would make good law. In doing so, we consider at least some of the reasons the directive is meant to settle, some of the dependent reasons Raz claims the directive

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[33]Surely Raz agrees with this; he indicates as much in his view that customary law can be authoritative. This leads one to believe that if Raz would object to Waldron's alternative condition of legitimacy, he would do so on grounds different from Marmor's. Given Raz's indication that a directive merely needs to be presented as an entity's view as to how subjects ought to behave in order to satisfy the first authority-capacity feature, I have difficulty seeing grounds on which he could object to [J].

[34]EPD 219. This formulation of the second authority-capacity feature is slightly different from the one which led off this section. It makes it clear that Raz does not believe the content of an order can be constructively identified, whereas the earlier passage left open the possibility that Raz only objected to constructively identifying an order's existence. See *above* 211.

should pre-empt. Thus a directive constructively identified cannot serve the mediating role between a subject and the reasons which apply to her that authoritative directives are meant to serve on Raz's analysis.

Before we evaluate this objection to constructive identification, we need to get a better sense of why Raz thinks that the directives of any authority must satisfy the second authority-capacity feature. Raz explains by telling a story.

> Suppose that an arbitrator, asked to decide what is fair in a situation, has given a correct decision. That is, suppose there is only one fair outcome and it was picked out by the arbitrator. Suppose that the parties to the dispute are told only that about his decision, i.e., that he gave the only correct decision. They will feel they know little more than they did before. They were given a uniquely identifying description of the decision and yet it is an entirely unhelpful description. If they could agree on what was fair they would not have needed an arbitrator in the first place. A decision is serviceable only if it can be identified by means other than the considerations the weight and outcome of which it was meant to settle.[35]

He also writes

> If I decide what would be the best life insurance policy to buy, it is no good to remind me of my decision by saying that I decided to buy the policy which it is best to buy. It means that I have to decide again in order to know what I decided before, so the earlier decision might just as well never have happened.[36]

Raz's point can be summed up by saying that a directive to 'Do the right thing' provides no information about what to do. It leaves subjects of the directive in exactly the same position they were in before the directive; they have to decide what the best thing to do is. Raz thinks that constructively identified law is similarly incapable of providing authoritative guidance. Since law must be capable of being authoritative, he concludes, it cannot be constructively identified.

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[35]EPD 219
[36]EPD 219

I propose to show that Raz's second authority-capacity feature imposes too strict a requirement for a directive to be authoritative, that a directive can be authoritative even if it does not meet it. The reason is this. Raz has demonstrated that, if a directive can only be identified solely on the basis of the reasons which it claims to settle, it cannot be authoritative. 'Do the right thing,' or 'Buy the best policy,' afford no guidance (though 'the decision is the fair one', as we shall see, in some circumstances affords guidance). After demonstrating this, however, he concludes that in order to be authoritative a directive must be able to be identified without reference *at all* to the reasons it is there to settle. This does not follow, as there are surely cases in the middle—cases where the directive must be identified only partially through reference to the reasons it is there to settle, and Raz must show that this too would be inadequate in order to establish that the identification of authoritative directives can never be dependent on the reasons they are there to settle. I believe Dworkin had just such an objection in mind when he wrote

> [Raz] defines authority in such a way that people cannot accept law as an authority unless their tests for law wholly exclude judgements of political morality. He is right that any successful interpretation of our legal practice must recognize and justify the common assumption that law can compete with morality and wisdom, and for those who accept law's authority, override these other virtues in their final decision about what they should do. ... But that condition can be met by a theory that makes judgements of morality and wisdom part of the grounds of law rather than law's only grounds. ... Raz thinks law cannot be authoritative unless those who accept it never use their own convictions to decide what it requires, even in this partial way. But why must law be blind authority rather

> than authoritative in the more relaxed way other conceptions assume?[37]

In order to show that the second authority-capacity feature is too strict, we need to show that law identified partially through reference to the reasons it is there to settle, but also identified partially through other means, can be authoritative. To this end, we shall look at a number of examples.

(A) Dworkin's example

Dworkin has recently offered his own counterexample to Raz's argument which purports to show that law identified partially through reference to the reasons it is meant to settle can still be authoritative. He writes

> An employer may be said not to be exercising his authority over his employees if he tells them only that they should do the best thing in all the circumstances that may arise from time to time. But suppose he directs them to treat customers fairly when some of them, at least, think that this is not what is best in the circumstances: they might think that they owe it to the shareholders of the company to behave unfairly to customers when there will be no adverse financial consequences. He has exercised his authority in directing them to act according to standards that they

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[37]LE 429. In a number of important ways Dworkin mischaracterizes Raz's position here. For example, Raz does not maintain that law overrides morality and only maintains that law competes with morality if this is taken to mean *conflicts* with morality. More importantly the passage does not accurately present the reasons for which Raz adopted the second-authority capacity feature. Its adoption was not motivated by the need to explain how law competes with morality. The reasons Raz did adopt it are discussed in the text above. Last, it is also a mistake to say that Raz holds that people can never use their own convictions to determine what law is. Whatever they rely on, they will be doing so because of their own convictions; it is the type of test for identifying law that they must use for law to be authoritative which Raz is addressing. Despite the problems with Dworkin's presentation, his comments nevertheless point us towards the problem with Raz's position under discussion, and for this reason it is important to examine it.

> would not otherwise have thought decisive or even pertinent.[38]

Dworkin claims that a directive to 'Do the fair thing' is different from a directive to 'Do the right thing' because it requires subordinates to apply a standard they may or may not have thought appropriate. An employee confronted with such an order will have to think about the reasons the directive is meant to settle in order to figure out what to do, because she will have to decide what is fair. Yet this alone is not sufficient to show that the employee constructively identifies an authoritative order because Raz has an avenue of response available.

Raz might argue that the employer has only exercised authority over a preliminary question—what standard to apply—but has not exercised authority over what specific actions employees might do. Employees, Raz might say, can identify the order to act fairly without considering the reasons it was meant to settle, because it was only meant to settle what standard should apply, not to govern what they should do in a given situation.[39] To put it another way, Raz might argue that the employer issued a protected reason to act fairly, but not a protected reason to take any particular action; reasons about what standard to apply are pre-empted, but not reasons about what action to take. Dworkin anticipates this possible response from Raz. He writes

> Shall we say that he did not exercise his authority in as much detail as he might have done? We need not, because that observation might be thought misleading in a different way. If he thought it better for his purposes to delegate decisions pursuant to broad standards, like the standard of fairness, than to attempt to decide all

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[38]RM Dworkin 'Political and Legal Archimedeans' *unpublished manuscript* 39n24.

[39]Cf an exchange between WJ Waluchow and Scott Shapiro. Waluchow, in defending inclusive legal positivism, argues that the arbitrator in Raz's example can offer guidance, even if he only tells the participants to do the fair thing. If the participants agree on what would be fair, but disagree about whether or not the fair thing should be done, Waluchow asserts an order to do the fair thing is useful, despite the fact that one has to consider dependent reasons in order to identify the fair thing. Shapiro claims that the arbitrator only exercises authority over the standard which ought to be used. WJ Waluchow 'Authority and the Practical Difference Thesis: A Defense of Inclusive Legal Positivism' (2000) 6 *Legal Theory* 45; S Shapiro 'Law Morality and the Guidance of Conduct' (2000) 6 *Legal Theory* 127,152-154.

> issues that might arise in advance, as all good managers often decide, then we might as easily say that he exercised his authority not less fully but only differently than he might have done. Should we say that he exercised his authority only so far as he stipulated the standard to be followed, but relinquished authority over the further issue of how that standard should be interpreted in various situations? We might, and that would not make him less an authority for that decision. But this distinction, too, is at least problematic. If there are right answers to the question of what is fair, even when people disagree, then what is the difference between commanding someone to act fairly and commanding him to act in the specific ways that fairness, properly understood, actually commands. If an employer disagrees with the employee's judgement, may he not say, with perfect accuracy, that his employee did not in fact do what he was instructed to do? He should not say that the employee deliberately disobeyed him. But he may say, with no violence to the concept of authority, that the employee did in fact disobey him. Of course, the employee might be right about the issue of fairness, and in that case he did not disobey his instructions. But that is a different matter.[40]

Dworkin argues that by ordering an employee to act fairly, the employer does exercise authority over what she does. An employee disobeys the employer, though perhaps not deliberately so, when she fails to do the fair thing. Dworkin's argument turns on an intuition about how to apply the concept of authority—the intuition that the employer exercises his authority 'all the way down' and not just over a preliminary question. I share Dworkin's intuition, and believe that in such a case an employer does exercise authority over what her employee does, even though the employee must constructively identify the order. This then shows that the second authority-capacity feature is too strict. We can, however, make out the case against Raz's second authority-capacity feature without relying on this intuition. Let us look at further examples.

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[40]Dworkin *above* note 37 at 39n24

(B) Jack and the pharmacist

> *Jack and the pharmacist*. After visiting his doctor, Jack takes a prescription to the pharmacist. The pharmacist looks at the prescription and is unable to decipher the doctor's handwriting. It is not that the pharmacist has no clue what the doctor has written; most of it is legible. However, a few letters at the end of the name of the drug are not readable, and this turns out to be crucial. The pharmacist knows that what is written can only be the name of one of two drugs, one prescribed to treat hair loss, one to treat high cholesterol. The pharmacist turns to Jack and says, 'What did you go to the doctor for?' Jack says, 'I'm going bald.' The pharmacist asks, 'Did the doctor say anything about high cholesterol?' Jack retorts, 'No, why?' The pharmacist now knows with reasonable certainty which drug to give Jack.

The information the pharmacist had about the doctor's order was insufficient for him to know what the order was, so he asked Jack what the purpose of the order was. Knowing that only one of the two possibilities would make sense as a prescription for hair loss, the pharmacist was able to figure out from Jack's answer what the doctor had ordered. All of this is an exercise in constructive identification. The prescription is meant to provide a protected reason regarding what drug the pharmacist should

dispense to Jack.[41] But in order to discover what the doctor's order was, the pharmacist had to consider the reasons the order was there to settle—the reasons Jack had for taking one medication rather than another. He had to determine, among the possibilities, what would be a good prescription for hair loss. The doctor's authority is not undermined by this, because the pharmacist did not have to consider *all* the reasons that the prescription was meant to settle. He did not have to do a full examination of Jack; he did not have to choose from among all the medications for hair loss. His reasoning was structured by the prescription, and structured such that a unique outcome was determined despite the pharmacist's need to identify the order constructively by considering one of the dependent reasons, the purpose for which the order was issued.

Notably, we cannot construe the doctor as having exercised authority over only a preliminary question like we could with Dworkin's employer.[42] Should we say that the doctor issued an order which said, 'Dispense drug X or drug Y,' rather than an order to dispense a particular drug? Clearly not. The doctor prescribed a single drug,

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[41]Notice that the pharmacist is the one to whom the order has been issued here. This sets this example apart from a medical vignette Scott Shapiro offers in which a friend helps a patient interpret a doctor's order to 'do whatever can help you get better.' The friend, Shapiro claims, becomes the authority if he has to engage in normative deliberation in order to identify the content of the order. Shapiro is correct that the friend is the authority in the example he offers, but wrong that engaging in normative deliberation when interpreting an order always undermines the authority of its issuer. His example could be tweaked slightly, by having the doctor communicate more information than 'Do the right thing' and this would become clearer. Shapiro *above* note 38 at 150-151. In any case, in our example Jack is not the subject of the order; the pharmacist is. Thus, there is no possibility of saying that the pharmacist has become an authority for Jack.

Jules Coleman's makes an ingenious attempt to save inclusive legal positivism from an objection also growing out of Raz's second authority-capacity feature. Coleman suggests that a Swede (someone outside our legal community) could advise us about what the law was in our legal community, and thus we could identify the law without reference to dependent reasons. Coleman's example might be thought to suffer the defect Shapiro identifies; perhaps the Swede becomes the law-giver, if we have to look to him to find out what the law is. Regardless, Coleman's argument is not needed to save inclusive legal positivism against Raz's objection, because the second authority-capacity feature is too strict. J Coleman *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Clarendon Oxford 2001).

[42]Dale Smith helped me to appreciate the possible objections to this example.

not a disjunction which the pharmacist could fill by choosing either. Perhaps we should say that the doctor tried to exercise authority but failed such that he succeeded only in narrowing down the options rather than prescribing a specific drug. This seems odd, however. The pharmacist does not dispense the drug for hair loss because he thinks, all things considered, it is the best drug to give Jack; perhaps he does not think it is best. Rather, he dispenses it because he is reasonably sure that this is what the doctor ordered him to do. As long as the pharmacist is right about this, it seems that the doctor has successfully exercised authority. Of course, the pharmacist might be wrong, but it is always possible to misidentify the content of an order, so this of no special worry here.

This example is not subject to the objections Dworkin's is but is subject to a different objection. In discussing a related issue in Gerald Postema's work, Raz addresses cases relevantly like this one. Raz argues that the reasoning required to identify an order in cases like these is *reconstructive* and not evaluative; that is, the merits of the case do not have to be considered.[43] Instead the pharmacist, on this view, is not evaluating reasons to provide Jack one drug or another, but is merely trying to reconstruct the reasoning process which led the doctor to prescribe a particular drug, and thus to identify which drug that was. The question the pharmacist is asking is not 'Would it be good to prescribe this drug?' but rather, 'Did the doctor believe it would be good to prescribe this drug?' Because of this Raz does not believe the merits of possible orders play a role in the identification of the order issued; no constructive identification, on this view, is taking place. Raz recognizes, however, that reconstructive reasoning often requires that 'we rely on our ideas of what is reasonable in reconstructing other people's thought.'[44] The pharmacist in our case does so. But Raz asserts, we only rely on these beliefs when we think those whose reasoning we are reconstructing share our beliefs about what is reasonable. If we believe they are prone to error or hold beliefs we reject, we can often reconstruct their reasoning so long as we are aware of the nature of their beliefs and fallibilities. Raz

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[43]J Raz 'Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment' (1998) 4 *Legal Theory* 1, 14-16; G Postema 'Law's Autonomy and Public Practical Reason' in R George (ed) *The Autonomy of Law: Essays on Legal Positivism* (Clarendon Oxford 1996) 79-188. Postema argues that finding the *ratio* of a precedent often requires evaluative or moral argument because it requires reconstructing the court's ruling; Raz disagrees for the reasons discussed below.

[44]Raz *above* note 40 at 15

correctly notes that a reconstructive argument is a good argument if it correctly identifies the order issued, even if the argument is a bad evaluative one.

What does this show? Reconstructive reasoning might proceed without relying on what we regard as reasonable. Yet this possibility is arguably not relevant when we are attempting to recover the reasoning of an authority. If I do not assume that an authority is reasonable, if I think that I can identify mistaken beliefs and errors it is liable to which would have affected the reasoning leading to the order I aiming to reconstruct, then I cannot regard the authority as legitimate (in Raz's sense). That is, I cannot regard the directive of the authority as an aid towards complying with the reasons I have better than I would by reasoning on my own. It follows that in every case in which I aim to reconstruct the reasoning leading to an order issued by an authority I hold legitimate, I must regard the authority as reasonable and hence rely on my own sense of reasonableness to the extent necessary in making the reconstructive argument. I might offer a bad reconstructive argument because I am bound in this way. My argument might be bad because my sense of reasonableness is off, because the authority was more reasonable than I. But while I could, were it appropriate, reason with the mistaken beliefs and fallibilities I am aware an authority is liable to, I cannot adapt my beliefs and reasoning processes to be more reasonable even if I believe the authority whose reasoning I am reconstructing is less liable to mistaken belief and error than I. This is because I cannot be aware of my mistaken beliefs and reasoning liabilities, as becoming aware of them obviates them. It follows, for our example, that if the pharmacist holds the doctor as legitimately authoritative, does not regard him as a dangerous quack, all he can do is rely on his own sense of what is reasonable in reconstructing the doctor's reasoning.

As it turns out, however, all of this is irrelevant even if I am wrong. Let us take another look at Raz's second authority-capacity feature. The claim is that in order for a directive to be authoritative 'it must be possible to identify the directive as being issued by the alleged authority without relying on reasons or considerations which the directive purports to adjudicate.'[45] As stated, the doctor's directive ceases to be authoritative whether the pharmacist uses his own sense of reasonableness or that of a Satan-worshipper, as the *reasons* he is evaluating are the reasons which are meant to be settled; he is relying on these reasons however he evaluates them, and indeed he relies on them even if he does not evaluate them at all. The mere fact that

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[45]EPD 218

the pharmacist is considering the same reasons the doctor did in issuing the order means that the directive cannot be authoritative on Raz's picture, at least as he currently formulates the second authority-capacity feature. Since the doctor's directive succeeds in being authoritative despite the pharmacist's consideration of the reasons it was meant to settle, the second authority-capacity feature is too strict.

Raz could try to save the objection we have been considering by reformulating the second authority-capacity feature to state that a directive can only be authoritative if it can be identified without *evaluating* the reasons that it was meant to settle. Only this revision can make his assertion that reconstructive reasoning is not evaluative reasoning relevant, but it would not make his objection successful. As I argued above, reconstructive reasoning which calls for evaluation, when aimed at reconstructing the reasoning of an authority we hold legitimate, requires evaluating the reasons the directive was meant to settle on the basis of our own sense of reasonableness. Our pharmacist successfully reconstructs and follows the doctor's order, and he does so by evaluating the reasons it was meant to settle. This conflicts with even the reformulated second authority-capacity feature, but it does not undermine the authority of the doctor. Thus the second authority-capacity feature is too strict on both potential formulations.

(C) Chef Malaprop

I want to offer one last example which circumvents the complexity which *Jack and the pharmacist* got mired in, even though that example ultimately carries its argumentative burden. This last example has a venerable philosophical history. Suppose a patron in a restaurant says to the waiter, 'Please give my condiments to the chef.' The waiter finds this confusing. But then he hypothesizes that the patron misspoke. He meant to say, 'Please give my compliments to the chef.' The waiter partially identifies the content of the patron's request by thinking about what it would be good for the patron to request, what it would make sense for the patron to request. He also partially relies on what the patron said. Indeed the words act as a constraint on what interpretations the waiter can develop, as he must explain his interpretation by reference to the words used. What is important here is that the fact that the waiter has to identify the request of the patron constructively in no way undermines its status as a request, nor does it make the request ineffective.

Now let us change the example a bit and look at an order instead of a request. Imagine that our harried waiter is now in the kitchen, where the chef, arm outstretched bearing mango chutney, demands, 'Give table four these compliments.' The waiter is once again confused, 'What an odd thing for the chef to say while he is handing me chutney.' But he develops a hypothesis. The chef, he believes, meant to say, 'Give table four these condiments.' Now the waiter has constructively identified the content of the order. He thought in part about what would be a good order, what it would make sense to order in the situation. Moreover, he thought about some of the dependent reasons which applied to him—reasons about what he ought to do—in order to identify what it would make sense for the chef to have ordered. But he did not have to think about all of them; only enough to realize that delivering condiments was more sensible than compliments. Once again, constructive identification fails to undermine the order's efficacy. The order serves its purpose even though the waiter has to think about some of the reasons it was meant to settle in order to identify it.

The chef's order cannot be seen as resolving a preliminary question for the same reason that the doctor's order from the previous example cannot. Should we say that the chef directed the waiter to 'Deliver compliments or condiments?' Clearly not. Should we say the chef ordered compliments to be delivered? Well, the chef did not intend to, and it is obvious to the waiter that he was ordered to deliver condiments and not compliments.[46] Should we say that the chef failed in his effort to act as an authority? This would be a mistake too, perhaps more clearly than in the pharmacist case, as the interesting thing about malapropisms is that they usually do not hamper successful communication.[47] The waiter identifies the chef's order and delivers condiments because the chef ordered it, not because it reflects, on his judgement, the best thing to do in the circumstances.

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[46]We can imagine circumstances in which it would not be obvious to the waiter what he had been ordered to do. Perhaps the chef regularly orders compliments delivered to patrons, or the waiter believes there is a reason to do so in this case. Such circumstances might make it ambiguous what had been ordered, or even clear that an order to deliver compliments had been issued. Nevertheless, in the absence of such circumstances, the waiter will reasonably attribute a slip of the tongue to the chef.

[47]As Donald Davidson notes, 'What is interesting is the fact that in all these cases [of malapropisms] the hearer has no trouble understanding the speaker in the way the speaker intends.' D Davidson, 'A Nice Derangement of Epitaphs' in E Lepore (ed) *Truth and Interpretation: Perspectives on the Philosophy of Donald Davidson* (Blackwell Oxford 1986) 433-446, 434.

Moreover, we cannot say that the waiter's reasoning is only reconstructive and not evaluative. Part of the waiter's reasoning is reconstructive, the part which aims to figure out what a sensible order would have been from the perspective of the chef. But what drives the waiter to do the reconstructive reasoning is a bit of purely evaluative reasoning which precedes it, the bit where the waiter thinks, 'What an odd thing for the chef to say while he is handing me chutney.' In thinking this, the waiter is considering the reasons the order was meant to settle, indeed evaluating them, and concluding that what the chef said does not make sense in the circumstances. Only then does he reconstruct to see if he can recover the reasoning process and identify the order the chef issued. But in the first evaluative bit, he runs afoul of the second authority-capacity feature, making Raz's objection that reconstructive reasoning is not evaluative irrelevant. Since the chef's order succeeds in being authoritative despite the evaluation the waiter must make, we can conclude that the second authority-capacity feature is too strict.

Conclusion

The upshot of these examples is that 'Give table four these compliments,' or 'No vehicles in the park after dark,' or 'The right to bear arms shall not be abridged' provide more information than 'Do the right thing,' or 'Buy the best policy.' 'Do the right thing' does not constrain its interpretation beyond a demand that one act correctly, which one should do anyway. However, 'Give table 4 these compliments' constrains its interpretation far beyond a simple injunction to the waiter to 'Do the right thing.' This remains true even though to identify the content of the order accurately one has to reason about some of the considerations it was meant to settle.

Raz's second authority-capacity feature is too strict. A directive can be authoritative even if one has to reason about some of the dependent reasons which it was meant to pre-empt in order to identify its content. Now, importantly, I am not claiming that the law bears an analogy to the last two examples, which turn, in different ways, on a message somehow being garbled (though legal doctrines allowing the correction of 'scrivener's error' are closely related). My goal was to show that Raz's argument imposes too strict a requirement on law, and we have seen that his arguments do not support the second authority-capacity feature. As long as we believe that pre-interpretive materials (like texts, practices and history) constrain their own interpretation, then they can do the work necessary to restructure our reasoning

so that law succeeds in being authoritative despite our need to identify it constructively. Constructive identification allows us to draw a distinction between what we have been ordered to do, and what, all things considered, we believe is the best thing to do. As long as we can draw this distinction, authority can be exercised.

All this leads to the conclusion that constructive identification is not inconsistent with law's authority. Raz's second authority-capacity feature must be relaxed to state that a directive fails to be authoritative if the considerations one must use to identify it are limited to the dependent reasons it was meant to pre-empt. This is all Raz shows. Most methods of interpretation which constructively identify law, like Dworkin's, do not run afoul of this requirement, as law is only partially identified by reference to the reasons it is there to settle. Law is also identified by reference to texts, practices, and history, all of which constrain their own interpretation and thus make Dworkin's interpretive method compatible with law's authority.

CONCLUSION

Pennsylvania Superior Court Judge J. Michael Eakin has a predilection for issuing decisions in verse. In recent years, the judged has waxed poetic twice, once in a dispute over a pre-nuptial agreement, once in an appeal involving a poodle struck by a car. Here is the beginning of Eakin's opinion in the case of the stricken poodle, *Julie A. Zangrando v. Jan Sipula.*[1]

> Appellee and two little dogs were walking down the street,
> tending to business as they went, but soon they were to meet
>
> Appellant, who this wintry day was driving toward the pair;
> their mistress reined them to a stop along the thoroughfare.
>
> Angel and Autumn were their names, one white, one apricot;
> to walk beside her on a leash was their happy lifelong lot.
>
> The poodles waited for the car, and watched as it drew near,
> thinking there was naught at all to cause them any fear,
>
> For often cars would pass them by, but this was no wayfarer—
> the car begin to veer toward them and caution turned to terror.
>
> The car was coming much too close, something inside told her;
> the next thing Mrs. Zangrando knew, a poodle flew over her shoulder.
>
> To appellee this was nothing short of an unmitigated disaster;
> the wingless Angel'd taken flight and ascended quickly past her.
>
> In this brace of miniature poodles, neither one wide nor tall,
> one may have been named Autumn, but 'twas Angel took the fall.

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[1]2000 PA Super 196 (citations within text of decision omitted)

> The impact could have killed the pup but Angel would survive;
> a doctor of the veterinary kept the dog alive.
>
> The bill for Angel's treatment, though, was anything but small,
> and appellee felt that in the end, appellant should pay it all,
>
> So she filed this civil action in Allegheny county court
> seeking eleven hundred fifty-five dollars for the nearly fatal tort.

Eakin's decision consists of fifty-nine rhymed couplets of inconsistent metre. He discusses the legal issues in the case with exceptional fluency.

> First he says that appellee was standing in the road
> in blatant violation of this Commonwealth's Vehicle Code,
>
> So contributory negligence the trial court should have found
> precluding his obligation to pay for damaging the tiny hound.
>
> Appellant points us to Code Section 3544,
> which provides, indeed, pedestrians are required to do more
>
> Than choose just any path while they are going down the way;
> when in the street one must walk the left, and off the road should stay.
>
> But appellee gave testimony she walked upon the "berm,"
> and while the Vehicle Code has not defined that term
>
> The cases hold a berm is not highway or street *per se*;
> it's a border visibly distinct from the remainder of the way.
>
> Appellee was toward the left side curb, and just about as far
> as she could be from the center of the roadway and the car.
>
> We find that being on the berm, when she could do no more
> does not make a violation of 3544.

Eakin's opinion is wonderful, not as a poem, not even as a decision (though it is a far better decision than poem), but as an illustration of what we learned about interpretation in the first part of the thesis.

We can read Eakin's opinion with an eye towards its legal merit. We can inquire into the arguments Eakin advances towards his conclusion that the appeal should be denied. We can ask whether he offers a proper interpretation of 'berm',

whether he is correct is claiming that the elements required for an emergency defence are not present, and whether he shows proper deference to the findings of the trial court. This was William Askin's task. He represented Jan Sipula, the appellant. A reporter asked Askin for his reaction to the decision, and Askin said, 'I've only read it once... I'll read it a couple more times and research the law he cites... and if I can't understand clearly what the verse says, I might have a different opinion.'[2] Askin presumably went through the decision carefully to see if it was right on the law and to see if any deficiencies in Eakin's reasoning might warrant appeal. Askin interpreted the verses well if, among other things, he accurately identified the judge's arguments and holdings. His interpretation would no doubt be informed by his legal training, by his sense of the issues at stake, and his sense of the standards for argument in judicial decisions.

Future litigants might also read Eakin's decision for legal reasons. If Eakin's opinion had broken new ground of any sort, extended the application of existing legal rules or principles or created new ones, we could imagine that judges would interpret his opinion with an aim of discovering precisely what rule had been appealed to or perhaps to find the rationale underlying the rule. As it stands, Eakin's commentary at the end of the opinion might aid another plaintiff whose person or pet has been struck in the road. Eakin writes

> This argument is not so far from the dog in the fabled manger;
> were we to find as appellant asks, we would create a danger
>
> For everyone who find the needs of their beloved pet
> makes them walk within the confines of their street, and yet
>
> They cannot be fair game for cars that drive that very street
> (and cars will always win the ties, when pedestrian and auto meet).
>
> Be it interstate or neighborhood, drivers get no free shot
> at things they may encounter, whether in the street or not.
>
> So while counsel raises issues that are worthy and well taken
> in the end we find the effort to apply them here's mistaken.

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[2]R Vigoda 'The judge is no jester, just a poet' *Philadelphia Inquirer* July 14, 2000

> We must conclude the issues raised do not warrant a new trial
> and all that we may offer now is this respectful rhymed denial.

Eakin's opinion can be read for any of the reasons we read legal texts. It can be a part of many different interpretive endeavours within the practice of law. The standards for judging legal interpretations of Eakin's opinion will of course be sensitive to the purposes the interpreter has. Likely, the appropriate standards will be such that the opinion constrains its own interpretation to a high degree. It is highly unlikely that judges will strive to develop original or surprising readings of the opinion (though good readings from a legal perspective may turn out to be both). Rather they will aim at delineating the *ratio* and *obiter* or correctly characterizing the main holdings or disambiguating confusing phrases. The quality of their interpretations will almost certainly be judged by standards that evaluate relationships between the interpretation and the text.

Eakin's opinion can be read in other ways as well, as part of other interpretive endeavours. Some of these will be literary endeavours and will explore the verse not as a legal decision, but as a poem. Critics might examine its formal structure or the narrative strategy Eakin uses to motivate the story he tells. They might note how Eakin's depiction of the poodles evokes the reader's sympathy or the mirth with which he describes the unfortunate fate of Angel. I can even imagine more ambitious readings which might attempt to uncover, for example, religious imagery ('twas Angel took the fall). All of this will be hard going—Eakin's poem is just not that good *as a poem*.

Eakin's decision highlights all of the elements of *almost pragmatism*. When we interpret, we are seeking understandings of the object of our interpretation appropriate for the purpose we bring to the interpretation. We can interpret for a limitless variety of purposes, and these purposes in turn determine what standards we ought to use to judge our interpretations. Relative to some standards, objects constrain their interpretation; relative to others they do not. When we read texts for legal reasons, our purposes almost always justify the use of standards on which objects constrain their own interpretation.

In the first three chapters of this thesis, we cleared away many confusions which pervade discussions of interpretation and developed a theory of what interpretation is and how it works. The latter part of the thesis examined a number of problems in jurisprudence with our new understanding of interpretation. First, we saw

that Wittgenstein's remarks are not helpful in understanding the scope of interpretation in law, in part because Wittgenstein meant something idiosyncratic by 'interpretation'. Moreover, the picture Wittgenstein develops of how rules operate is consistent with a wide range of possible roles for interpretation in law, including expansive ones.

The final three chapters approached the relationship between interpretation and authority from a number of different angles. We learned that we need not interpret in accord with the intentions of law-makers to make sense of their authority. We also learned that methods of interpretation which make the identification of legal norms partially dependent on their merit do not necessarily undermine the authority of those norms. This opened space for Ronald Dworkin's method of interpretation and others like it.

Two themes unfolded over the course of our argument. The first, developed in the initial chapters, is that we can learn very little about interpretive debates, debates over this or that interpretation, by thinking about the nature of interpretation. We can clear away confusion through careful attention to the concept of interpretation, and we did this. But while a clear understanding of interpretation allows us to reject some interpretive arguments, namely those that presuppose confused understandings of interpretation, it does not replace them with alternatives. A clear understanding of interpretation leaves ground-level interpretive debates pretty much as they are.

The second theme emerged in the latter chapters, and it merits further investigation. Contemporary jurisprudence, it seems, is stuck in a paradigm best designed to understand law issued by a monarch and not particularly well-suited to understanding law in modern democracies. In this paradigm, law is seen as the product of deliberation of an agent as to how subjects ought to behave, and it is legitimated by the quality of the directives the agent issues. We can understand law in a democracy from a different perspective, however. We can view law as the outcome of procedures which are important to use for making collective decisions about how we ought to live our lives. These procedures *might* be important to use because they produce good law, but they *are* important to use because they are the *right way* to produce law, good or not. They are legitimated primarily by their merits as procedures. On this perspective, it becomes less important to see law as the view of a deliberative agent about how its subject ought to behave. Rather, legitimate (and perhaps good) law is the result of the right people making the right sorts of inputs into

the right kind of procedures for us to use to settle on rules to live our lives by. Moreover, this perspective shift has consequences for how we understand our legal institutions. We saw two: it changes the way we think about the legitimacy of political authorities, and it allows us to make sense of the authority of legislatures without matching our interpretations to their intentions. More thorough investigation may uncover additional consequences as well.

Interpretation has occupied a central role in legal theory for a long time, and it might seem that there is little payoff to continuing the debate. In a way this is true. We will not learn much about the interpretation of specific laws from continuing to study interpretation. But we can learn a great deal about the nature of our legal institutions. We must remain steadfast, however, in rejecting overblown theories of interpretation which attempt to deliver too much. If we have modest aims, the payoff from investigating interpretation and its role in law may not be modest at all.

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