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Handout #4: Constructive Interpretation, Legal Positivism, and Natural Law

In Law's Empire (1986) Dworkin contrasts his own interpretive conception of law with what he sees as a conception that is common in both popular and academic circles – the **Plain Fact View** (PFV). Hart is clearly supposed to be the philosophical champion of PFV. It says that the existence of law is a matter of plain social and institutional fact with the result that questions of law (as opposed to empirical fact) cannot be controversial. So PFV implies that hard cases must be legally indeterminate. **Conservative** conceptions of PFV insist that it's the judge's job to apply, not make, law and conclude that hard cases should rarely, if ever, be resolved judicially. By contrast, **progressive** conceptions of PFV see the need for judges to exercise a quasi-legislative capacity in the margins of existing legal rules and so conclude that judges should decide hard cases by exercising discretion.

Dworkin rejects PFV as inconsistent with the phenomena of legal interpretation. PFV cannot explain why there is legal disagreement about the resolution of hard cases (as opposed to moral or political disagreement) or why legal interpreters wrestle with the best interpretation of legal materials in hard cases (LE: 7-8).

DWORKIN'S INTERPRETIVE TURN

Dworkin claims that there are two conditions that an object (e.g. a practice, institution, or text) must satisfy if an interpretive attitude toward it is to be appropriate.

1. **Value:** The object not only exists but has value (e.g. has a point or serves some interest or goal).
2. **Fallibility:** Our beliefs about the object may not all track the value or point properly.

The process of interpretation makes use of these two assumptions by requiring that interpretations of an object see that object in its **best light**, revising common beliefs about the object in light of that understanding. Dworkin calls this account of interpretation **constructive interpretation**. According to Dworkin, there are three stages of constructive interpretation.

1. **The Pre-interpretive Stage.** Here the set of interpretive objects (e.g. laws, books, social practices) is tentatively constructed. This set will consist of paradigm objects of interpretation. The list of objects is tentative or defeasible, because later stages of the interpretive process may add or subtract from the list.
2. **The Interpretive Stage.** Here the interpreter finds an account of the meaning, point, or value of the main elements identified at stage (1) that shows them in their best light.
3. **The Post-interpretive Stage.** Here the interpreter adjusts his view of the identity and nature of the objects to be interpreted in light of the justification he finds in stage (2). Of course, if there is important adjustment to be made here, then the post-interpretive stage may call for further interpretation, and the stages will presumably repeat until our interpretation and our interpreteds are in "reflective equilibrium".

Dworkin makes two important claims about the interpretive stage.

Concepts and Conceptions. Different interpretations of a subject matter will often agree on an abstract description of the point or value of the subject matter and then disagree about the appropriate specification of this abstract description. Dworkin puts this point by saying that different interpretations must or at least usually identify the same concept underlying or informing the subject matter but disagree about the correct conception of that concept.

Dimensions of Assessing Interpretations. The first dimension of a good justification is **fit**. A justification fits well insofar as it accounts for and explains various features of the pre-interpretive data. The best fit need not account for all the pre-interpretive data; it may show the pre-interpretive data to be inconsistent or in some other way mistaken. The second dimension might be called the dimension of **acceptability**. Here we're interested in the value that the interpretation shows the object of interpretation to have. One interpretation of an object might show it to be more important or attractive than another; if so, the first interpretation is to be preferred at least along this second dimension. Both dimensions are important if, as Dworkin claims, an interpretation is supposed to show the object of interpretation in its best light.

Dworkin illustrates the demands of constructive interpretation as applied to social practices, in particular, the practice of **courtesy** (LE: 46-49). At the pre-interpretive stage, we begin with a defeasible list of the main forms or manifestations of courtesy. Perhaps these include bowing to nobility, taking one's hat off in church, honoring one's parents, opening doors for women. At the interpretive stage, we look for a value that informs these practices and shows them in an attractive light. In doing so, we might appeal to the value of respect. But if we do, we may decide that respect is something that must be earned or deserved. But if people are born into nobility, then it seems nobility as such does not deserve respect; rather, respect should be reserved for those who use the privileges of nobility wisely and for the common good. Similarly, biological parents appear not to deserve respect if they have failed to provide good education, opportunities for growth, and nurture. Only caring parents deserve honor. Presumably, women do not deserve more respect than men because of their gender and independently of their character or actions. Indeed, we may wonder whether the practices of courtesy with respect to women exhibit respect or disrespect. If it's part of a culture of putting women on a pedestal and treating them as especially vulnerable and dependent, then the practices of courtesy toward women actually show unjustified disrespect. These interpretive claims require us, at the post-interpretive stage, to modify our views about the requirements of courtesy so that they do not track these pre-interpretive categories per se and so that they do track differences in character and merit, regardless of class, gender, or age.

CONSTRUCTIVE INTERPRETATION OF THE LAW

Dworkin thinks that the fundamental concept underlying the **rule of law** is that legal decisions, distributing rights and responsibilities, ought to be **consistent** with past decisions, distributing rights and responsibilities. He thinks this account of the concept of law poses three questions for any conception. (1) Does it accept this requirement of consistency? (2) What is the point or value of requiring this kind of consistency? (3) What kind of consistency is required? Dworkin identifies three different conceptions of legal interpretation and their answers to these questions.

Conventionalism. Conventionalism is supposed to be the intellectual heir of Hart's positivism; it denies that propositions of law can be deeply controversial. (1) It endorses the rule of law and its requirement that assignments of legal rights be consistent with previous ones; (2) it claims that the point of consistency is predictability; and (3) it interprets consistency with past

decisions as requiring that a new decision be explicitly recognized in previous decisions or be derivable from what is explicit in previous decisions by uncontroversial methods and techniques.

Pragmatism. Pragmatism has some affinities both with legal realism and natural law. (1) Unlike both Conventionalism and Law as Integrity, Pragmatism denies that assignments of legal rights and responsibilities must be consistent with past decisions and insists that judges should decide cases by deciding what decision will be best (e.g. be most just or best serve the community as a whole). There may sometimes be "reasons of strategy" for judges to act "as if" there were pre-existing legal rights, grounded in the value of predictability, but predictability is not sacred; past decisions, as such, do not constrain how courts should behave.

Law as Integrity. (1) Like Conventionalism and unlike Pragmatism, Integrity insists that decisions about legal rights and responsibilities be consistent with past decisions. (2) Integrity is the demand that government act on coherent principle, and it is a distinct political virtue, alongside justice and fairness. (3) But, unlike Conventionalism, Integrity understands consistency with past decisions to be a matter of principle that can be quite controversial. How does Dworkin defend Law as Integrity? Of course, he argues that it fares better along dimensions of fit and acceptability than its two rivals.

Conventionalism, Dworkin believes, is a poor fit with interpretive practice, because it is unable to provide a non-skeptical explanation of why interpreters disagree even though each recognizes his own claim to be controversial. Moreover, Dworkin thinks that those versions of conventionalism that encourage judges to decide controversial cases (cf. the Progressive wing of the Plain Fact View) are not even faithful to their own conception of the value underlying the rule of law, viz. predicatibility.

Pragmatism may sound like the more radical rival, but in some ways Dworkin thinks that it is a stronger rival than Conventionalism. It doesn't do so well along the dimension of fit, because it attaches no intrinsic significance to consistency of principle of the sort interpretive practice seems to manifest. But, of course, it fares pretty well along the dimension of acceptability, precisely because it says that political decisions are justified by their acceptability (in different guises – justice, utility, economic efficiency). Why care about the dead hand of the past when there's so much good to do?

But in attaching no intrinsic significance to consistency of principle, pragmatism ignores the independent virtue of integrity. Integrity – understood of consistency in principle – is recognized as an independent virtue of character when we admire people for sticking to their principles through thick and thin, even if we don't fully approve of those principles. It is recognized as a political virtue in legislation when we reject the sort of unprincipled compromises that Dworkin describes as "checkerboard solutions" to problems of principle. Integrity in adjudication is the demand to decide legal controversies in light of the best conception of the concepts or principles that are reflected in previous decisions. Integrity in adjudication or interpretation puts the interpreter in the position of a contributor to a **chain novel** that is already well underway. She is constrained by the prior history of the novel, but she seeks to add to the novel in ways that make it, as a whole, the best work that it can be.

Are there any limitations in the analogy between legal interpretation and contribution to a chain novel? (a) In one way, legal interpreters seem to have **more** freedom than chain novelists. Inconsistency in legal interpretation is possible and sometimes a virtue, as when a bad precedent is overruled. Inconsistency in a novel introduces incoherence and always seems to be a vice. (b) In another way, legal interpreters would seem to have **less** freedom than chain novelists. The chain novelist is free to introduce any new theme that is not inconsistent with the prior course of

the novel if that will make the novel better. It's not clear that legal interpreters have this freedom. They seem constrained to interpret existing principles.

CONSTRUCTIVE INTERPRETATION, LEGAL POSITIVISM, AND NATURAL LAW

It's an interesting question what constructive interpretation implies about the debate between legal positivism and natural law. That's a debate over whether there is any essential connection between law and morality. As the debate is sometimes understood, the natural lawyer thinks genuine law cannot be morally defective in significant ways, whereas the legal positivist thinks it can. The two dimensions of constructive interpretation -- fit and acceptability -- seem to deny a simple victory for either legal positivism or natural law. **Fit is the backward-looking dimension** requiring consistency with past assignments of rights and responsibilities, whereas **acceptability is the forward-looking dimension** of morally acceptable assignments of rights and responsibilities. Insofar as fit with prior assignments of rights and responsibilities is a dimension of interpretation, this seems to favor legal positivism, because there seems no reason to assume that prior assignments of rights and responsibilities track the proper assignment of rights and responsibilities. However, insofar as the acceptability of an assignment of rights and responsibilities is a dimension of interpretation, this seems to favor natural law. Since both are dimensions of interpretation, this seems to be a partial victory for both and a simple victory for neither.

We might explore these issues further by looking at different ways in which the two dimensions might interact.

1. Fit only.
2. Fit with acceptability only as a tie-breaker.
3. Fit as the greater independent dimension: large differences in acceptability can compensate for small differences in fit; otherwise, fit wins.
4. Fit and acceptability are equal partners.
5. Fit is a mere (low) threshold; above the threshold, acceptability alone matters.
6. Acceptability only.

Constructive interpretation requires rejecting the two extremes -- (1) and (6). (1) does not embody an attempt at constructive interpretation, which would show the interpreted in its best light. (6) cannot distinguish between interpreting some existing thing and fashioning something wholly new. However, beyond that, Dworkin is unclear. At different points, he says things that suggest different intermediate possibilities. But we can see why (2) might also seem inadequate. Suppose that there are six previous decisions (D1-D6) with which a decision in the present case might fit. Suppose also there are two possible principles (P1 and P2) that might be used to decide the present case. (2) allows that the greater acceptability of P2 can be a reason to decide the present case by P2, rather than P1, iff P1 fits with D1-D3 and P2 fits with D3-D6 (or they are otherwise tied along the dimension of fit). But now suppose that P1 fits D1-D4 and P2 fits D4-D6. Here P1 enjoys marginally better fit than P2 does. But suppose, as before, that there is a significant difference in acceptability between the two principles such that P2 projects to other possible controversies with much more acceptable results than P1. Surely, constructive interpretation requires interpretive appeal to P2 under such circumstances. This requires claim (3). But it's hard to resist a similar argument for at least (4). Suppose there's a pretty big difference in fit between P1 and P2, such that P1 provides significantly better fit with previous

decisions than P2 but that nonetheless P2 is a much more acceptable principle such that it projects to possible cases with much more acceptable results. This might well have been the situation with respect to deciding between the Plessy Equal Protection Principle (separate can be equal) and the Brown Equal Protection Principle (separate is unequal). Here, PP enjoyed better fit than BP, yet BP projected to other possible controversies with more acceptable results. To explain interpretive reliance on BP, we must accept at least (4).

THE FUGITIVE SLAVE LAWS

The debate between legal positivism and natural law comes into sharpest focus when we look at social norms that are otherwise like laws but that are morally defective. We might focus discussion by thinking about the Fugitive Slave Laws (1850s) which required escaped slaves to be returned to their owners, even if they had escaped to a state in which slavery was prohibited. In the Massachusetts Supreme Court, Chief Justice Lemuel Shaw upheld the Fugitive Slave Laws, requiring Sims to be returned to his master in Georgia. Shaw appears to endorse the following analysis of the situation (A).

1. The Fugitive Slave Laws are laws.
2. The Fugitive Slave Laws are immoral.
3. It is the court's duty to enforce legal rights.
4. Hence, it's the court's duty to require the return of escaped slaves, even if this is unjust or wrong.

In his book Justice Accused: Antislavery and the Judicial Process (1975), Robert Cover attributes this sort of reasoning to Shaw and describes it (perjoratively) as positivist jurisprudence. Why? Elsewhere, he suggests an alternative natural law jurisprudence for the Fugitive Slave Laws (B).

1. The Fugitive Slave Laws are immoral.
2. It would be wrong for courts to require the return of escaped slaves.
3. It is the court's duty to enforce legal rights.
4. Hence, the Fugitive Slave Laws are not law.

We might wonder whether these are the only options and whether Cover is right about the commitments of legal positivism. Notice that the first two analyses agree that it's the court's duty to enforce legal rights (A3, B3). Is this assumption mandatory? Consider a third analysis (C).

1. The Fugitive Slave Laws are law.
2. The Fugitive Slave Laws are immoral.
3. It would be wrong for courts to require the return of escaped slaves.
4. Hence, it is the court's duty not to enforce these legal rights.

This analysis is like the analysis Hart offers in his debate with Lon Fuller about the case of the Grudge Informer – a post-war case in Germany in which a woman was prosecuted for making use of Nazi laws to imprison her husband pursuant to Nazi statutes for making subversive remarks about Hitler. Consider the following analysis of this situation.

1. Gertrude acted in accord with statute S.
2. All statutes are laws.
3. Gertrude acted wrongly.
4. The court was right to hold Gertrude liable for her wrongdoing.
5. Courts should not hold persons liable for wrongdoing committed pursuant to the law.
6. Hence, S is a law [(1), (2)].
7. Hence, S is not a law [(1), (4), (5)].

(6) and (7) show that (1)-(5) are mutually inconsistent. Fuller appeals to (1) and (3)-(5) to deny (6) and (2). Hart insists that it is more plausible to give up (5) than (7) and (2). Hart's position seems easier to defend. It supports the third (C) analysis of the Fugitive Slave Laws.

Dworkin's position on this issue is curious. He seems to allow that the best constructive interpretation of the Fugitive Slave Act might recognize a legal right on the part of the slave holder to a return of his escaped slave despite the fact that such a right offends against justice and equality (LE: 219). However, he suggests that the judge must choose among three options: (a) enforcing the legal right, as Shaw did, (b) lying about what the law requires, or (c) resigning his position. Neither (a) nor (b) may seem attractive. But this does not leave (c) as the judge's only option, inasmuch as this overlooks Hart's possibility of the judge forthrightly claiming that it would be morally unconscionable to enforce the law in such a case.