Philosophy of Law
An introduction

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the disputes between the positivist models of rules and their critics become most explicit. The problem revolves around the issue of what judges are entitled or obliged to do when faced with a case for which there is no clear judicial precedent, or upon which there appears to be no definite and unambiguous statutory guidance.

Positivist theories of hard cases

Although Austin had little to say about hard cases, he said enough to initiate a tradition of positivist interpretation. It was clear to Austin that in practice – even if the legal system has been thoroughly reformed and purged of the irrational elements in common law – the sovereign could not allow for every eventuality, every case that comes before its courts. For the purpose of cases not covered by posited law, the sovereign delegates powers of discretion to its judges, powers that are only to be used when there are no appropriate general rules to apply to this particular case; which is to say, when the law runs out. The judges are then temporary 'commanders' in their own right; however, they hold their authority only by virtue of appointment by the ultimate commander.

Austin believed that the inevitability of unforeseeable cases arising was due to the inherent vagueness or lack of perfect precision in the wording of the law. The delegation of powers of discretion was unavoidable because laws had what he called 'furry edges'. Therefore, one of the most important functions of a judge is to act as a subordinate deputy legislator to create new law by clarifying these furry edges. These views of Austin on the delegation of judicial discretion were schematic and primitive. He regarded it as a straightforward matter of common sense. Hart, it will be remembered, rejected Austin's command theory in favour of a more sophisticated analysis of legal rules. Hart nevertheless retained, in its essentials, an Austinian approach to judicial reasoning and hard cases.

Hart's approach was more developed and philosophically sophisticated than Austin's, but essentially similar in that he identified an area of discretion created by the incompleteness of existing rules of law. On Hart's conception, the nature of law is such that some degree of discretion is unavoidable, because no matter how well drafted the legislation and how wide-ranging existing precedent in case law, the established rules cannot cover every eventuality. Nearly all rules lack certainty in their range of reference.

On Hart's theory there is usually in hard cases what he calls a 'penumbra of uncertainty' surrounding the application of a rule. This penumbral quality of a rule is explained by the language in which any kind of rules – legal or otherwise – are invariably expressed. Sometimes it is possible to express a rule so precisely as to avoid any ambiguity or vagueness; however, this is often impossible because of the open texture of language.

Hart's standard example is of the use of the word 'vehicle' in a by-law banning vehicles from a public park. There is an undisputed core meaning

of the word: it clearly applies to cars and motorcycles; but less clearly to such things as bicycles, pedal cars, roller skates, skateboards or even prams. Unless they are specified by the rule, these cases are left to judicial discretion as to what is to *count* as a vehicle. This analysis can be extended to any major area of law. In contract law, the meaning of 'fraud' has a clear meaning, but there are peripheral contexts in which it is not clear whether a certain kind of action constitutes a deliberate deception and counts as fraud. These peripheral contexts are the areas for judicial discretion. On Hart's conception, then, the law has a core of settled meaning; there are penumbral areas in which the law is not settled. There are 'rules which are determinate enough at the centre to supply standards of correct judicial decision' (Hart 1961: 141–2).

In contrast to legal realists, Hart argues against the idea that the best a lawyer can ever do is to use his knowledge of past legal decisions to guess how a judge will decide a particular case. This, however, is exactly what Hart does accept when the rules become blurred by the vagueness of their language; that is to say, in hard cases. 'When the area of open texture is reached,' he asserts, 'very often all we can profitably offer in answer to the question "What is the law on this matter?", is a guarded prediction of what the courts will do' (ibid.: 143).

This, for Hart, is why it is not always easy or even possible to apply existing law. The indeterminacy of rules makes it inevitable that a certain amount of strong discretionary judgement has to be made in court. It is also, according to Hart, desirable. Without some degree of discretion, it would be a repressively rigid legal system. But while Hart sees this situation as acceptable, others regard it as a gesture of despair in the face of the complexity of the law. Instead of repressive rigidity, they see justice and consistency in complete determinacy.

Between the nightmare and the noble dream: Hartian discretion

In 1977, Hart published an essay in which he responded to Dworkin's growing influence in jurisprudence, reinforcing his own original interpretation of hard cases. In this essay, he depicted Dworkin's defence of complete determinacy and unique right answers as an overreaction to the extreme rule-scepticism of the American legal realists, with Hart's own positivistic account of judicial discretion as the genuinely realistic middle ground. Reviewing the last century of American legal theory, he points to the two extremes of regarding the law either as wildly arbitrary and unpredictable, or as a fully explicable, wholly determinate and certain process.

On the one hand, he maintains, we can see the American 'nightmare view that, in spite of pretensions to the contrary, judges make the law they apply to litigants and are not impartial, objective declarers of existing law' (Hart 1983: 127). In contrast to this surface appearance of impartiality, the judge is in reality a legislator, indistinguishable from a politician. Why is this a

nightmare? If it is true, it means that the image of judicial impartiality is a complete fraud. Litigants or defendants are entitled to expect judges to apply the existing law evenhandedly, rather than to have new law made for every occasion.

At the other extreme, argues Hart, we find the utopian noble dream, according to which judges never make new law, that despite superficial appearances to the contrary, judges never determine what the law *shall* be. Judges are confined to saying what they believe the law consisted in before their decision, which is the mere application of it. Dworkin he describes as the latest in the line of these 'noble dreamers', denying, in the face of all the evidence, the reality of judicial discretion. What we need to consider now is whether Dworkin's defence of complete determinacy really does imply this kind of utopian idealisation of the legal process.

Dworkin's theory of law as integrity

The comprehensive theory unfolded by Ronald Dworkin (b. 1931) over the last quarter of the twentieth century owes much to the analysis developed by both Fuller and Hart. Dworkin took over and developed many of Fuller's themes, but the importance of his writings to mainstream Anglo-American legal theory rests largely on the claim that they represent a sophisticated and plausible alternative to Hart's version of legal positivism, succeeding where Fuller failed in providing a concrete exposition of the unity of law and morality, thus undermining the key thesis of legal positivism. He regards all versions of positivism, from Bentham to Kelsen and Hart, as fatally flawed in their assumptions about legal validity. There is nevertheless a degree of convergence between Dworkin and Hartian positivists that had not been possible in the stark confrontation between classical natural law and its positivist enemies.

This is partly because Dworkin's own theory can only loosely be called a theory of natural law. Although it inclines in this direction, he is concerned more with the merits and faults of a historically specific legal system than with general or timeless concepts of law. What does link Dworkin with natural law, however, is his rootedness in the common law tradition and the central claim that the principles of justice that have evolved within this tradition are an essential ingredient of law. This is closely connected with his 'rights thesis', that judges are obliged to recognise and protect pre-existing individual rights. It will also become clear from this account of Dworkin's theory of law that, while it is indebted to many of the insights of philosophical pragmatism and legal realism, especially in its court-centredness and focus on controversial judicial rulings, it rejects the most characteristic of the realist tenets. The result is a strikingly original and independent theory of constructive interpretation or 'law as integrity'. As a complete theory, this emerges gradually from early essays published as *Taking Rights Seriously* (1977b), to the later work, *Law's Empire* (1986).

Rights, principles and policy

The centrepiece of Dworkin's rejection of the positivist concept of law is his distinction between what he identifies as legal rules and legal standards. The assumption he makes explicit from the outset is that the model of law as an elaborate set of rules, whether Austinian or Hartian, expresses only one limited dimension of the law, and this limitation obscures the wider reality of law as a whole. This inclusion of 'standards' of law, in addition to rules, is the keystone of Dworkin's theory because what it amounts to is an attempt to refute, on the grounds of actual legal practice as well as philosophical argument, the defining positivist thesis that law and morality are separate. For Dworkin, as for Fuller, law and morality are inseparably intertwined. Whereas for Fuller, however, the 'inner morality' of law is primarily procedural, for Dworkin, the moral dimension of law is wider and more substantive than this. Law is more than the factual matter of predicting and applying 'black letter' rules as laid down in the past by legislatures and courts; it also comprises intrinsically moral legal standards such as principles of justice, rights and perceptions of good social policy.

Considerations of policy, however, are regarded by Dworkin as subordinate to the principles of justice and the recognition of rights. It is the distinction between rules and *principles* that is crucial to his critique of positivism. The essential point is that a legal rule is something that is either applicable to a given case or it is not. It is an all-or-nothing concept. Principles of justice and fairness, by contrast, have what Dworkin calls the dimension of 'weight'. If a valid rule of law exists, it is normal procedure to apply it automatically. If a legal principle is acknowledged, its weight or seriousness has to be taken into account, possibly to be balanced against other principles, before it is allowed to affect the judicial decision.

Legal validity and interpretation

The purpose behind these distinctions is to show that the positivist theories of legal validity are unrealistic and ultimately incoherent. Although his arguments are aimed equally at past and present versions of positivism, Dworkin concentrates his fire on Hart's account of legal validity in relation to the rule of recognition. What he sees as mistaken in this account is the continued positivist assumption that there must be a single master test for distinguishing legally valid from invalid rules. On Hart's account, the valid rules of law are those that can be traced back to the original rule that authorises the entire structure of law. What Dworkin rejects, then, is the pyramid structure of law that is common to all the leading positivists, whether this originates in the power of the Austinian sovereign, the Kelsenian basic norm or Hart's rule of recognition. What Dworkin is himself asserting is that this image of legal validity does not in fact match the ways in which laws are actually validated in advanced legal systems.

In order to get this match, we have to look in detail at the complexity of arguments that support judicial decisions in controversial cases. The general point, however, is that on Dworkin's alternative to the positivist account of legal validity, judges are under a legal obligation that is imposed, not by hard and fast rules underpinned by a basic norm or rule of recognition, but by 'a constellation of principles' (Dworkin 1977b: 44) as well as rules. This is an obligation to come up with the right answer to the case under consideration, no matter how difficult or controversial. The source of the obligation lies in the past, in the body of judicial and legislative rules, decisions and unwritten principles of the common law. With these raw legal materials to hand, the role of the judge is to aspire to a completely coherent theory of law that will yield a judgement which (1) will provide the best 'fit' with existing legal materials, i.e. with previous rulings and legislation; and (2) will reveal the law in its best possible light, in terms of moral and political soundness, as exemplified by the liberal values of justice, fairness, equality, due process and individual rights. These two aspects of interpretation Dworkin describes as the dimensions of 'best fit' and of 'best light'.

The most illuminating analogy that Dworkin develops at length to justify this approach is a comparison of legal with literary interpretation. As the mouthpiece of the law, the judge is in the position of a creative writer asked to continue an unfinished novel in the vein of the original. 'The complexity of this task models the complexity of deciding a hard case under law as integrity' (Dworkin 1986: 229). The completion of the analogy requires that we imagine a chain of authors each expected to write another chapter. Law is like an ongoing literary narrative, the only difference being that it is open-ended. Each author in this situation would have to interpret what had gone before; the new chapter would have to fit the materials already written. At the same time, however, the author would have to make the novel the best it could be as a novel, integrating plot, image and setting, using substantive aesthetic judgement to accept one interpretation and reject others. The assumption is that there would only be one best way to continue it, rather than several equally good ways. Similarly, the judge has to fit his or her interpretation of previous law to the existing materials, while at the same time making the narrative of law the best it can be, in terms of political morality.

Right answers to questions of law

Must there always be 'right answers' to questions of law? This question, made prominent by Dworkin, is another way of asking about the nature of the discretion exercised by a judge in a hard case. When a case arises, with every appearance of being incompletely dealt with by existing law, one's instinct is to assume that there must be several options left open, more than one way of solving the difficulty. If there were only one way, how could it qualify as a hard case?

One of Dworkin's main endeavours is to show that this is mistaken, and that, contrary to appearances, there must in principle always be one and only one right answer to any hard case, and that this is 'right' both morally and legally. The allowance of alternatives or a range of possible acceptable answers is regarded by Dworkin as the result of a failure to recognise the duty imposed upon the judge to reach a decision that reflects the objective balance of rights in the case. The question here, then, is whether there is one determinate answer to every difficult case in which legal rules or principles or rights are in conflict, seemingly pointing to different but equally persuasive conclusions.

If there were no single decision required by law, then the judge could not decide the case 'according to law'. If more than one outcome is legally possible, then it seems that there are gaps in the law, gaps that must be filled by the judge, whose judicial function is then that of a creative legislator. He or she determines what the 'right' answer in this case 'ought' to be. It would seem that judges are then supplementing their legal knowledge and expertise with their own moral perceptions, that they have a free hand to refer to their own instincts for justice and equity, and so on. It is the freedom or judicial caprice seemingly sanctioned by this view of hard cases that Dworkin is opposing as contrary to the spirit of common law, which requires a degree of principled consistency in its succession of decisions.

Hercules and moral objectivism

Dworkin's advancement of the 'one right answer' thesis is an integral part of his wider defence of moral objectivism against moral scepticism and relativism. This moral objectivism is presupposed by the one right answer thesis and by the rights thesis. The claim that answers to moral problems or conflicts can be 'right' or 'correct', and the related claim that some rights prevail over others, is objectivist in the sense that the standards of morality or justice are taken to be independent of human decision or convention.

It is to illustrate this principle of moral objectivity as a model for legal reasoning that Dworkin introduces the mythical judge Hercules. This is the name he gives to an imaginary judge of unlimited intellectual power, for whom the failings of memory and the pressure of time would be no problem. Without any such impediments, Hercules would find the unique correct answer to every hard legal case, because he would have all the relevant information about the entire history of the rules and principles of the common law, and about the facts and competing claims in the case before him. With these superhuman powers he would not simply follow precedent; he would reason his way to the correct solution by constructing a complete theory of law and what it required for the case in hand. His interpretive reasoning would be guided by the requirement of 'best fit' with all relevant legal precedent, and at the same time by the criterion of 'best light', finding the interpretation that provides the best political reading of past law. Both criteria presuppose moral objectivism, the assumption being that there can only be one morally sound interpretation of

precedent. Hercules symbolises legal reasoning at its best because, with maximum knowledge of the law, he can justify his decision by legal precedent and balance the relative weight of the relevant principles and act accordingly, endorsing the rights that are entitled, on the balance of arguments, to prevail. Above all, Hercules will see that he has no discretion to act otherwise.

Dworkin's hard cases

From the many morally controversial cases in English and US law cited by Dworkin, the one he has made pivotal to his argument is the relatively minor one of *Riggs v. Palmer* (New York, 1889). The relevant facts of the case were as follows. Elmer Palmer was a 16-year-old who successfully prevented his grandfather from changing his will, of which he himself was the main beneficiary, by murdering him. After serving a prison sentence, there appeared to be no legal obstacle to prevent Palmer from claiming his inheritance. This was challenged in court by relatives (who were minor beneficiaries), but the judge upheld Palmer's claims because the formalities of law in relation to the will had been satisfied. This decision was overturned by a majority decision in the Court of Appeal, depriving Palmer of his inheritance, on the grounds that no one should profit from their own wrongdoing.

It is not difficult to see why Dworkin regarded this case as a striking illustration of his concept of law as a complex of rules, principles and policies. The central conflict in the case was between the black-letter legal *rules* of probate relating to the validity of wills and legal inheritance, and the unwritten *principles* of the common law. The case also provides an excellent illustration of the practical implications of the competing theories of law. A number of points should be noted before we examine these.

First, it seems intuitively obvious, given the prevailing moral views on such cases, that anyone who murders for profit thereby forfeits their right to the proceeds. Nobody would suggest that a man convicted for armed robbery should keep the money that he had hidden before serving his sentence. The difference with Palmer, of course, is that he appeared to be legally, if not morally, entitled to it. Second, it should be remembered that two judges did not find it intuitively obvious that he should forfeit the right to inherit, or at least not obvious enough to find against Palmer. One dissenting judge declared that it would be bad social policy to punish someone twice for the same crime. There had also been earlier cases similar enough to *Riggs* v. *Palmer* to be cited as precedent, in which apparently shocking judgements had not been appealed. In *Owens* v. *Owens* (Adams 1992: 138), for example, a widow convicted of being accessory before the fact to the murder of her husband was nevertheless granted entitlement to the legally specified portion of his estate.

Third, many still believe that unworthy claims like these have to be upheld for the sake of legal consistency. If the current state of the law points in an unwelcome direction, it can always be amended for future cases. This might

be unfortunate, so the argument goes, but it is necessary for maintaining the credibility of the institution of legal inheritance. Consider now how the advocates of the main theoretical positions might react to and deal with a case such as *Riggs* v. *Palmer*.

(1) *Christian natural law*. It seems unlikely, given their standpoint on the necessary connection between law and morality, that any traditional natural lawyer adhering to the higher law of reason would countenance such a manifest injustice. Good law is derived from the moral precepts of Christianity, rather than a literalistic reading of the law. A decision for Palmer would be contrary to the requirements of right reason. This is not to say that the ruling would be invalid, only that a natural law judge would have been more inclined to apply principles of natural justice.

(2) *Black-letter positivism*. It was probably only those who advocated following the rules of law to the letter who supported the decision in Palmer's favour. This is the narrowest possible interpretation of positivism, according to which judges should apply the rules exactly as they find them, no more and no less, regardless of the consequences. The dissenting judge Gray justified his rejection of the appeal with the opinion that:

> the matter does not lie within the domain of conscience. We are bound by the rigid rules of law, which have been established by the legislature [which] has by its enactments prescribed exactly when and how wills may be made, altered, and revoked, and apparently, as it seems to me, when they have been fully complied with, has left no room for the exercise of an equitable jurisdiction by courts over such matters.
>
> (Adams 1992: 138)

Although this severely literalist approach has a strong following in the courts, it should not be assumed that all positivists accept it.

(3) *Austinian positivism*. One thing that all positivists do accept is that the legal decision on this case must be constrained by the rules governing wills, the validity of which depends upon their having been posited by an authorised body. According to Austin's command theory, judges apply the orders or rules authorised by the sovereign, and in situations that require clarification they act as delegated 'temporary' commanders to resolve ambiguity or vagueness. On the face of it, this seems straightforward; judges stand in for and legislate on behalf of the sovereign when hard cases arise. Austin's own recognition of the problem of cases unanticipated by the drafters of statutes is limited, as we have seen, to the observation that some rules have blurred edges. In a case like *Riggs* v. *Palmer*, however, the rules have run out; there is no relevant rule to apply. This, though, is only the beginning of the problem. Do the 'temporary commanders' make the ruling as they see fit, following their own inclinations, or do they rule in such a way that they believe the sovereign legislature (Parliament, Congress or whatever) would have done with this case in mind? The latter course – which is called 'equitable

construction' – was in fact taken by Judge Earl, who found against Palmer, stating that:

> it was the intention of the lawmakers that the donees in a will should have the property given to them. But it could never have been their intention that a donee who murdered the testator to make the will operative should have any benefit under it.
>
> (Adams 1992: 136)

His reasoning proceeds to justify the reconstruction of the intentions of the lawmaker by imaginary interrogation. This doctrine certainly goes beyond Austinian positivism, but could easily be accommodated by it.

(4) *Hartian positivism*. Despite the greater sophistication of Hart's concept of law and of his approach to the linguistic problems at the root of hard cases, it is doubtful that it takes us much further than Austin. Does the idea of a judge's discretion to bring clarity into the area of the penumbra, where the meaning of the law is indeterminate, provide an answer to a case in which the rules have simply run out? In fact, Hart's response is that it is in cases like these where judges have genuinely free discretion to formulate an appropriate rule and create new law. According to Hart, the 'noble dream' of complete determinacy breaks down in cases like this, leaving judges to their own best devices. What this means is that the discretion they exercise is a freedom to apply their own moral beliefs or values, rather than merely a discretion to interpret the law in their own way. In a case like *Riggs* v. *Palmer*, there is no legal guidance on how to proceed.

(5) *Realism and rule-scepticism*. As we have seen, there is no easily identifiable 'realist' position, and there are many degrees of rule-scepticism. On Hart's account of the rule-sceptic 'nightmare', they see nothing but perpetual *ad hoc* creativity and unreliability in the law. This kind of rule-sceptic would undoubtedly see *Riggs* v. *Palmer* as a dramatic confirmation of the sceptical image of law as a chaos of personal bias and prejudice, in which judges, when backed into a tight corner, do just as they please. The case would indeed have been seen by Hutcheson or Frank as corroboration of their criticism of the false certainties of mechanical jurisprudence. Even these 'extreme' realists, however, were not as one-sided as this. They might also have seen the outcome of this particular case as a vindication of their belief in the ability of the best judges to reason their way intuitively to the just and equitable solution to the most difficult of hard cases. Hutcheson in particular described judges as waiting for the creative flash of inspiration, seeking out the solution from their knowledge of written and unwritten rules and principles of common law.

The important point here is that this kind of solution does not require the 'equitable construction' of the intentions of the original lawmaker. The Aristotelian 'equity', the ability to individualise general principles of justice to a particular case, is in the hands of the judges, not the legislators. Why, after

all, should a court appeal to what a legislator or drafter of a constitution, perhaps as long as two or three centuries ago, might or might not have intended in the wording of a statute? Realist reflections such as these in the 1920s and 1930s were an important source of Dworkin's theory of hard cases.

(6) *Dworkin's theory*. Dworkin's treatment of *Riggs* v. *Palmer* as a paradigm case differs radically from all of these interpretations. He took this case as a paradigm because he believed that it brought into sharp focus the shortcomings of every version of positivism. The central point is that, for Dworkin, the rules may have run out but the law has not. Dworkin's argument is that the decision finally reached by the majority of judges in the Court of Appeal was the right one, not only allowed by but also required by law. In other words, the judges were under a duty – in this as in all cases – to find a particular decision in accordance with the objective rights of the parties involved. There was a real solution to be discovered, rather than a workable decision to be taken.

The decisive principle of common law in this case was, as we saw at the outset, the principle that no one should profit from their own wrongdoing. This is why the relevant rules did not prevail. The manner in which this was cited by Judge Earl was, however, more complex than this. The wider context was that:

> all laws, as well as contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.
>
> (Adams 1992: 137)

This judge was in no doubt that he could detect the operation of this principle in countless previous rulings in every area of common law. It was to be taken as paramount in this case because he perceived it to be authentically legal, not because it was a worthy moral principle. On the other hand, of course, he believed that unless it were morally sound, it could not have become an embedded feature of the common law. It is this general outlook, binding the moral with the legal, as well as this particular decision that Dworkin is endorsing as an exemplification of the most justified legal practices.

Dworkin, however, does not maintain that such principles drawn from the common law tradition should be treated as absolute. On the contrary, the decision reached in this case was legally sound because it took account of the relevant rules, principles and social policies. As we saw earlier, the status of principles is logically different from that of rules, which either apply or they do not. Principles, by contrast, have the dimension of weight, which means that if they are in conflict with established rules, other principles or good social policy, they have to be balanced against them. Also, the source of their validity is different. Whereas the 'pedigree' of rules is traced back to their enactment,

thereby confirming their validity, principles such as 'nobody should profit from their own wrongdoing' have never been enacted or otherwise laid down; they are inferred as the best explanation for existing legal practices.

How far does the outcome of *Riggs* v. *Palmer* support Dworkin's theory of law as integrity? In the first place, it does seem to confirm the proposition that common law moral principles, distinct from legal rules, are themselves an integral part of the law. This in itself, however, is insufficient to support the further claim that a holistic assessment of the case would provide a unique correct answer, according to the lights of political morality. On Dworkin's reading, the judgement of Earl did discover that answer, by applying the criteria of best fit and best light. One of his key comments in this respect was his observation that Gray seemed to have agreed with Earl that the law would be better if it blocked Palmer's inheritance, but did not agree that the law therefore did deny it to him (Dworkin 1986: 36). Faced with conflicting precedents, Earl was looking for the best fit with the past and reading the law in its best possible light, making the best moral sense of it, thereby finding a deeper consistency and making the law speak with one coherent voice.

Others, however, have rejected this interpretation and have even denied that this was the right decision according to law, or that the judges had the legal right to innovate in this manner. On this view, the proper legal procedure was to apply the rules and leave the matter to the legislature. If true, this would imply that Dworkin's criterion of best light is a misconceived intrusion of moral and political values into law and legal reasoning.

Criticisms of Dworkin

The rule–principle distinction

It is central to Dworkin's case against positivism – especially in its Hartian version – that the law is a moral–legal complex of rules and principles. This is the fundamental challenge to the separation thesis. If it is true, there is no morally neutral procedure of legal validation, because it is not possible to abstract the purely factual rules from this complex and identify those that are binding in the sense that they will always prevail in a hard case. The determination of legality always involves the recognition of moral principles. Given this wider and more flexible concept of law, it is possible for Dworkin to argue that while the rules may run out, the law need never do so, that it will always have the principled resources to deal with any question which arises.

There are several plausible responses to the rule–principle distinction. The first is to question the intelligibility of ascribing different logical status to a principle, which according to Dworkin has weight rather than an all-or-nothing quality. What does it mean to say that whereas a rule is either applicable or it is not, a principle can be 'weighed' against another one? In the end, it also either applies or it does not. In the *Riggs* v. *Palmer* example, the

principle prohibiting profit from wrongdoing is applied, while in other cases it is not. Indeed, what is the difference between a rule and a principle? It is not a matter of particularity and generality; there can be particular or general expressions of either. It cannot be that a principle can be unwritten or 'understood'; so can a rule. This problem, which has never been satisfactorily clarified by Dworkin, is in the end, though, only a matter for clarification. The implications of the distinction for legal validity are undeniable.

Given that the distinction is accepted as meaningful, one uncompromising line of criticism is to insist that only hard and fast rules laid down by legislation or judicial ruling are genuinely legal, and that the cases which Dworkin highlights, bringing common law principles into play, are examples of dubious legal practice, allowing judicial decisions to be politicised. This has also been said about the case of *Henningsen* (1960), in which substantial damages were awarded against a motor company standing on a valid contract, and about more famous cases deployed by Dworkin, such as *Brown* v. *Board of Education* (1954), declaring racial segregation in schools to be unconstitutional. With this formalistic approach, saving the predictability and determinacy of existing law at the expense of admitting serious gaps in the law – to be filled by subsequent legislation – judges have to operate within the rules, applying law as they find it. No element of moral or political assessment is required or permitted. On this line of argument, the separation thesis stands intact: the law as we find it (or the sum of the rules as we find them) is one thing, our moral judgement of its merits and defects is another.

Most positivists today, however, accept that something like Dworkin's principles do play a prominent and legitimate part in legal reasoning, while denying that this has the implications Dworkin argues for. It has been argued, for example, that in Hart's account of positivism he understands 'rules' in the wider sense that includes principles, thus bringing them into the system of validation whereby they are traceable back to a rule of recognition. Alternatively, it can be conceded that Hart's account is defective in this respect, that it needs supplementing with principles, but that the resultant legal–moral complex can be subjected to a positivist master test. On this 'inclusive' account, principles as well as rules have ultimately to be validated by the original rule of recognition.

If this much is conceded, however, it might seem that positivism has fatally compromised its position by abandoning the separation thesis, allowing that moral principles are an integral part of the law. What is required, according to 'inclusive' positivists, is a closer examination and rearticulation of the separation thesis, of what is separable from what. According to Neil MacCormick, for example, Dworkin scored a palpable hit in his critique of Hartian positivism's exaggerated attention to rules to the exclusion of principles, but failed to show that the essential tenets of positivism were thereby discredited. MacCormick accepts that law is never value-free; on the contrary – he agrees – in both its rules and principles it *embodies* values, and is always already infused with values. He claims that Dworkin is right to argue that the law cannot be

'hermetically sealed from morals and politics' (MacCormick 1978: 236), but wrong to conclude from this that the law cannot be described in a positivistic manner, independently of evaluative appraisal, or that the rule of recognition criterion for determining the legality of rules should be abandoned.

The real meaning of the separation thesis, for MacCormick, is that one could describe, expound or explain, for example, the South African system of apartheid – rules, principles and all – without thereby morally endorsing or condemning it. The separation thesis, properly understood, requires only the descriptive–normative distinction. This is what moral neutrality means: judgement is suspended for purposes of analysis and description. The laws of England or the USA on sex or race discrimination cannot be explained without reference to moral and political principles, but they can be fully described without moral judgement one way or the other. This, MacCormick argues, is the defensible form of the separation thesis, rather than the claim that the law is intrinsically value-free.

As a modified version of Hart's model of rules, extending it to include Dworkinian principles, this is a plausible alternative to Dworkin's theory of constructive interpretation. MacCormick's further insistence, however, that no positivist has seriously entertained the 'intrinsic' interpretation of the separation thesis, and that this suspension of judgement was what they had in mind all along, is unconvincing. The least that can be said is that the leading defenders of the separation thesis (Bentham, Austin, Holmes, Kelsen) equivocated between the two versions as described by MacCormick. What he implies is that they did not see the issue clearly, and that his explanation is a clarification of what they really meant. There is little doubt, however, that they were proposing more than a method of objective detachment, of refraining from evaluation. The underlying reality of law described from this position – law as an object of legal science – was indeed understood to be 'value-free', a bare pyramid structure of commands, rules or Kelsenian norms, stripped of the moral language of rights and duties. It was this image of law that Dworkin, following Fuller, was challenging.

To use MacCormick's own example (MacCormick 1978: 200–4), the Rent Restriction Act of 1920 would not have been understood by the classical positivists to have no moral implications for the interests of landlords and tenants, but their separation of law and morals would have required not only that they look dispassionately at the content and operation of the Act, but also that they disregard the moral or political principles of fairness, justice and rights governing the introduction of the rules. What they were looking for was the underlying structure of validation of these legal rules, in terms of the authority of the sovereign, the basic norm or whatever. This 'science of law' requires the expulsion of these principles from the domain of law; they are regarded as extraneous factors. Dworkin's response was to argue for their inherent legality, not by virtue of their sources or points of origin, but by virtue of their mere presence in the common law. MacCormick's acceptance of these principles as authentically legal, by virtue of their function in rela-

tion to rules, thus indirectly validated by the rule of recognition, aligns him with a developed Hartian positivism against Dworkin while at the same time distinguishing his own position from that of classical positivism.

While Dworkin's assault on the model of rules and his emphasis on the role of principles have received a generally favourable response, and have stimulated refinements and adjustments to the positivist position, it is his own alternative to these models that has attracted the most fundamental criticism.

Dworkin's moral objectivism

Much of the criticism of his theory as a whole is an extension of the wider philosophical disputes about the moral objectivism upon which Dworkin's legal theory rests. If it were true that all moral judgement had an inescapably subjective element (Mackie 1977a), then it would be clear that the one right answer thesis would have to be rejected. Given that Dworkin's concept of law includes moral standards, we would have to conclude that with questions of law there is either more than one possible 'right' answer, or that the very idea of correctness as applied to law is inappropriate. Those critics of Dworkin who do emphatically reject any form of moral objectivism tend to focus their criticism accordingly on the figure of the ideal judge Hercules, who symbolises the possibility of objective judgement. If Hercules can be exposed as a fraud, it is believed, the idea that every hard case has a unique correct answer, and that this answer will be based on the recognition of objective rights, will go down with him.

Arguments from disagreement

The most common criticism of Hercules is that, as a mythical figure embodying the possibility of objectivity about legal problems with a moral dimension, he is inappropriate because the supposition that such a judge is possible in principle presupposes what Dworkin is trying to prove. Sceptical feelings about the role of Hercules are reinforced by the suspicion that the objectivity claimed on his behalf is just another substitute for God as the absolute and omniscient authority and ultimate arbiter of human disagreement. On this reading, the theory of constructive interpretation is no more than a recycling of a discredited legal formalism, declaring that fallible human judges can shed their subjectivity and use the law 'as a whole' to cut through intractable moral problems and conflicts between rights to find the elusive right answer, which in fact does not exist. Those more sympathetic to Dworkin's approach, however, regard this as an exaggeration of the problem of objectivity and a misrepresentation of what it requires. Dworkin himself, it should be remembered, sees objectivity in the assessment of conflicting rights in accordance with existing law not only as a logical possibility, but also as a practical reality, as law working at its best. Hercules – with his unlimited vision – is only the perfected ideal of what is often actually achieved in the courts.

The important criticisms, however, are more specific than this. One of the main types of criticism is that there is too much fundamental disagreement between people, and especially between judges presiding over hard cases, for Dworkin's thesis to be plausible. If there were right answers to moral questions, one would expect more convergence of opinion, at least between rational individuals who have reflected long and hard on the matter. All the more so might we expect such convergence in legal decisions, when the adjudicators are professionals; yet one case after another is inherently controversial, dividing judicial opinion at every level in the system. Surely this is an indication that there cannot be one objective answer?

In this form, the argument from disagreement should not be taken too seriously. The first point is that 'objectivity' does not *mean* convergence of opinion (either of universal or of well-informed opinion); such convergence or consensus is no more than a symptom, and certainly no guarantee of objectivity. Objectivity here means *mind independence*, that the answer is right or wrong independently of any opinion. There is nothing inherently implausible about serious disagreement on difficult moral matters leading the best-informed opinion astray, any more than there is in disputes in the natural sciences in contexts where the point at issue is subject to demonstrable truth. Disagreement in itself, no matter how extensive, proves nothing against a truth-claim. Being right does not mean having the ability to command universal assent. The second point is that the majority is not necessarily right. Two judges on a bench of five can be right, the other three wrong, about the state of the law and what it requires in the instant case. Dissenting judges are often vindicated by a higher court. The frequency of dissent is no indication either way on the question of whether or not there is a right answer to be found.

If the argument from mere disagreement is ineffective, however, others directed more specifically at the nature of judicial reason and at Dworkin's version of objectivism are potentially more damaging. Brian Bix, for example, has argued that there are reasons why it is inevitable – rather than just a matter of fact – that judges would give different judgements if they were to apply Dworkin's criteria. When it is all a matter of interpretation, the criterion of moral soundness ('best light') will vary from one judge to another, according to variations in their political and moral beliefs; as will the criterion of best fit with the relevant legal materials. Furthermore, there is too much flexibility in the application of these two criteria, such that judges are not sufficiently constrained by the requirement of 'best fit'. If applied, Dworkin's theory, supposedly objective, would generate more disagreement than already exists. Dworkin's only defence, he argues, is that his theory is an interpretation of actual judicial practice in its best possible light, but in this case he is prescribing and cannot present the theory as a description of actual practices (Bix 1993: 106–11).

It is doubtful, however, that this criticism does undermine the right answer thesis, or even establish the claim that Dworkin's theory would have this unsettling effect. Dworkin's own understanding of the points at issue

here is that he is advocating the interpretive approach to steer it between the undesired alternatives of mechanical jurisprudence and free discretion. The best judicial practices, he believes, adhere to neither of these options. Judges are indeed bound by the constraints of best fit with existing precedent, hence they are not free creators of law; however, at the same time – by virtue of the criterion of best light – they are more free than those who believe that they are mechanically finding law (Dworkin 1986: 234). The question here is whether Dworkin's recommendations, if universally adopted, with every judge constructing a complete theory of law, would be likely to generate more disagreement than exists at present. This question persists through all the significant criticisms of the Dworkinian theory.

MacCormick, who as we saw above accepted the value of Dworkin's critique of Hart's model of rules, develops the argument from disagreement to attack the rights thesis and the one right answer thesis. His argument is that there are no right answers because of the *kind* of disagreement involved in hard cases. Citing Thomas Reid's argument against Hume's subjectivism – that the very presence of genuine disagreement proves that there is always in principle a correct answer to moral questions – MacCormick argues that Reid's mistake here lies in the conflation of two kinds of disagreement, the speculative and the practical. With speculative disagreement, the differences can in principle be resolved because they are wrangles over what is or is not actually the case. With practical disagreement, what it always comes down to is a decision about how best to lead our lives, or how society should be organised. What rights and principles of justice, in the end, do we want to acknowledge?

MacCormick's illustration of this distinction is the principle established in the historic case of *Donoghue* v. *Stevenson* (1932) (Baker 1991: 90), which changed the course of English law on negligence. The salient facts of the case were that a customer in an ice cream parlour had bought her friend Mrs Donoghue a bottle of ginger beer, the contents of which she had partially consumed before discovering the remains of a decomposed snail. On account of the distress and subsequent illness suffered, she sued the manufacturer Stevenson for compensation. Her first action failed, because the manufacturer was only legally liable to the person with whom he had a contract, the one who had actually purchased it. When the appeal was heard by the House of Lords, however, the decision went in her favour, by a majority of 3–2. The important point established here was that there existed in law 'a general duty of care'. This was expressed by the 'neighbour principle' expounded in Lord Atkin's ruling, according to which every person has a legal duty of care towards his or her neighbour, who is defined as anyone who it might reasonably be foreseen will be affected by that person's acts or omissions, not merely as those with whom one has a contract. This majority ruling was disputed by two judges, whose main arguments rested on the prediction of disastrous implications for the manufacturing industry.

One question here is whether this principle was already present in English law. Was the prevailing opinion a new departure, or was it a recognition of what was implicitly there? While for most positivists, such landmark rulings quite clearly signal new departures, a Dworkinian interpretation is that positive law on this matter did indeed change in 1932, but that this change was superficial compared with the deeper continuity in terms of its emergence from earlier principles and rulings from which the neighbour principle was inferred. The decision that the Lords reached on this occasion was, legally and morally speaking, the right answer, rather than a deduction from a principle snatched out of thin air. If they had decided any other way, they would have been *wrong*.

MacCormick, however, uses this case to undermine the one right answer thesis. The legal disputes in such cases he sees as distinguishable into both kinds of disagreement, speculative and practical. He concedes to Dworkin that the principle recognised in *Donoghue* may well have been implicit in the law before 1932, by virtue of earlier decisions, and that disputes of this nature do admit of an objectively right answer. Against Dworkin, however, he argues that once such speculative disagreement has been settled, 'we find ourselves beyond that which can be reasoned out'; we are confronted with a choice between what are often equally plausible alternatives. When all speculative disagreement is resolved, the practical question remains: Which right do the courts, speaking for society, prefer to support? In the practical sense, there was no one right answer to which of the equally tenable rights (of the manufacturer's right of contract, or the customer's right to compensation) should be upheld. In the event, a narrow majority endorsed the neighbour principle and significantly changed our way of life. The matter was resolved by mixed considerations of public interest, corrective justice and common sense. The overall point here is that on this interpretation, while it might be true that there is in principle a right answer to the question about fitting precedent, the same cannot be said about the moral soundness of the adjudication between competing rights. Hercules can cope with the first question, but not with the second (MacCormick 1978: 108–15, 251–8).

The best Dworkinian reply to this is not, as MacCormick suggests, the argument that all legal disputes are speculative. The best way is to question MacCormick's Humean premises, which include the supposition that competing conceptions of justice are essentially subjective, in the sense that they must, in the end, simply be a matter of preference. It is not true that, in cases like this, judges can only reach out beyond reason and decide which social policies to endorse. Is it really true that the competing rights here were 'equally tenable'? What was actually happening was that one principle-based right (to compensation) was outweighing the principle behind a rule-based right (of contract). The manufacturer was found to be liable because the outweighed principle was objectively weaker than the one that prevailed. Such claims are not 'objective' in the sense of being value-free. Questions of justice are imbued with value, but they can still be resolved objectively.

Arguments from incommensurability

Two things are said to be commensurable when there is a common standard by which to measure them. Any two trees are commensurable in terms of height. It is meaningful and true to say that a three-yard line is longer than one of eight feet, and a two-mile road is longer than one of three kilometres, because in either case there is a determinate method of conversion from one scale to the other. When two things are incommensurable, lacking a common standard, the one cannot be measured against the other. Only like can be compared with like. The quality of two pieces of music can be compared, but they cannot be compared with the quality of a scientific treatise.

The problem of incommensurability has been raised against Dworkin by a number of critics, including Mackie (1977b), Finnis (George 1992), MacCormick (1978) and Bix (1996). The general thrust of this criticism is that opposing rights cannot be weighed against each other, because there is no common standard by which to measure the respective value of, say, the rights based on contract and the right to compensation. It is a problem of finding a neutral standpoint from which to judge the competing claims. If the situation is such that one of the rights has to give way, then it is a matter of public policy for judge, legislature or society to decide which of the rights is to be preferred. Hard cases cannot be resolved by declaring which right 'scores' higher than another.

Mackie's criticism is that with his rights thesis, Dworkin presupposes a single scale upon which opposing rights-claims can be measured against each other, with one right outweighing another. The idea that a unique right answer can objectively emerge from 'too simple a metric of commensurability on a linear scale' is rejected by Mackie on the grounds that the merits of opposing claims cannot be measured in this manner.

Dworkin's reply to this criticism – that we make such 'best-decision-all-things-considered' arbitrations all the time – has generally been regarded as unsatisfactory. It is difficult to see what distinguishes this from a Hartian positivist interpretation. It is not the best decision Dworkin is looking for; it is the right answer. A better reply here would follow the same course as the reply to the arguments from disagreement. In the same way that there is no need to argue that all legal disputes are speculative, there is no need to argue that all rights are commensurable in the sense of being quantifiable. Rights can have objectively discernible relative weight in terms of principles of justice, without this relative weight being expressible in numerical terms.

Finnis's criticism is quite different. As a natural lawyer, his quarrel is not with Dworkin's moral objectivism. Dismissing the arguments from disagreement and the subjectivist scepticism about correct moral judgements, Finnis argues that Dworkin's mistake is that he has failed to understand the real complexity of the tension between the technical requirements of law for providing the means for unequivocal dispute resolution, and its character as an instrument of justice. This failure, he argues, is reflected in Dworkin's theory of the relation between the dimensions of best fit and best light, which he assumes

to be commensurable. According to Finnis, commitment to moral objectivism does not entail the one right answer thesis in law, because looking for one right answer to a hard case is like looking for the single English novel that is both 'the funniest' and 'the best'. Similarly, one answer might provide the best fit, but another answer the soundest morally speaking. In other words, the scales of moral soundness and of fit are incommensurable, a fact that is obscured by Dworkin's assumption that the right answer can always be found on each scale, with Hercules interpreting law in its best light by selecting the morally soundest from the range of those that fit the best. Dworkin's awareness of this problem is apparent from his change of strategy in his later writings. Moving away from the intuitively plausible argument in *Taking Rights Seriously*, that the right answer is the morally soundest with sufficient fit, to the vaguer argument in *Law's Empire*, that it is only a question of striking the right balance, he implicitly admits that the problem is not easily solved.

Conclusion

Within the theoretical framework established by Hart and Dworkin, the most influential interpretations of law in recent years are still essentially rooted in the traditional antagonisms between conflicting perspectives in moral philosophy and radically opposed understandings of the relation between law and morality. In many ways, the contemporary disputes are still seen by some as continuations of the long-standing conflicts between common law thinking and its critics. What has changed, however, is the level of sophistication in the opposed theories and the degree of convergence between them. The exchanges between Dworkin and his Hartian and natural law critics, in particular, are no longer marked by the mutual incomprehension displayed in earlier episodes of these disputes.

Study questions

General question: When judges decide hard cases, should they be understood as applying existing law or as making new law?

Further study questions: Is there always one and only one right answer to questions of law? Explain and critically evaluate either Hart's or Dworkin's theory of hard cases. Critically assess Dworkin's theory of law as integrity. Does Dworkin's criticism of the positivist models of rules succeed in undermining the positivist understanding of law? Which theory of law do the cases of *Riggs v. Palmer* and *Donoghue v. Stevenson* support? Are there morally neutral and legally objective answers to these cases? Is MacCormick's revision of the separation thesis more convincing than the traditional version?

Suggestions for further reading

Recommended general reading on contemporary legal theory, representing a range of views and approaches, are Gavison (1987), George (1996), Raz (1975), Finnis (1980), Lyons (1993) and Posner (1990).

From the extensive literature on hard cases, Hart (1961: ch. VII.l; 1983: ch. 4) and Dworkin (1977b: chaps 1–4) are essential. The revised edition of Hart (1995) contains a postscript in which he replies to Dworkin's criticisms. Useful and important general commentaries include MacCormick (1978: ch. 8), Bix (1993), Cotterell (1989: ch. 6) and Lyons (1984: 87–104).

On Dworkin's theory of law as a whole, the most sympathetic is Guest (1992). An anthology of critical essays (Cohen 1984) includes replies from Dworkin. Discussions of Dworkin can also be found in Mackie (1977b), MacCormick (1982: ch. 7), Posner (1990: ch. 6) and Simmonds (1986: ch. 6).

On contemporary natural law theory, there are valuable collections by Finnis (1991, vols I and II) and George (1992). Other significant works include Finnis (1980), Beyleveld and Brownsword (1986) and Weinreb (1987). On contemporary positivism and the analysis of rules, the main works to read are Raz (1975), Twining and Miers (1976) and George (1996).

For further details and conflicting interpretations of the significance of the case of *Donoghue* v. *Stevenson*, see Baker (1991: 90–5), Halpin (1997: ch. 6), MacCormick (1978) and Fleming (1994: 158–64).