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Ronald Dworkin, *Legal Theory and the Problem of Sense*,
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THE PROBLEM

I spoke about the general character of jurisprudence: about the proper aims of that discipline and its proper methods. I was concerned with one central issue of jurisprudence: analysing or accounting for what might be called the *sense* of propositions of law. Lawyers and laymen accept and assert (or disbelieve and deny) propositions about what the law of their nation or state "says". These propositions are sometimes very general (the law forbids states to deny anyone the equal protection of the laws within the meaning of the Fourteenth Amendment), sometimes much less general (the law does not allow murderers to inherit from their victims), and sometimes very concrete (the law requires Mr. O'Brien to compensate Mrs. McLoughlin for the emotional injury she suffered on 19 October 1973).

The question of sense asks what these propositions of law should be understood to mean, and in what circumstances they should be taken to be true or false or neither. (Or, if you object to using "true" and "false" about propositions of law, in what circumstances it is proper and improper to assert them.) These must always be central problems of jurisprudence. Since the use of propositions of law and debate over their truth or soundness are pervasive features of legal practice, no competent account of that practice can ignore the issue of what kind of claims these propositions are used to make. We can no more grasp what legal practice is like without some understanding of the sense of propositions of law than we could understand the institution of mathematics with no grasp of the sense of mathematical propositions. That is why successful theories of law will always have or entail what might seem a merely linguistic aspect or component.

II. THE ORTHODOX ANSWER

Orthodox legal theories (I shall mention some examples in a moment) each contain some general thesis about what propositions of law mean and when they are true, although this must sometimes be dug out from beneath the surface. I believe they share a common and mistaken assumption: that lawyers all use roughly the same factual criteria for deciding when propositions of law are true or false, and that a correct statement of the criteria they use constitutes a statement of the sense these propositions have. So a philosopher answers the question of sense by an accurate report of these shared criteria, which must be a neutral, descriptive report quite independent of any moral or political convictions the philosopher might have.

This story supposes that lawyers follow common rules — I shall call these semantic rules — which stipulate necessary and sufficient factual conditions for the

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truth of any particular proposition of law. It does not follow that lawyers know what rules these are, in the sense of being able to state them in some crisp and comprehensive form. For we all follow rules, in using our language, of which we are not fully aware. It falls to legal philosophy, on this account, to explicate the conceptual rules lawyers have been following unawares. This may be a matter of some difficulty and legal philosophers may well disagree.

Legal positivism, as a school of jurisprudence, argues that the rules lawyers follow unawares stipulate exclusively historical grounds for law, stipulate, that is, criteria that make the truth of propositions of law turn on whether certain specified social and psychological events have actually occurred. Positivists differ about the exact characterization of these historical criteria. Austin, for example, said that a proposition of law is true, within a particular political society, if it correctly reports the past command of some person or group occupying the position of sovereign in that society and he defined a sovereign as someone whose commands are habitually obeyed and who is not himself or itself in the habit of obeying anyone else.

Hart rejected Austin's account of legal authority as a brute fact of habitual command and obedience. He said that the true grounds of law lie in the acceptance, by the community as a whole, of a fundamental master rule (he called this "a rule of recognition") that assigns to particular people or groups the authority to create law. So propositions of law are true, when they are true, not just in virtue of the commands of people who happen to enjoy habitual obedience, but more fundamentally in virtue of social conventions which represent the community's acceptance of a scheme of rules empowering such people or groups to create, by their decisions from time to time, valid law.

All forms of legal positivism must meet a formidable challenge, which we can describe most quickly by noticing a distinction between two kinds of disagreement lawyers can have about any particular proposition of law. They might agree about what I called the grounds of law — about which non-legal facts can make a particular proposition of law true or false — but disagree about whether those grounds are in fact available in a particular case. They might agree, for example, that the speed limit is 55 if the appropriate legislature has passed such a law, but disagree about whether it has because they have not yet consulted the statute books. Call this an empirical disagreement. Or they might disagree about what really are the grounds of law, about which non-legal facts make a proposition of law true or false. Call that a theoretical disagreement about the law.

If the positivist's general solution to the problem of sense is sound, then theoretical disagreement would be impossible or at least very rare. How can lawyers and judges disagree about the grounds of law if they all follow the same rules (whether or not they are able to articulate these rules) for deciding what grounds make a proposition of law true? The positivist's reply, so far as it appears in the literature, is a bold claim. Theoretical disagreement is, in some sense or another, an illusion. There are two versions of this bold claim. The first is the cruder: it holds that when lawyers and judges appear to disagree about whether some proposition of law is true they are actually agreed that it is not because there is in fact no law at all on the question it purports to answer. They are actually debating about whether the proposition *should* be true, about whether judges should use

their power to fill gaps in the law in the way that would make the proposition true after they act. Why then do they all pretend that there is law and that they are disagreeing about what the law is? Because the public believes that there always is law and that judges should always follow it. On this view lawyers and judges connive to keep the truth from the public so as not to disillusion it or arouse its ignorant anger.

This crude answer is unpersuasive, because it is unclear why the pretence should be necessary, or how it could be successful. If lawyers all agree that there is no decisive law in hard cases, then why has this view not become part of our popular political culture long ago? Why do losing as well as winning lawyers co-operate in the deception? In any case, there is no evidence, in actual judicial opinions, that when lawyers and judges seem to be disagreeing about the law they are really keeping their fingers crossed. Most of their arguments would be entirely inappropriate as arguments for either the repair or improvement of law; they make sense only as arguments about what judges must do in virtue of their responsibility to enforce the law as it is.

The second version of the claim that theoretical disagreement is a kind of illusion is more sophisticated. It stresses the importance of distinguishing between standard or core uses of the word "law" on the one hand and border-line or penumbral uses of that word on the other. Rules for using words (it points out) are not precise and exact; they create penumbral or borderline cases in which people speak somewhat differently from one another. So lawyers may use the word "law" differently in marginal cases when some but not all of the grounds specified in the main rule are satisfied. This explains, according to the present argument, why they disagree in hard cases. Each uses a slightly different version of the main rule, and the differences become manifest in these special cases.

According to this more sophisticated defence of positivism lawyers are in no way pretending or trying to deceive the public. They really do believe they disagree about the state of the law, but their disagreement is spurious. From our standpoint, as critics, it is better to think of their argument as one about repair, about what the law should be, because we will understand the legal process better if we use "law" only to describe what lies within the core of that concept. If we use it, that is, to cover only propositions of law true according to the central or main rule for using "law" that everyone accepts, like the propositions of the highway code. So legal positivism, defended in this different way, has a reforming as well as a descriptive character, but the reform is in the interests of clarity, not any particular vision of political morality.

This new story is in one way like the fingers-crossed story, however: it leaves wholly unexplained why the legal profession should have acted for so long in the way the story claims it has. How could they think that important decisions about the use of state power should turn on an arbitrary decision to use a word one way rather than another at its borders? The crossed-fingers defence shows judges as well-meaning liars; the borderline case defence shows them as simpletons instead.

The borderline defense is worse than insulting, moreover, because its diagnosis ignores an important distinction between two kinds of disagreements. I mean the distinction between borderline cases and testing or pivotal cases. People sometimes

do speak at cross-purposes in the way that defence describes. They agree about the correct tests for applying some word in what they consider normal cases — they all agree about what ordinarily makes a house a house — but they happen to use the word somewhat differently in what they all recognize to be marginal cases like the case of a palace. Sometimes, however, they argue about the appropriateness of some word or description not for that reason but because they disagree about the correct tests for using the word or phrase on *any* occasion, including occasions on which they agree the word applies. The arguments judges and lawyers have about propositions of law in hard cases are arguments of this second kind, pivotal arguments testing fundamental principles, not borderline arguments about where some concededly arbitrary line should be drawn. Arguments about the proper way to read a statute, for example, are deep arguments that reflect different sets of assumptions about the character and point of legislation not just when statutes are unclear but when they are clear as well.

III. LAW AS AN INTERPRETIVE CONCEPT

I said that orthodox theories go wrong in this way because they fail to realize that propositions of law make *interpretive* claims, and that any useful account of the truth conditions of such propositions must therefore be normative rather than simply descriptive. This claim assumes a particular account of what interpretation, most abstractly described, really is. In the context I have in mind, it is the activity of trying to impose coherence on the behaviour that makes up a social practice, and imposing coherence means proposing some consistent point or meaning the behaviour can be taken to express or exemplify. Very often — perhaps even typically — the data will under-determine the point. In that event normal interpretation aims to make, of the material being interpreted, the best it can be of the enterprise to which it is taken to belong. So an interpretation of something assumed to be a work of art seeks to make it the best it can be artistically, and an interpretation of all or some part of legal practice seeks to make this the best it can be from the point of view of political morality.

Propositions of law, I argued, make interpretive claims of that general character. They claim that some part of legal practice is seen in its best light if it is understood as deploying and enforcing the principle or rule the proposition reports. Judges develop, over their careers and in response to their own convictions and instincts, working theories about the best interpretation of various levels and parts of the legal practices of their jurisdiction. They expand and rely on these theories when they are confronted with new and difficult issues; they try to decide hard cases consistently, so far as they can, with what they take to be the best interpretation of the general practice of deciding hard cases. When they disagree about the law their disagreements are interpretive. If two judges disagree about how statutes should be read, or about what force should be given to precedent decisions not directly in point, this will ordinarily reflect a deeper disagreement over the best general interpretation of their community's practices of adjudication, that is, a disagreement about which account of that practice shows it in its best light from the point of view of political morality. Interpretations struggle side by side with litigants before the bar.

Legal philosophers cannot produce useful semantic theories of law. They cannot expose the common ground rules lawyers follow for fixing legal labels onto facts, for there are no such rules. General theories about the circumstances in which propositions of law are true are abstract interpretations. They are abstract because they aim to interpret the main point and structure of legal practice, not some particular part or department of it. But for all their abstraction they remain interpretations: they try to show legal practice as a whole in the best light it can bear. So no firm line divides jurisprudence from adjudication or any other aspect of legal practice. Legal philosophers debate about the general part, the interpretive foundation any legal argument must have. We may turn that coin over. Any practical legal argument, no matter how detailed and limited, assumes a general foundation of exactly the kind jurisprudence offers, and when rival foundations compete it assumes one of these and rejects others. Jurisprudence is the general part of adjudication.

An abstract interpretation of legal practice — a “conception” of law — will deploy, as its organizing idea, some account of how the familiar practices and procedures of modern legal systems contribute to the justification of collective coercive force. Legislation — the practice of recognizing as law the explicit decisions of special bodies widely assumed to have that power — is a prominent part of our legal landscape, and precedent also has a prominent place. So any competent conception must provide some answer to the question why statutes enacted through particular procedures and past judicial decisions should in themselves provide a justification for the later use of state power. No conception need justify every feature of the practice it offers to interpret: like any interpretation it can condemn some of its data as a mistake, as inconsistent with the justification it offers for the rest, and perhaps propose that this mistake be abandoned. A conception of law might try to show, for example, that the general explanation of legislation that provides overall the best justification of that institution requires, contrary to now prevailing practice, that old and out-of-date statutes should be treated as no longer law. Conceptions of law are controversial just because they differ in this way in their post-interpretive accounts of legal practice, in their opinions about the right way to expand or extend the practice in topics or areas or procedures at present controversial. These controversial opinions are the cutting edge of a conception of law, and that is why hard cases provide the best theatre for their power.

IV. SCEPTICAL THEORIES AND WICKED LAW

There is plainly room, in this general picture of what legal theory should be like, for sceptical or nihilistic conceptions of law. It must be open to a philosopher of law to conclude that the practice he sets out to interpret has no decent justification that fits even most of what is done or demanded in its name, and to recommend that the practice therefore be abandoned or ignored. Some of the more extreme examples of legal realist theories have that flavour, when they are understood as interpretations instead of semantic theories of law, as do some theories that call themselves Marxist. The question whether a particular conception of law is a negative or sceptical conception, however, is sometimes a matter of perspective. An interpretation that emphasizes one point or purpose is sceptical about others, and if the

latter appear more ambitious or profound the theory will have an overall sceptical cast.

In the heyday of semantic theories legal philosophers worried about whether wicked places really had law. Semantic rules were meant to capture the use of "law" generally, and therefore to cover statements people make not only about their own legal system, in which they participate as members of a continuing practice, but about very different historical and foreign legal systems as well. It was, for example, a common argument against strong "natural law" theories, which claim that a scheme of political organization must satisfy certain minimal standards of justice in order to count as a legal system at all, that our linguistic practice does not deny the title of law to obviously immoral schemes. We say the Nazis had law though it was very bad law. This fact about our linguistic practice was widely thought to argue for positivism, with its axiom that the existence of law is independent of the value of that law, in preference to any "natural law" theory.

If useful theories of law are not semantic theories of this kind, but are instead interpretive of a particular stage of an historically developing practice, then the problem of immoral legal systems appears in a very different light. Interpretive theories are in their nature addressed to a particular legal culture, generally the culture to which their authors belong. Unless these theories are deeply sceptical they will treat that legal system as a flourishing example of law, one that calls for and rewards the interpretive attitude. They will offer to find, in its general structure of their practice, a political justification of its role in licensing political coercion. They should therefore not be supportive, but in some way sceptical, about legal systems that lack features essential to that justification.

But it does not follow that a lawyer who finds the best interpretation of Anglo-American law in some feature the Nazi regime wholly lacked must then deny that the Nazis had law. His theory is not a semantic theory about all uses of the word "law", but an interpretive theory about the consequences of taking the interpretive attitude towards his own legal system. He may, with perfect linguistic propriety, insist that the Nazis did have law. We would know what he meant. He would mean that the Nazi system can be recognized as one historical realization of the general practices and institutions from which our own legal culture also developed. It is law, that is, in what we might call the pre-interpretive sense.

We need not deny that the Nazi system was an example of law, no matter which interpretation we favour of our own law, because, as I have just said, there is an available sense in which it plainly was. But we have no difficulty in understanding someone who does say that Nazi law was not really law, or was law in a degenerate sense, or was less than fully law. For he is not then using "law" in that sense; he is not making a pre-interpretive judgement of that character, but a sceptical interpretive judgement that Nazi law lacked features crucial to flourishing legal systems whose rules and procedures do justify coercion. His judgement is now a special kind of political judgement for which his language, if the context makes this clear, is entirely appropriate. We do not understand him fully, of course, unless we know which interpretation of the point of flourishing legal systems he favours. But we catch his drift; we know the direction in which he will argue if he continues.

It is perfectly true that the lawyer just mentioned, who says that Nazi law was

no law, might have put the very same point in the different way favoured by positivists. He might have said that the Nazis had law but very bad law lacking the features of a minimally decent system. But that would have told us less of what he thinks, revealed less of his overall jurisprudential position, because it would not have signaled his view about the consequences of lacking those features. On the other hand, on some occasions, this curtailment might be an advantage. It might be unnecessary and even diversionary — productive of argument unnecessary to this present purpose. — for him to reveal more. In that case the alternative positivist formulation of his point would be preferable, and there is no reason why we should artificially limit our language to make context-sensitive choices of this kind impossible.

Context sensitivity will be even more important when the question in play is sharper, more specialized, more practical than simply one of general classification or critique of a foreign and very different legal system. Suppose the question somehow arises, for example, how a judge in the foreign system we disapprove — Judge Siegfried, for example — should decide some hard case arising there. The focus has changed, because this question requires, not merely a general comparison of the foreign system with our own, but an independent interpretation of that system in some detail.

Suppose we think that Siegfried's legal system is so wicked that it can never provide any justification at all, even a weak one, for state coercion, so that in every case Siegfried, if he can get away with it, should simply ignore legislation and precedent altogether. Once again we might, but need not, put that opinion in the dramatic language that denies that there is any law in Siegfried's nation at all. That choice of words, which relies on the post-interpretive sense of 'law', would enforce the premises that interpretation proposes a justification, so that when no justification at all is provided by what is law in the pre-interpretive sense, the right interpretive judgment is the sceptical one that denies the title of law. But we could make the same complex point by using 'law' in the pre-interpretive rather than the post-interpretive sense, and then adding that in this case what is law provides no warrant for a judicial decision. Whichever language we choose the important point, for us, would be the point of political morality, that nothing just in the fact that this nation has law in the pre-interpretive sense provides any litigant with any right to win what he seeks in its courts.

Suppose, however, that on further reflection this is not exactly our view. For we might find something in the history of the legal practices of Siegfried's community that we think justifies *some* claim of right by some litigant in some case before him, in spite of the general wickedness of the political system, and in spite of the fact that we believe these practices as a whole are so defective that no supportive general interpretation is possible. Suppose, for example, that that case in question is an ordinary contract case that seems to involve no issue of racial or political discrimination or otherwise any piece of tyranny. We might think that the plaintiff in this case has an overall right to win just because the statutes and precedents of his jurisdiction grant him that right. Our opinion might, in another case, be more guarded. Suppose the case does in some way involve discriminatory or otherwise unjust legislation. Suppose the defendant is a Jew and the plaintiff has appealed to some statute denying Jews defences available to Aryans in contract cases. We might

still think that the facts just cited justify a *weak* right in the plaintiff to win, although we would want to add that this weak right is overridden, all things considered, by a competing moral right in the defendant so that Siegfried should nevertheless do all in his power — even lie about the law if this would help — to dismiss the claim.

We can make the political issues more difficult still by improving the complexity of our example in various ways. The underlying moral issues would then change, and more distinctions and discriminations would become necessary. Even so the question of which words we used — whether we wished to report our conclusions in an interpretive judgment and what standards of interpretation would then be appropriate — would be secondary to the moral convictions we used these words to report, and the resources of legal language are sufficiently flexible so that much the same convictions could be reported in rather different language. The question of wicked legal systems is not, in the sense jurisprudence has long assumed it is, a conceptual question about the right way to use the word 'law'. It is not one but many questions, and they all arise at the level where political convictions, not semantic rules, are in play. Of course, all these various discriminations can be made within the positivist vocabulary. But the problem of wicked legal systems hardly forces positivism upon us.

QUESTIONS FOR DISCUSSION

1. According to Dworkin, how do legal positivists answer questions about the sense of legal propositions, and what is wrong with their answer(s)?
2. Why does Dworkin believe that an interpretive approach to law is superior to a semantic approach?
3. How does Dworkin defuse the debate about the characterization of Nazi law (which was exemplified in the Hart-Fuller debate, see articles in Chapter 3 and earlier in this Chapter)?

I. NOTE: DWORKIN AND HIS CRITICS

Ronald Dworkin (1931–2013) was probably the most influential English-language legal theorist of his generation. Over the course of 30 years, he developed a sophisticated alternative to legal positivism. Though his theory has little resemblance to the traditional natural law theories of Aquinas and his followers, Dworkin occasionally referred to his approach as a natural law theory, and it is on the natural law side of the theoretical divide set by the Hart-Fuller debate. At the same time, it may sometimes be helpful to see Dworkin's work as establishing a third alternative to legal positivism and natural law theory: an interpretive theory of law.

In Dworkin's early writings,¹ he challenged a particular version of legal positivism, a view which saw law as being comprised entirely of rules, and judges as having discretion in their decision-making where the dispute before them was not covered by any existing rule. Dworkin offered an alternative vision of law, in which

¹ Collected in RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).