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The Unity of Interpretation

Lawrence B. Solum
Georgetown University Law Center, lbs32@law.georgetown.edu

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LAWRENCE B. SOLUM[**]

INTRODUCTION

What is interpretation? One can imagine a range of answers to this question. One answer might begin with the observation that the English word "interpretation" is used to refer to a variety of human activities. Translators at the United Nations interpret remarks made in French when they offer an English translation. Literary critics interpret novels when they investigate the deep and sometimes unconscious motivations of the author. Conductors interpret a score when they make decisions about meter, tempo, and dynamic range. Actors interpret a screenplay when they improvise new lines based on their understanding of the characters. Judges interpret statutes when they attempt to disambiguate words and phrases that could have multiple senses. The term "interpretation" is used in a variety of contexts to refer to a variety of human activities.

It might be the case that the word "interpretation" is used in different senses in these diverse contexts – the word "interpretation" may be ambiguous. Or it could be the case that the diversity of interpretive activities is evidence that "interpretation" is a "family resemblance"[1] concept (to use Wittgenstein's felicitous phrase): the various forms of interpretation may share an overlapping set of characteristics, but lack an "essence" or core. And finally, it is possible that all of the diverse human activities that we call "interpretation" are unified – that "interpretation" is a functional kind with an essential structure.

In other words, there are at least three views about the relationship between all of the various activities that we call "interpretation"; we can express these three views as three competing theses or claims. The *ambiguity thesis* is the claim that the word "interpretation" refers to several conceptually distinct activities and that it is simply a mistake to advance a theory of interpretation that seeks to unify them. The *family resemblance thesis* is the claim that the *diversity* of interpretive phenomena is structured by a series of common features, no one of which is shared by all of the activities that we call "interpretation." The *unity-of-interpretation thesis* is the claim that all (or almost all) of the activities that we call "interpretation" share a common structure or set of essential properties. This Essay investigates the unity-of-interpretation thesis in relation to the views advanced by Ronald Dworkin, in his new, deeply interesting, and sure-to-be-controversial book, *Justice for Hedgehogs*.[2]

Justice for Hedgehogs represents the latest stage in the development of Dworkin's complex and evolving theory of interpretation. Part I of this Essay argues that as Dworkin's theory of "interpretation" has developed, the object of the theory has shifted from the interpretation of legal texts to the construction of legal rules to general normative theory. Part II explicates the theory of interpretation offered in *Justice for Hedgehogs* and the unity-of-

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[1] *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 32 (G.E.M. Anscombe trans., 3d ed. 1968).

[2] RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (forthcoming 2010) (Apr. 17, 2009 manuscript, on file with the Boston University Law Review).

interpretation thesis – the claim that all of the various activities that we call "interpretation" share an essential structure with all human intellectual activities other than science. This Part concludes that Dworkin's view obscures rather than illuminates the nature of "interpretation" in law and legal theory. Part III suggests a reconstruction of Dworkin's view that draws on the distinction between "interpretation" and "construction."

I.   THREE STAGES IN DWORKIN'S THEORY OF INTERPRETATION

Justice for Hedgehogs offers a new theory of interpretation, but it also represents the culmination of decades of theorizing by Ronald Dworkin. In this Part of the Essay, I will investigate the changes in Dworkin's views by identifying three stages of development in his thought. Stage one is roughly associated with his early essay, *Hard Cases*.[3] Stage two was developed in his book *Law's Empire*[4] and is the basis for his theory, law as integrity. Stage three is found in *Justice for Hedgehogs*. Dworkin may or may not accept this three-stage sequence as an adequate reconstruction of the positions he intended to convey,[5] but the three stages do represent distinct moments in the understandings of his readers and interlocutors.

A.   Hard Cases*: Fit and Justification*

In *Hard Cases*, Dworkin offered a view of interpretation that seemed to distinguish between easy cases, where the legal sources did the work, and hard cases, in which judges were required to move beyond the rules that were explicit in legal texts (such as constitutional provisions, statutes, and cases) and resort to principles.[6] At this stage, Dworkin explicitly distinguished between the criteria of "fit" and "justification," and seemed to suggest a two-step process. Step one: identify the set of possible legal rules that fits the existing institutional history (e.g., the texts of the authoritative legal materials).[7] If there is only one rule that fits, or if all the rules that fit favor the same resolution of the case, then we need not proceed beyond step one. Step two: select from among those rules on the basis of the principles or values that provide the best justification for that institutional history.[8]

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[3] Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

[4] RONALD DWORKIN, LAW'S EMPIRE (1986).

[5] In oral remarks at the Boston University conference, Dworkin seemed to express general assent to the account offered in the oral remarks that formed the basis for this Essay. *See* Ronald Dworkin, Ronald Dworkin, Response to Panel II: Interpretation at *Justice for Hedgehogs*: A Conference on Ronald Dworkin's Forthcoming Book (Sept. 25-26, 2009) (transcript on file with the Boston University Law Review) [hereinafter Dworkin, Response].

[6] Dworkin, *Hard Cases*, *supra* note 3, at 1058-60.

[7] *Id.* at 1059 (discussing "arguments of policy").

[8] *Id.* (discussing "arguments of principle").

This reading of *Hard Cases* may be controversial, but it is supported by the text. For example, in introducing the idea of a hard case, Dworkin stated, "if the case at hand is a hard case, when no settled rule dictates a decision either way, then it might seem that a proper decision could be generated by either policy or principle."[9] The implication is that easy cases are those in which a "settled rule" does "dictate a decision" and this seems (on the surface) to be consistent with H.L.A. Hart's picture of "core" and "penumbra"[10] – although that theory is never mentioned in *Hard Cases*. If the core of a legal rule decided a case, it was in the "core" and an "easy case," and both Hart and Dworkin seemed to agree that the positive law dictated the outcome. But Dworkin's account of the judging in "hard cases" seems inconsistent with Hart's account of judging in the "penumbra."[11] If the case was in the penumbra, then Hart believed the adjudicator has discretion, but Dworkin argued that there is always a right answer – and that answer is provided by the normative theory that best fit and justified the law as a whole.

B.   Law's Empire*: Law as Integrity*

In *Law's Empire*, Dworkin offered a more fully developed and systematic theory of the law, which he called "law as integrity"; this theory is an application of the more general method that he calls "interpretivism."[12] That theory seemed to differ from the theory offered in *Hard Cases* in several respects, but for our purpose, one of these (seeming) differences is particularly important. Dworkin adopts the position that the method for deciding hard cases and easy cases is identical,[13] and this seems to imply that Dworkin parts company with Hart on the related notion that there is a sharp distinction between the core and penumbra of a legal rule.

In this second stage of development, interpretation begins with construction of the normative theory that best justifies the institutional history, including the texts of the authoritative legal materials. That theory then supplies the content of the law.[14] Of course, "fit" still plays a role in a certain sense. The normative theory is a theory that provides the best possible justification for the

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[9] *Id.* at 1060.

[10] H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

[11] *Id.*

[12] *See* Stephen R. Perry, *Method and Principle in Legal Theory*, 111 YALE L.J. 1757, 1807 (2002) (reviewing JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY (2001)).

[13] *See* DWORKIN, LAW'S EMPIRE, *supra* note 4, at 354 ("Hercules does not need one method for hard cases and another for easy ones."); *see also id.* at 266 ("[E]asy cases are, for law as integrity, only special cases of hard ones . . . .").

[14] My view of this relationship has been greatly influenced by the work of Mark Greenberg. *See* Mark Greenberg, *The Standard Picture and Its Discontents* (UCLA Sch. of Law Research Paper No. 08-07, 2008), *available at* http://ssrn.com/abstract=1103569.

institutional history of a particular community, and that history includes constitutional provisions, statutes, and court decisions. Thus, the normative theory must "fit" the institutional history. But if it turns out that the best normative theory requires that a particular case be decided in a way that is contrary to the core (in Hart's sense) of an existing legal text, then the normative theory prevails and the seeming "core" of the legal rule must give way. We could call this implication of Dworkin's theory, the "instability-of-the-core thesis."

Whereas the theory of interpretation offered in *Hard Cases* seemed to be a two-step theory, the theory offered in *Law's Empire* looked like a one-step theory.[15] Fit and justification were not two distinct moments in the interpretive enterprise; rather, *justification* now does all the normative work and *fit* merely identifies that which must be justified.[16]

This one-step theory of *Law's Empire* seemed to have a variety of advantages over the two-step theory that was presented in *Hard Cases*, but it also raised a number of questions. One of those questions focused on the moral significance of the theory that provided the best justification for the institutional history of a particular community. Dworkin argued for that theory on the basis of the value of integrity, but this argument struck many as odd. Why should the value of integrity trump our all-things-considered moral judgments in the case of law if that value is insufficient in other contexts? If there is a moral theory that is superior to the theory that best justifies our institutional history, then shouldn't we act on the basis of the superior theory? After all, our institutional history may involve moral mistakes. Why should those mistakes exert moral force? At a deeper level, there seemed to be discontinuity between the kind of morality that ruled *Law's Empire* and the rest of morality. How can there be two distinct approaches to morality, one for law and a different one for the rest of life?

These questions suggest a familiar objection to Dworkin's theory, which we can state in terms of the distinction between easy and hard cases. We might accept that judges have an obligation to comply with the law, even when the

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[15] Dworkin does, however, describe the theory of *Law's Empire* as involving two steps:

First, there must be a "preinterpretive" stage in which the rules and standards taken to provide the tentative content of the practice are identified. . . . Second, there must be an interpretive stage at which the interpreter settles on some general justification for the main elements of the practice identified at the preinterpretive stage.

DWORKIN, LAW'S EMPIRE, *supra* note 4, at 65-66. But this is not a two-step theory of interpretation; interpretation *is* stage two. If the same schema were applied to the theory in *Hard Cases*, there would be a three-step theory: (1) identify the object of interpretation; (2) identify the settled core (the easy issues); and (3) apply the method of fit and justification to the penumbra (the hard issues).

[16] This is explicit in the passage quoted *supra* note 15.

result the law requires is not the same as the result that would otherwise[17] be required by the application of the moral theory that we believe is true or correct; let us call this the "first-best moral theory." Different comprehensive moral theories will give different justifications for a judicial obligation of fidelity to law; for example, consequentialists might argue that judicial adherence to the law produces better consequences than the alternatives. The next stage in the objection argues that in hard cases, judges should have direct recourse to the first-best moral theory: for example, a consequentialist might argue that in a hard case, the judge should make the decision that will produce the best consequences. But Dworkin's theory does not permit judges to do this. Instead, Dworkin's ideal judge, Hercules, must decide on the basis of the moral theory that best justifies the law as a whole, and if the law contains substantial moral mistakes, as it surely does, then this moral theory will systematically vary from the first-best moral theory. Thus, we might call the moral theory that Hercules constructs the "second-best moral theory." The objection then concludes that law-as-integrity requires judges to adhere to the second-best moral theory in hard cases, when it is plain that in such cases, our best theory of morality would require that the judge act directly on the basis of the first-best moral theory itself.

Of course, Dworkin has an obvious answer to these questions. He can argue that the first-best moral theory does indeed require that judges decide on the basis of the theory that best fits and justifies the law as a whole. Indeed, there are passages in *Law's Empire* that seem to aim at this conclusion.[18] But there is a problem with the execution of this strategy; in *Law's Empire*, Dworkin does not offer a comprehensive theory of morality. This means that Dworkin's critics are free to argue that Dworkin is mistaken about the moral attractiveness of law as integrity, because there are good and sufficient reasons to affirm a comprehensive moral theory that implies that law as integrity is not correct. For example, a consequentialist could argue that consequentialism is the correct comprehensive moral theory for a variety of reasons (using the method of reflective equilibrium, using arguments from metaethics, and so forth). The consequentialist could then argue that consequentialism does not support law as integrity, and hence, that the theory in *Law's Empire* should be rejected on moral grounds. Dworkin cannot answer this argument with evidence that the consequentialist view is inconsistent with the phenomenology of judging or the implicit commitments of legal practice. The consequentialist could concede that point, but argue that these perceptions and practices are moral mistakes.[19]

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[17] By otherwise, I mean "in the absence of controlling legal rules" or "if the case were a hard case rather than an easy case" or "if the case were in the penumbra rather than the core of the relevant legal rule."

[18] *See, e.g.*, DWORKIN, LAW'S EMPIRE, *supra* note 4, at 186-90.

[19] These remarks and questions about Dworkin's view in *Law's Empire* are not intended as objections; this assessment of the viability of the normative legal theory offered in *Law's Empire* is far outside the scope of this Essay. Rather, I aim to present a picture of the way in

How could Dworkin answer the objection to law as integrity from the argument that it is inconsistent with the first-best moral theory? I will discuss four possibilities. The first three possibilities are unattractive for reasons that I will discuss in the next three paragraphs. This leaves us with the fourth possibility, which will set the stage for our discussion of the view of interpretation that has emerged in *Justice of Hedgehogs*.

First, Dworkin might argue that all of the plausible moral theories support law as integrity. This strategy would be a variant of the strategy that Rawls employed in *Political Liberalism*, which relied on the idea of an overlapping consensus.[20] But executing this could well be a Herculean task: it seems unlikely that Dworkin, who "takes rights seriously," will be able to show that his theory is fully consistent with all forms of consequentialism (e.g., act utilitarianism) or with aretaic theories of morality (e.g., NeoAristotelian virtue ethics).

A second option would be for Dworkin to argue that one of the existing moral theories that is external to law as integrity is the first-best theory and then to show that this theory (perhaps a form of deontology) supports law as integrity. This strategy might work, but it would require Dworkin to do considerable work, as it is not clear that any of the comprehensive moral theories that are plausible candidates for the title of "first-best" will easily accommodate law as integrity.

Third, Dworkin might pursue an "independence" strategy, arguing that that realm of legal normativity is independent of general views about moral and political philosophy. This strategy is a nonstarter for Dworkin, because law as integrity is explicitly committed to the continuity of legal normativity with moral and political philosophy.

There is, however, a fourth strategy available to Dworkin. Dworkin could argue that his theory of legal normativity, law as integrity, is actually a special case of the best comprehensive moral theory. Using somewhat different terminology that Dworkin employs himself, we might call this fourth strategy "morality as integrity." For this strategy to succeed, Dworkin would be required to argue that interpretivism, the metatheory that provided the metajurisprudential foundations of law as integrity, is also the appropriate metatheory (or metaethics) for normative theory in general. In other words, Dworkin would be required to argue that all normative inquiry is interpretive in nature, and hence that the concept or activity of interpretation has a very wide scope.

C.   Justice for Hedgehogs*: The Unity of Interpretation*

This brings us to the third stage in the development of Dworkin's theory of interpretation. In *Justice for Hedgehogs*, Dworkin argues that both law and

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which *Law's Empire* was received in order to provide the context for the emergence of Dworkin's new view in *Justice for Hedgehogs*.

   [20] JOHN RAWLS, POLITICAL LIBERALISM 133-72 (expanded ed. 2005).

morality are interpretive. That is, Dworkin argues that interpretation is a general normative practice, and that law and morality, as well as a variety of other human activities, are best understood as instances of interpretation. Indeed, it turns out that the normative standards that govern every human activity except science are interpretive.

A full sketch of Dworkin's theory will be provided in the next Part of this Essay. At this point, however, we are in a position to take stock of the development of Dworkin's theory of interpretation. In *Hard Cases*, interpretivism plays a role limited to the zone that Hart might have called the penumbra of legal rules. In *Law's Empire*, interpretivism governs all of law. And in *Hedgehogs*, interpretivism provides the normative theory for all human endeavors except science. If this pattern continues, we might expect that Dworkin's next book will take up the philosophy of science, extending interpretivism to this final domain.

II.   WHAT IS INTERPRETATION?

At this point, my investigation of Dworkin's theory of interpretation pivots. I turn from narrative to a critical examination of the content of the theory offered in *Justice as Hedgehogs*. Let me state my conclusion up front. Dworkin argues that interpretation is a very general human practice, and that legal interpretation, musical interpretation, moral reflection, and every human intellectual activity (aside from science) are instances of interpretation. That argument is in error; Dworkin has confounded activities that are of fundamentally different types. In other words, the unity-of-interpretation thesis is false.

A.   *The Structure of Dworkin's Theory*

Dworkin begins Chapter Seven of *Justice for Hedgehogs*:

> You are interpreting me as you read this text. Historians interpret events and epochs, psychoanalysts dreams, sociologists and anthropologists societies and cultures, lawyers documents, critics poems, plays and pictures, priests and rabbis sacred texts. . . .
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> . . . [A]ll these genres and types of interpretation share important features that make it appropriate to treat interpretation as one of two great domain[s] of intellectual activity, standing as a full partner beside science in an embracing dualism of understanding.[21]

In these passages, Dworkin explicitly affirms what I have called "the unity-of-interpretation thesis." Dworkin realizes that this thesis may be controversial. After acknowledging the possibility that these disparate activities are unified only by family resemblance, and that "the different genres have little in

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[21] DWORKIN, *supra* note 2 (manuscript at 79).

common,"[22] Dworkin then states that there is "one important contrary indication"[23]:

> We find it natural to report our conclusions, in each and every genre of interpretation, in the language of intention or purpose. We speak of the meaning or significance of a passage in a poem or a play, of the point of a clause in a particular statute, of the motives that produced a particular dream, of the ambitions or understandings that shaped an event or an age.[24]

But this common feature does not lead Dworkin to embrace the view that interpretation is a matter of recovering "psychological states." Although there is one important case, "conversational interpretation," in which we do aim at the recovery of the speakers' intentions, in other genres, for example historical interpretation, psychological states are not the proper target.[25] Each genre or type of social practice has its own purpose; we interpret within a genre by attributing to the tokens of the genre their "proper purpose," that is "the value that it does and ought to provide."[26]

This leads Dworkin to a three-step theory of interpretation:

> We interpret social practices, first, when we individuate those practices: when we take ourselves to be engaged in legal rather than literary interpretation, for example. We interpret, second, when we attribute some package of purposes to the genre or sub-genre we identify as pertinent and, third, when we try to identify the best realization of that package of purposes on some particular occasion.[27]

But it is important to emphasize that Dworkin is using the term "purpose" in a special sense here, because he does not mean the kind of purpose that is necessarily a psychological state.

Dworkin's sense of the term "purpose" is illustrated by his discussion of statutory interpretation:

> We can state the purpose of statutory interpretation very briefly in the abstract: the practice aims to make the governance of the pertinent community fairer, wiser, and more just. That description fits what lawyers and judges do when they interpret statutes; it justifies that practice, in a general way, and it suggests, also in a very general way, what standards are appropriate for deciding which interpretation of a particular statute is most successful.[28]

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[22] *Id.*

[23] *Id.*

[24] *Id.* (manuscript at 79-80).

[25] *Id.* (manuscript at 83).

[26] *Id.* (manuscript at 84).

[27] *Id.*

[28] *Id.* (manuscript at 85).

"Purpose" in Dworkin's sense is the goal, aim, or telos of the object of interpretation. The kind of goal that can be a Dworkinian "purpose" is a goal that provides a normative justification for the practice being interpreted.

Dworkin then argues: "Interpretation is holistic: just as a moral philosopher might aim at an equilibrium holding together concrete moral intuitions and abstract justifying principles, adjusting each of these as necessary to achieve that equilibrium, so an interpreter seeks, though usually unawares [sic], an equilibrium between background values and concrete interpretive insights."[29] This holism is directly parallel to the holism that characterized the theory of law offered in *Law's Empire* and reminiscent of the notion of "reflective equilibrium" deployed by John Rawls in *A Theory of Justice*.[30]

After arguing for holism, Dworkin distinguishes between three forms of interpretation:

- Collaborative interpretation, which assumes that the object of interpretation has an author who had a project the interpreter tries to advance.[31]
- Explanatory interpretation, which assumes that "an event has some particular significance for the audience the interpreter addresses."[32]
- Conceptual interpretation, which assumes "that the interpreter seeks the meaning of a concept that is created and recreated not by single authors but by the community whose concept it is."[33]

Both law and morality are instances of conceptual interpretation. This leads to the following conclusion: "We must scrap the old picture that counts law and morality as two separate systems and then seeks or denies interconnections between them. We must replace this with a one system picture: law is a part or aspect of morality."[34] Although this passage comes late in the book, for our purposes, the point to emphasize is that both law and morality are forms of the same interpretive enterprise – conceptual interpretation – that creates the norms that govern humans and their communities.

B.   *Is the Unity-of-Interpretation Thesis True?*

At this point, we can zero in on the unity-of-interpretation thesis. Is it really the case that interpretation is unified in the way that Dworkin claims? Does all interpretation aim at the recovery of "meaning" or "purpose"? Of course, the way we talk about interpretation does lend some credence to Dworkin's assertion. We associate interpretation with the recovery of meaning, and if "meaning" were a single thing, then it would seem to follow that "interpretation" too is a single thing. But there is a problem with this idea.

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[29] *Id.* (manuscript at 86).

[30] JOHN RAWLS, A THEORY OF JUSTICE 18 (rev. ed. 1999).

[31] DWORKIN, *supra* note 2 (manuscript at 87).

[32] *Id.*

[33] *Id.*

[34] *Id.* (manuscript at 255).

The term "meaning" is notoriously ambiguous; it has distinct senses with different referents. Take the example of a legal text. When we ask the question, "What does this provision mean?," we might refer to the linguistic meaning or semantic content. Call this first sense of meaning the *semantic sense*. But the term "meaning" can also be used to refer to implications, consequences, or applications. Call this second sense of meaning the *implicative sense*. We might also use the term meaning to refer to the purpose or function of a given constitutional provision. Call this third sense of meaning the *teleological sense*. These three senses of meaning are nonequivalent. The semantic content of a text is not the same as its implications. The implications of a text are not the same as its purposes. The purposes of a text are not the same as its semantic content.

Nor are these three different senses of meaning (semantic, implicative, and teleological) actually unified by some underlying feature: they are different in kind. The semantic meaning of a text is a different kind of thing than is the purpose of the text. Different purposes might motivate the same semantic content; the same purpose might be expressed by different semantic contents. The same points could be made about the relationship of implications to semantic content and the relationship of purposes to implications. Of course, there can be relationships between these three kinds of meaning. Linguistic meanings can be used for purposes, and they can create implications. But the fact that there are relationships between concepts does not show that they are unified by some underlying structure.

The same ambiguities that inhere in "meaning" also lurk in the noun "interpretation," the verb "to interpret," and the gerund "interpreting." We have already observed the wide variety of human activities to which the word "interpretation" can be applied. In some cases, the activity that we call "interpretation" seeks to recover the linguistic content of semantic meaning of a text. When we try to decipher an ancient script in an extinct language or to discover the contemporary expression that best captures an obscure passage in a letter written in an archaic version of English, our objective is meaning in the semantic sense. In other cases, what we call "interpretation" aims at meaning in the teleological sense. We ask questions like, "How do you interpret the significance of the Senator's change in position?" and the same inquiry could be formulated, "Why did the Senator make this switch?" And in yet other cases, the activity for which we use the word "interpretation" seeks to discover the implications of some event with respect to our concerns and interests. We ask questions like, "On your interpretation, are the results of the election good or bad for health care reform?" The object of this question is meaning in the implicative sense.

Dworkin claims that the unity of interpretation is provided by purpose.[35] We need to be very careful when parsing this claim, because there are several

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[35] *See id.* (manuscript at 84).

different versions of the move to purpose as vindication for the unity-of-interpretation thesis.

Consider first the possibility that Dworkin is claiming that all interpretation aims at the recovery of meaning in the teleological sense. That claim is false. There are a wide variety of interpretations that do not aim at the recovery of the purpose or function of the object of interpretation. When we "interpret" a text or utterance, we sometimes aim at the semantic content of the utterance. In some cases, the function or purpose of the text may be relevant evidence of its linguistic meaning or semantic content, but it would be gross error to move from the premise, "X is evidence of Y," to the conclusion, "Y is X." Moreover, there are a variety of cases in which our interpretation of a text or utterance does not involve evidence of purpose or function. Such evidence may be unavailable or simply not required given the plainness of the meaning. Of course, in such cases it is possible for us to make inferences about what the likely purpose or function of the text was, but the fact that such moves are possible does not establish the further claim that the recovery of purpose was the aim of a particular interpretation.

Or perhaps Dworkin is making the claim that because interpretation is a purposive activity, the teleological sense of meaning is the primary or basic sense. But this argument would clearly be fallacious. A very wide range of human activity is purposive – running, eating, playing, working, and so forth. But it does not follow from the fact that running is a purposive activity that running is necessarily a form of interpretation. (And if we came to say that runners "interpret" the track, we would be using the word "interpretation" in a new and metaphorical sense.) Assuming that interpretation is always a purposive activity, a further argument would be required to establish the conclusion that the purpose of interpretation is always the recovery of purpose.

There is yet another sense in which "interpretation" involves purpose. Consider once again the variety of activities that are called "interpretation." A performance of a symphony can be called "interpretation." When a scientist tries to determine the implications of an experiment for the confirmation or disconfirmation of a theory, we say that he "interprets" the results. When a translator tries to determine the linguistic meaning in English of a text in Mandarin, the result is an "interpretation" of the text.

Dworkin is right when he observes that the objects of interpretation in each of these cases have purposes. The composer of the symphony had purposes, the architect of the experiment had purposes, and the author of the Mandarin text had purposes. But it does not follow from this fact that the aim of interpretation in each case is a recovery of the purpose. The conductor may deliberately offer an interpretation that ignores the purposes of the composer. The scientist wants to know whether the data from the experiment confirm the research hypothesis; his interpretation of the results is surely not aimed at discovering the purpose of the experiment, which he already knew before he looked at the data. The translator may find knowledge of the purpose for which the Mandarin text was composed to be useful in determining its

linguistic meaning, but the translation aims at the semantic content of the text and not at the purpose for which that semantic content was generated. In each of these cases, the object of interpretation is of a different kind.

More damning is the fact that interpretation can have nonpurposive objects. For example, we can interpret the barometer even though barometric pressure is a natural phenomenon that lacks teleological meaning. But according to Dworkin, scientific interpretation of data is not "interpretation" at all.[36] Nevertheless, "interpretation" of data bears as much family resemblance to the activity of discovering semantic content as do other activities for which we use the word "interpretation."

In sum, the unity-of-interpretation thesis cannot be vindicated by the move to purpose. It is true that "interpretation" is an intentional human activity, but this does not differentiate interpretation from other human activities (for example, running, eating, and hammering) that have purposes. It is true that most of the objects of interpretation are purposive human activities, and that these purposes may provide evidence that is relevant to the meaning of the activity in the semantic, teleological, or implicative senses of "meaning." But the fact that purpose is evidence relevant to the various objects of interpretation does not show that these objects are purposes. We sometimes use the term "interpretation" to describe the activity of attempting to discern a purpose, but the word "interpretation" has other senses where the aim of interpretation is something else.

In oral remarks at the conference where an earlier version of this Essay was presented, Dworkin suggested that the unity of interpretation is provided by his three-stage theory of interpretation.[37] Recall the three stages:

1. We individuate the practice by distinguishing between genres of interpretation (literary, legal, musical, and so forth).
2. We attribute some package of purposes to the genre identified in step one.
3. We identify the best realization of that package of purposes on some particular occasion.[38]

It is difficult to imagine how Dworkin could think that the three-stage sequence can provide an argument for the unity of interpretation. Dworkin introduces one problem of the three-stage sequence in his introduction: "A particular interpretation succeeds – it achieves the truth about some object's meaning – when it best realizes, for that object, the purposes properly assigned to the interpretive practice properly identified as pertinent. Interpretation can therefore be understood, analytically to involve three stages."[39]

There is an obvious difficulty in this passage. The first sentence identifies Dworkin's theory of the success conditions (or "truth conditions") for

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[36] *Id.* (manuscript at 98).

[37] *See* Dworkin, Response, *supra* note 5, at 4.

[38] *See supra* text accompanying note 27.

[39] DWORKIN, *supra* note 2 (manuscript at 84).

interpretation.   The second sentence then asserts that the meaning of
"interpretation" (how it can be "understood, analytically") involves a recipe for
the satisfaction of these success conditions.   The second sentence does not
follow from the first. An action token, A_1, can be a member of type, T_p, even
if A_1 does not follow the recipe, R_x, required for reliable success for T_p. I can
engage in fly-fishing, even if I do not follow the recipe for successful casting.
Likewise, I can engage in interpretation even if I do not try to produce the
interpretation that realizes the package of purposes for the genre of interpretive
object on some particular occasions. If viewed as an account of the unity-of-
interpretation thesis, the passage in *Justice for Hedgehogs* that we have been
discussing states an invalid argument. The conclusion does not and could not
follow from the premises.

Of course, the validity problem with Dworkin's argument for the unity-of-
interpretation thesis does not entail that the thesis is false. It is possible that
Dworkin could provide other arguments, but there are good reasons to doubt
this. First and foremost of these is what we might call, following Dworkin, a
problem of fit.   The diverse phenomena that Dworkin seeks to unify as
"interpretation" simply do not uniformly display the structure identified by the
three-stage sequence. That is, the three-stage sequence does not identify an
essential or necessary feature of all actions that Dworkin calls interpretation.
Dworkin must recognize this point, because it is implicit in his own
formulation of the argument that there can be interpretations that do not
succeed or are false. Thus, Dworkin's position may be internally inconsistent.

But internal inconsistency need not be a fatal flaw. Presumably, Dworkin
could fix the statement of his position to eliminate the inconsistency. The
deeper problem with the idea that the three-stage sequence provides the
essential structure of interpretation is that there is overwhelming evidence to
the contrary. Conductors interpret symphonies even when they do not aim to
realize the purposes of the genre – it is still an interpretation even if it aims to
undermine those purposes. Consider the issue of "period performance" in
classical music. A conductor might offer an interpretation of Beethoven's
Ninth Symphony in order to best realize the purpose of the genre, "symphony".
But this need not be the case. One can imagine a conductor who says:

> Musical beauty is the purpose of symphonic music. And I believe that
> the most beautiful interpretations of the Ninth were those of Furtwängler,
> who ignored the conventions of performance from Beethoven's time. But
> my interpretation aims at something else. I think it is interesting to hear
> the symphony as Beethoven would have heard it (had his hearing not
> been impaired), even if this interpretation is not the "best realization" of
> the purposes of the symphonic music as a genre.

If Dworkin were right, our conductor's statement would be simply nonsensical
– an oxymoron. But that is clearly wrong. There is no necessary connection
(conceptual, functional, or metaphysical) between the interpretive character of
an action and its fulfillment of Dworkin's three-step account.

   Suppose then that Dworkin were to fix up his argument by conceding that the three-step sequence does not describe the necessary conditions for an action to count as interpretation. He might argue instead that the three-stage sequence allows us to sort the universe of interpretations into the true and the false (or the successful and the unsuccessful). The argument would then go something like the following: "An action is an interpretation if and only if it is the kind of action that would be successful or true if and only if the three-stage sequence were applied."

   Dworkin has not, so far as I can tell, made such an argument, but were he to do so, it would face severe difficulties. The three-stage sequence asks us to identify the type of which the activity is a token, to identify the purpose of that activity type, and then to conduct the activity so that its purpose is realized. At first blush, this might sound tautological; an action is successful if and only if it accomplishes its purpose. If that were all there was to the three-stage sequence, then every human action would satisfy the criterion for interpretation. But that hardly will do as a theory that differentiates interpretation from other human activities. If Dworkin's claim is that all human action is interpretation, then he ought to be clear that he is using the word "interpretation" in a novel (and very unusual) sense. Everyone is entitled to coin new technical senses for the words used in a natural language, but that is not the same as offering an account of the activity *interpretation* that corresponds to our word "interpretation."

   Dworkin might argue that the tautological gloss on his formulation of the three-stage sequence is inaccurate. For example, he might claim that the formula is limited to "social practices" and that the idea of a practice provides the necessary content to differentiate interpretation from other human activities. So Dworkin might formulate his theory of interpretation as follows: "An action is an interpretation if and only if (1) the object of the action is a social practice; and (2) the success conditions of the action token are given by the purpose of the social practice which is the object of action." We are now in deep waters far from the shore provided by the actual text of *Justice for Hedgehogs*. And it is not clear that his move will enable Dworkin to vindicate the unity-of-interpretation thesis. What does it mean for the object of an action to be a social practice? The object of a particular action token, running, may be a social practice, competing in a race, but that does not make running into a genre of interpretation.

   We could continue with our effort to fix up Dworkin's argument for the unity-of-interpretation thesis, but at this stage we have done enough work to identify a pattern in the dialectic of argument. Dworkin has attempted to make "interpretation" into something that is "interpretive all the way down."[40] This means that his question – "What is the object of interpretation?" – is itself an interpretive question. Once Dworkin becomes committed to making interpretation "interpretive all the way down," he must give a theory of

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   [40] *Id.*

interpretation that does not include an account of the particular kind of thing (or type of "meaning") at which interpretation aims. I will call this *the avoidance strategy*. Dworkin avoids an account of the kind of meaning (or other object) at which interpretation aims.

Dworkin's avoidance strategy is required for him to make out the unity-of-interpretation thesis. If he were to specify the object (target, aim, or goal) of interpretation then he would be forced to acknowledge that "interpretation" is being used in different senses in cases where the aim is to discover different objects (for example, linguistic meaning, purposes, implications, or something else). Dworkin cannot give up on the unity-of-interpretation thesis if he wants to make out his larger claim – that there are only two forms of human intellectual activity, science and interpretation ("the two-forms claim"). And Dworkin cannot give up on two-forms claim, because it is the basis of his ultimate conclusion that law is part of morality, because both law and morality are interpretive.

The avoidance strategy is a consequence of Dworkin's attempt to make the category of interpretation so broad as to encompass all human intellectual activity outside of science. But once the category becomes this broad in scope, it becomes disconnected from the word "interpretation" as it used in ordinary language. Dworkin began with a theory of interpretation in hard cases (in *Hard Cases*), expanded that theory into a general account of legal decision-making (in *Law's Empire*), and then broadened that theory into a general account of all human intellectual activity other than science (in *Justice for Hedgehogs*). Once we have this pattern clearly in view, it should come as no surprise that something has been lost in translation. A theory of the interpretation of legal texts is not a good candidate for a theory of all legal decision-making. A theory of legal decision-making is not a good candidate for a theory of all nonscientific human intellectual activity. When Dworkin started, he was discussing a category that could meaningfully be understood as "interpretation"; when he finished, he was not.

We are now back to the question posed at the beginning of the Essay. Recall that we identified three possible views of the relationships among the various activities that we call interpretation: (1) the ambiguity thesis, (2) the family resemblance thesis, and (3) the unity-of-interpretation thesis. We have established that the unity-of-interpretation thesis is false, and this leaves two possibilities. It might be the case that interpretation is a family resemblance concept – the close association among the various senses of interpretation and the related idea of meaning suggest that this might be the case. Or it is possible that the ambiguity thesis is correct, and at least some things we call "interpretation" are wholly different in kind from others. But the claim that all the various human activities we call "interpretation" are marked out by an essential structure is false.

III. THE PATH NOT TAKEN: THE INTERPRETATION-CONSTRUCTION
DISTINCTION

Justice for Hedgehogs is a hugely ambitious book, a cathedral of argument. Although Dworkin's theory of interpretation appears to be a central part of the architecture – the dome itself and not a merely decorative gargoyle – it is possible that the central structure might survive a radical revision of his account of interpretation. We might be able to reconstruct the dome and leave the flying buttresses, arches, and walls intact. In this Part of the Essay, I will investigate an alternative universe of argument – the possible world in which Dworkin pursued an entirely different strategy in responding to the problem of hard cases.

A. *Alternative Dworkin*

Suppose that Dworkin had embraced, rather than rejected, the theoretical significance of the distinction between "hard cases" and "easy cases" and the corresponding notion of a "core" and "penumbra." This alternative Dworkin would *not* have said, "Hercules does not need one method for hard cases and another for easy ones."[41] He would never have abandoned to the two-stage view (first "fit," then "justification").   Alternative Dworkin might have avoided the difficulties with law as integrity that drove actual Dworkin to the implausible theory of interpretation that he advances in *Justice for Hedgehogs*.

Alternative Dworkin would have needed a much different theory of interpretation – one that distinguishes the type of activity that does the work in easy cases from the activity that is required in hard cases. There are hints in Dworkin's later work, including *Justice for Hedgehogs*, that he continues to recognize the basis for such a distinction.   In the context of statutory interpretation, he writes:

> [Lawyers] must decide, for example, what division of political authority among different branches of government and civil society is best all things considered. That question in turn forces upon American lawyers, at least, further and more general questions of democratic theory; they must assume or decide, for instance, drawing on theory or instinct, how far unelected judges should assume an authority to decide for themselves which of the *semantically available interpretations* of a controversial statute would produce the best law.[42]

I have added emphasis to the phrase "semantically available interpretations" because it suggests that Dworkin may still be committed to a two-step picture or a two-methods view. But I do not want to over-interpret such scanty evidence, as the phrase does not appear again in *Justice for Hedgehogs*. The phrase is absent from any article by Dworkin in the Westlaw database of law

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[41] DWORKIN, LAW'S EMPIRE, *supra* note 4, at 354.

[42] DWORKIN, *supra* note 2 (manuscript at 85) (emphasis added).

journals,[43] and a Google search for the phrase yields only a single paper, which is itself a precursor of *Justice for Hedgehogs*.[44] But the suggestion is clear: some interpretations of a legal text are "semantically available" and some are not. This suggests that Hercules must choose from among the semantically available interpretations, requiring Hercules to engage in the enterprise of determining "semantic availability."

Imagine then the possible world in which alternative Dworkin offered a theory of semantic availability and then developed a theory of interpretation that incorporated that theory. How might that go?

B. *The Interpretation-Construction Distinction*

Alternative Dworkin might have noticed an old distinction, familiar to the common lawyer, between "interpretation" and "construction."[45] The common-law distinction was and is a technical one – in ordinary parlance, the two words are frequently used interchangeably, but they are also used to mark a difference between two distinct activities. Let us stipulate[46] the following definitions for the purposes of the interpretation-construction distinction:

- "Interpretation" shall refer to the process (or activity) that recognizes or discovers the "linguistic meaning" or "semantic content" of the legal text.
- "Construction" shall refer to the process (or activity) that translates linguistic meaning into legal effects (or "semantic content" into "legal

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[43] I searched the Journals and Law Reviews database, using search term "semantically available."

[44] Ronald Dworkin, Interpretation, Morality, and Truth (Fall 2002) (unpublished manuscript), *available at* http://www1.law.nyu.edu/clppt/program2002/readings/dworkin/dworkin.rtf. I performed this Google search on January 24, 2010.

[45] *See* E. Allan Farnsworth, *"Meaning" in the Law of Contracts*, 76 YALE L.J. 939, 939 (1967). Although this article by Farnsworth is the first theoretically sophisticated discussion in a contemporary law review, the distinction goes back at least as far as the nineteenth century. *See* ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 534 (1952); FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 43-44 (3d ed. 1880); 4 SAMUEL WILLISTON & WALTER H.E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 602 (3d ed. 1961); Arthur L. Corbin, *Conditions in the Law of Contract*, 28 YALE L.J. 739, 740-41 (1919); Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 833 (1964).

[46] To be absolutely clear, the words "interpretation" and "construction" are not always used this way. There is a long history of this usage in American common-law jurisprudence that embraces this distinction, but the distinction between interpretation and construction is a technical, legal and theoretical distinction. The senses that are stipulated in the definitions specified above are technical senses. In other contexts, these words are used as synonyms that refer to whole activity (both the discovery of linguistic meaning and the construction of legal doctrines). And both words have other senses as well – already identified for "interpretation," and obvious in the case of "construction" (that is, "construction" has a sense that refers to building).

content"), typically through the development of legal doctrines that resolve particular cases or guide official behavior.

Recall the two-step picture in *Hard Cases* and the Dworkinian concept of semantic availability. We can now see that the first step involves interpretation; after Hercules identifies the set of authoritative legal texts, he then ascertains their linguistic meaning or semantic content. The linguistic meaning of the texts in turn determines what Dworkin calls "semantic availability."[47] The second step involves construction – determination of the content of legal doctrine from among the range of possibilities that are semantically available. In easy cases, the range of semantically available alternatives is narrow. Once we have discovered the linguistic meaning of the relevant legal texts, the relevant content of legal doctrine is clear, and construction (the translation of semantic content into legal content) is easy. In hard cases, the range of semantically available alternatives underdetermines the set of possible legal doctrines, and determination of the legal effect of the text requires construction that goes beyond easy translation of semantic content into legal content. This additional work at the stage of construction is what makes these cases "hard." Hard cases are located in what I call "the construction zone,"[48] the arena in which the underdetermination of legal content by semantic content highlights the work done by construction.

We can make this sketchy reconstruction of the two-step picture of *Hard Cases* more detailed and concrete by saying more about the ways in which alternative Dworkin might theorize each of these two activities.

C. *Interpretation: An Account of Semantic Availability*

In *Hard Cases*, Dworkin seemed committed to a distinction between hard cases and easy cases that corresponded in a rough and ready way with H.L.A. Hart's idea of the core and penumbra.[49] How does interpretation (which yields semantic content or linguistic meaning) sometimes result in easy cases and sometimes produce hard cases?

What do we do when we interpret a legal text? This is a complicated question and a full answer would take us into the deepest waters of the philosophy of language. If we stay close to the surface, a familiar picture emerges. When we communicate via language (written or oral), we use words and phrases that can be formed into complex expressions using the rules of syntax and grammar. Sometimes the smallest meaningful unit of expression is a single word; sometimes, whole phrases carry meanings that cannot be decomposed into the meaning of constituent words. When we parse a legal text, we aim to recover the meaning of the relevant words and phrases and to

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[47] *See supra* text accompanying note 42.

[48] *See* Lawrence B. Solum, The Interpretation-Construction Distinction 14 (Mar. 4, 2010) (unpublished manuscript on file with the Boston University Law Review).

[49] *See supra* Part I.A.

discern the way in which they are combined into larger units of meaning – for example, sentences, clauses, sections, rules, and statutes.

In the standard case, the reader of a legal text can rely on an intuitive knowledge of the natural language that she speaks. The act of interpretation is *invisible*, because it does not require our conscious attention. But in many cases, the parsing of a legal text requires effort – the meaning is not intuitively obvious. In such cases, the act of interpretation becomes *visible* – we notice an initial failure of comprehension and work to interpret the text. There can be a variety of reasons for the initial failure of understanding. Complex statutes and rules may require multiple readings in order to reveal the underlying structure – patterns of conjunction, disjunction, and exception – that provide the algorithm contained in the text.

In addition to complexity, there are at least two other sources of uncertainty connected with the linguistic meaning or semantic content of a legal text – vagueness and ambiguity. In ordinary speech, the distinction between vagueness and ambiguity is not always observed. The two terms are sometimes used interchangeably, and when this is the case, they both mark a general lack of what we might call "determinacy" (or "clarity" or "certainty") of meaning. But the terms "vague" and "ambiguous" also have technical (or more precise) senses, such that there is a real difference in their meaning.[50]

In this technical sense, ambiguity refers to the multiplicity of meanings; a term is ambiguous if it has more than one sense.[51] A classic example is the word "cool." In one sense "cool" means "low temperature," as in, "The room was so cool we could see our breath." In another sense, "cool" means something like "hip" or "stylish," as in, "Miles Davis was so cool that every young trumpet player imitated him." And cool has several other senses, referring to temperament, certain colors, and a lack of enthusiasm (or the presence of skepticism or mild hostility).

The technical sense of vagueness refers to the existence of borderline cases; a term is vague if there are cases where the term might or might not apply.[52] A classic example is the word "tall." In one sense, "tall" refers to height (of a person or other entity) that is higher than average. Abraham Lincoln, who stood at almost 6'4", was certainly tall for his time. Napoleon was not tall,

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[50] *See* Legal Theory Lexicon, Legal Theory Lexicon 051: Vagueness and Ambiguity, http://lsolum.typepad.com/legal_theory_lexicon/2006/08/legal_theory_le.html (last visited Feb. 6, 2010).

[51] Farnsworth, *supra* note 45, at 953; Michael B. Rappaport, *The Ambiguity Rule and Insurance Law: Why Insurance Contracts Should Not Be Construed Against the Drafter*, 30 GA. L. REV. 171, 173 (1995); John T. Valauri, *Confused Notions and Constitutional Theory*, 12 N. KY. L. REV. 567, 570-71 (1985).

[52] A deeper account is offered in TIMOTHY A.O. ENDICOTT, VAGUENESS IN LAW (2000). Endicott identifies two marks of vagueness: (1) borderline cases; and (2) a tolerance principle, which states that "a tiny change in an object in a respect relevant to the application of the expression cannot make the difference between the expression's applying and not applying." *Id.* at 33.

although at 5'6" he was of average height for his time. There are persons who are clearly tall and clearly not tall, but there are also borderline cases. For example, in the United States in the twenty-first century, males who are 5'11" may be neither clearly tall nor clearly not.

Finally, a given word or phrase can be both vague and ambiguous. "Cool" is ambiguous, and in the temperature sense, it is also vague. For example, in the upper Midwestern United States, sixty-five degrees Fahrenheit is neither clearly cool nor clearly not cool.

Interpretation relates to ambiguity and vagueness in different ways. When a text is ambiguous, the aim of interpretation is to determine which of the alternative senses is the intended or public meaning.[53] Characteristically, the context of utterance (the situation in which the text was written) enables a reader or listener to determine the semantic content of an ambiguous text. The word "cool" is acontextually ambiguous, but in the utterance, "This room is really cool, I'd better put on my sweater," the evidence points to the temperature-related sense of "cool."

In some cases, however, interpretation cannot resolve an ambiguity. There are two conceptually distinct reasons for persistent ambiguity. The first reason is epistemological. We may lack sufficient evidence of context to permit disambiguation. For example, if you find a slip of paper on the ground with only the word "cool," and you have no other relevant information, you simply do not have sufficient information about context to permit you to determine the relevant sense.

The second reason for persistent ambiguity is ontological. Some utterances are irreducibly ambiguous. These irreducible ambiguities would remain even if we had complete information about contexts of utterance. Irreducible ambiguity can be created intentionally. For example, the drafters of a legal provision might have good reasons to bring the drafting process to an end even though they are unable to agree on semantic content. One way this can be accomplished is via deliberate ambiguity: draft language that can be read in two different ways, corresponding to the two distinct semantic contents favored by the two subsets of the drafters.

Interpretation relates to vagueness in an entirely different way. When a text is vague, the linguistic meaning or semantic content of the text is vague. When a legal text employs a word or phrase that is vague, the semantic context of the text creates a set of borderline cases that are neither clearly within nor clearly outside of the linguistic meaning. This is at least part of what Hart attempted to capture with his notion of the core and penumbra. Hart's penumbra is (at least in part) simply a metaphor for the borderline cases that are created by the semantic content of vague texts. Interpretation sometimes *resolves* ambiguity,

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[53] By "intended or public meaning," I mean to elide the question whether the meaning of a legal text is a function of the author's intentions or the conventional semantic meanings of the words and phrases and the patterns of usage that constitute the rules of grammar and syntax for a given linguistic community.

but interpretation *yields* vagueness. Once we determine that the linguistic meaning of a text *is* vague, interpretation has done its work.

D.   *Construction: Alternative Dworkinian Accounts*

Interpretation exits the stage once we have determined the semantic content of a legal text. That is, interpretation determines the range of legal content that is semantically available – the construction zone. Provisionally, we might assume that alternative Dworkin would distinguish between (1) cases in which the construction zone is tightly constrained by the semantic content of authoritative legal texts, *easy cases*; and (2) cases in which the construction zone is (in relation to the case at hand) capacious, creating a range of semantically available legal content that will produce legal outcomes that have different practical implications for the interested parties, *hard cases*.

On this provisional assumption,[54] Hercules would need two different methods for resolving easy cases and hard cases. As for "easy cases," not all of them will be easy in the sense that they require very little effort. It might require hard work to clarify ambiguous language or to parse the intricate structure of a complex statute. What is easy about easy cases is the process of construction. In an easy case, the semantic content of the text can be directly translated into the legal content or doctrine that determines the legal effect of the text. In these cases, interpretation does the work (whether difficult or not) and the required construction of legal doctrine follows directly.

In hard cases, on the other hand, interpretation does only some of the work. When interpretation yields semantic content that is vague or irreducibly ambiguous, Hercules will require a theory of construction that will enable him to choose among the irreducibly ambiguous senses of the text or to draw a line in order to resolve borderline cases. What theory of construction might alternative Dworkin have produced?

This question is not the same question as, "What theory of construction would actual Dworkin provide for alternative Dworkin?" Actual Dworkin has already gone through the psychological processes that led him from *Hard Cases* to *Law's Empire* to *Justice for Hedgehogs*. In the possible worlds talk, we might say that actual Dworkin is psychologically distant from alternative Dworkin – or more precisely that the actual world is distant in that way from the possible world of alternative Dworkin.

We can imagine that alternative Dworkin might have developed a theory of construction that shares a variety of features with the theory of interpretation produced by actual Dworkin. Consider the model of fit and justification from *Hard Cases*.[55] Alternative Dworkin might develop a theory of construction

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[54] In this Essay, I will not investigate the possibility that a Dworkinian theory of construction might authorize legal content that is inconsistent with semantic content. This is an important question, but its resolution is not required for the purposes of investigating the main implications of the interpretation-construction distinction for Dworkin's view.

[55] *See supra* Part I.A.

that adapts this model to the interpretation-construction distinction. Alternative Dworkin might say that the model of fit and justification does not properly apply to interpretation at all. Interpretation is the activity that produces the semantic content from which Hercules develops the theory of construction that best fits and justifies the semantic content of the authoritative legal texts as a whole.[56]

From there, alternative Dworkin might proceed in a number of different directions. Or to put it differently, we can imagine a branching tree of possible worlds in which different alternative Dworkins develop various theories of construction. One alternative Dworkin might emphasize the idea of coherence. His alternative Hercules might develop a theory of construction that takes seriously the idea that "the law is a seamless web." That version of the theory would emphasize the idea of consistency and mutual normative support among legal rules, with the semantic content produced by interpretation providing the starting points from which doctrine is constructed. The first alternative Dworkin would have "taken rights seriously," because his theory of construction is based on the idea that there is (in principle) a legally correct answer to every legal question – the answer that best coheres with the legal materials as a whole.

Another alternative Dworkin might emphasize the role of morality and political philosophy in construction. This second alternative Dworkin might have argued that the choice between legal doctrines is underdetermined by interpretation, and that Hercules should adopt the construction that is supported by the first-best moral and political theory, even if that theory would count rules required by the linguistic meaning of many cases, rules, statutes, and constitutional provisions as mistakes. The second alternative Dworkin also takes rights seriously, but the work is done by moral rather than legal considerations.

Both the first and second alternative Dworkins share a picture of the relationship between law and morality that actual Dworkin rejects in *Justice for Hedgehogs*. Here is his statement of that picture:

> Here is the orthodox picture. "Law" and "morals" describe different collections of norms. The differences are deep and important. Law belongs to a particular community. Morality does not: it consists of a set of standards or norms that have imperative force for everyone. Law is, at least for the most part, made by human beings, through contingent decisions and practices of different sorts. It is a contingent fact that the law in England requires people to compensate others whom they injure by their negligent acts. Morality is not made by anyone (except, on some

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[56] For the purposes of this simplified version of alternative Dworkin's theory, I am eliding a number of complexities. For example, the object of "fit" might be broader than the semantic content of the authoritative legal texts; it might include the actions and practices of legal actors and institutions. These complications are simply set aside for the purposes of this Essay.

views, God) and it is not contingent on any human decision or practice. It is a necessary not contingent fact that people who injure others negligently have a moral obligation to compensate them if they can.[57]

As we have already noted, the actual Dworkin rejects the orthodox picture, but he clearly states that this rejection is a late development – coming after early statements of his views in essays like *Hard Cases*:

> Forgive a paragraph of autobiography. When, more than forty years ago, I first tried to defend interpretivism, I defended it within this orthodox two-systems picture. I assumed that law and morals are different systems of norms and that the crucial question is how they interact. So I said what I have just said: that the law includes not just enacted rules, or rules with pedigree, but justifying principles as well. I very soon came to think, however, that the two-systems picture of the problem was itself flawed, and I began to approach the issue through a very different picture. I did not appreciate the nature of that picture, however, or how different it was from the orthodox model, until much later when I began to consider the larger issues of this book.[58]

Can we imagine a third version of alternative Dworkin, one who accepts the interpretation-construction distinction but rejects the two-systems view? That is a very large question, and anything like a thorough answer would require an essay or monograph of its own. Nonetheless, we can reflect on the question and consider some tentative thoughts.

The third alternative Dworkin must embrace a distinction between interpretation and construction – between the activity of determining linguistic meaning and the activity of constructing the content of legal doctrines. Can someone who rejects the two-systems view of law and morality accept this distinction? The actual Dworkin of *Justice for Hedgehogs* provides reasons to think that the interpretation-construction distinction can be reconciled with the one-system view of law and morality. Recall that Dworkin's position in *Justice for Hedgehogs* accepts a distinction between science and interpretation. Dworkin accepts that there are "brute fact[s]" about the world that are not the product of "interpretation" in the broad sense that Dworkin uses that word.[59]

Investigations into the linguistic meaning of utterances are "scientific" in the broad sense of that term. Linguistics and the philosophy of language provide the theoretical structure of the science of interpretation (remembering that we are using the word "interpretation" in the technical sense specified by the interpretation-construction distinction). The truth or falsity of particular interpretations is a function of the correct theory of linguistic meaning, linguistic facts about patterns of usage that establish conventional semantic meanings and regularities of syntax and grammar, and the particular facts that

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[57] DWORKIN, *supra* note 2 (manuscript at 252).

[58] *Id.* (manuscript at 253).

[59] *Id.* (manuscript at 17, 97-100).

provide the content and context of a particular utterance or writing. The fact that interpretation is "scientific" in this sense does not imply that we can be certain about the meaning of particular utterances, nor does it imply that particular interpretations are not causally influenced by the values, purposes, or ideologies of the human beings who do the interpreting. The claim is simply that interpretations (or assertions about interpretations) are truth-apt (they can be true or false), and that their truth or falsity (as opposed to their acceptance or effect) is determined by facts about the world.

The third alternative Dworkin could simultaneously embrace the interpretation-construction distinction and reject the two-system view of law and morality. There is nothing in the one-system view (law is part of morality) that requires either law or morality to reject the relevance of scientific truth or facts about the world as inputs into legal deliberation. The interpretation-construction distinction would require Hercules to consider linguistic facts when reaching legal conclusions. And every plausible moral theory requires moral actors to consider facts about the world when they decide how to act on particular occasions.

What the third alternative Dworkin could *not* do is affirm "interpretivism" in the sense that term would have given the interpretation-construction distinction. That is, the third alternative Dworkin would reject the idea that discerning linguistic meaning is the activity that unifies law and morality – a silly view if ever there was one. The third alternative Dworkin would not be an interpretivist. Where else might the third alternative Dworkin turn? The relevant continuity would be between legal construction and morality. We might imagine that the third alternative Dworkin would call the method that underwrites this continuity "constructivism."

Once again, explication of the details of Dworkinian constructivism is beyond the scope of this Essay. But we can begin to imagine how that explication might go. Consider the following passage, where Dworkin adumbrates the way that "interpretivism" works on moral concepts:

> [I]nterpretive concepts . . . are concepts we share not in virtue of sharing criteria for their application but rather by accepting that the correct application depends on the best justification of the various social practices in which the concept figures. We explicate an interpretive concept through such a justification: we try to construct an interpretation of the concept that displays the value we take it to have and we disagree about the best interpretation because we disagree about that value. Conceptual analysis of an interpretive concept is therefore itself an exercise in moral theory. The concept of a moral principle or ideal is an interpretive concept.[60]

This passage is infused with the language of interpretation, but it could easily be rewritten. Here is what the third alternative Dworkin might have said:

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[60] *Id.* (manuscript at 67-68).

> *Constructive* concepts are concepts we share not in virtue of sharing criteria for their application but rather by accepting that the correct application depends on the best justification of the various social practices in which the concept figures. We explicate a *constructive* concept through such a justification: we try to *construct* a *version* of the concept that displays the value we take it to have and we disagree about the best *construction* because we disagree about that value. Conceptual analysis of a *constructive* concept is therefore itself an exercise in moral theory. The concept of a moral principle or ideal is a *constructive* concept.

I will later refer to this paraphrase of Dworkin as the "constructive concepts view." Of course, much more would need to be said about the constructivism of the third alternative Dworkin. The third alternative Dworkin might borrow actual Dworkin's idea that justification, reason, and argument do the work of construction. That Dworkin might invoke the idea of "constructions of reason" or perhaps he would emphasize the notion that construction is a shared (or social) reason-giving practice.

Further questions arise. Most obviously, what would be the relationship between the constructivism of the third alternative Dworkin and the views in contemporary metaethics that we call "constructivism"?[61] Onora O'Neill notes two features of constructivism as a general view in metaethics:

- "Ethical constructivists . . . doubt or deny that there are distinctively moral facts or properties, whether natural or nonnatural, which can be *discovered* or *intuited* and will provide foundations for ethics."[62]
- "Constructivisms are distinctive among antirealist ethical positions, not only in claiming that ethical principles or claims may be seen as the *constructions of human agents* but in two further respects. They also claim that constructive ethical reasoning can be practical – it can establish practical prescriptions or recommendations which can be used to guide action – and that it can *justify* those prescriptions or recommendations: objectivity in ethics is not illusory."[63]

Could the third alternative Dworkin take the distinctive commitments of constructivism on board, while affirming the core of the view of morality that Dworkin embraces in *Justice for Hedgehogs*? Hints are contained in the following ideas from *Justice for Hedgehogs*:

- "[I]t is hard to imagine any distinct state of the world – any configuration of fundamental moral particles or morons, for instance –

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[61] There is only one reference to "constructivism" in *Justice for Hedgehogs*, *see* DWORKIN, *supra* note 2 (manuscript at 171), and in oral remarks at the conference, Dworkin disavowed understanding of "constructivism" as a theory. *See* Dworkin, Response, *supra* note 5, at 2. On constructivism, see generally Onora O'Neill, *Constructivism in Rawls and Kant*, *in* THE CAMBRIDGE COMPANION TO RAWLS 347 (Samuel Freeman ed., 2003).

[62] O'Neill, *supra* note 61, at 348.

[63] *Id.*

> that can actually makes [sic] your moral opinion true the way physical particles can make a physical opinion true."[64]
> - "Since value judgments cannot be barely true, they can be true only in virtue of a case. The judgment that the law does not permit a particular defense, or that invading Iraq was immoral, can be true only if there is a sound case in law or morals that supports it."[65]

Dworkin rejects the relevance of the label "moral realism,"[66] but his discussion of morons suggests the he agrees with the substance of constructivism on this point. He agrees with the constructivists on both the objectivity and practicality of morality.

This leaves one final question for the third alternative Dworkin: Can he embrace the constructivist idea that morality is a construction of human agents and still embrace the substance of actual Dworkin's views of morality? If the third alternative Dworkin can embrace the constructive concepts view (contained in the paraphrase of Dworkin above), then it would seem that the answer is "yes." The constructive concepts view is a version of the constructivist thesis that morality is a construction of human agents.

In sum, the third alternative Dworkin could embrace the interpretation-construction distinction and reject the unity-of-interpretation thesis, but continue to affirm much of the substance of Dworkin's views about law and morality by turning to constructivism as the method that grounds both legal construction in particular and morality in general.

CONCLUSION: FROM CONSTRUCTIVE INTERPRETATION TO CONSTRUCTIVISM

I have argued that the unity-of-interpretation thesis is false, but even if this is so, it does not follow that the substance of Dworkin's account of normativity is false. Nor does it follow that Dworkin's main point about the relationship between law and morality – that these are not two separate realms – is incorrect. Dworkin might be right about these claims, even if he is wrong about the role that a unified account of interpretation plays in the argument for them. I have suggested that Dworkin might employ a strategy that rejects interpretivism and embraces constructivism. Whether the actual Dworkin would embrace this strategy seems doubtful at best. Whether he should is another question entirely.

Ronald Dworkin's views about interpretation have been both influential and provocative. The main argument of this Essay, which denies the unity-of-interpretation thesis, suggests that Dworkin took a wrong turn at a very early stage in the development of his general views about law and morality. *Justice for Hedgehogs* is the culmination of developments that began at least as early as *Hard Cases* and continued in *Law's Empire*. One wrong turn led to another and then another.

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[64] DWORKIN, *supra* note 2 (manuscript at 17).

[65] *Id.* (manuscript at 75).

[66] *Id.* (manuscript at 10).

One thing is certain – Ronald Dworkin's turns, both right and wrong, have changed the landscape of contemporary legal theory. *Justice for Hedgehogs* provides a welcome occasion for celebrating, debating, and reevaluating Dworkin's impressive legacy.