
INTERPRETATION

TWO TAKES ON TRUTH IN NORMATIVE DISCOURSE

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INTRODUCTION

It is a pleasure and a privilege to be a part of this Symposium. Professor Dworkin's newest work provides philosophical riches comparable to those which we find in his massive body of work, a corpus plainly unmatched by any other figure in law and philosophy. What remains remarkable and inspiring is the combination of extraordinary philosophical depth and acumen on a range of highly abstract topics, and the capacity to connect these analyses with matters of serious practical and political importance.

I. STATUS SKEPTICISM AND THE NORMATIVE THEORY OF ADJUDICATION

First, I want to set forth my understanding of the connection between a variety of pressing issues in interpretive legal theory and Dworkin's thesis that there is a right answer to legal questions even in hard cases.¹ The easiest way to see the linkage is to survey a line of thought running from Holmes and Learned Hand all the way to Justice Antonin Scalia, with H.L.A. Hart in the background. What it says is that there are many cases in which there is no right answer and judges exercise what Dworkin calls "strong discretion."² A number of normative implications have been drawn from this thesis. Hand's (and others') was that the Supreme Court in *Brown v. Board of Education*³ was legislating, not applying law, and that it ought to avoid doing so because it

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¹ See Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1060 (1975).

² See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 32 (1977).

³ 347 U.S. 483, 495 (1954).

displaces more politically accountable entities or branches.⁴ Scalia advocates interpretive methodologies that are supposedly hard-edged, so as to decrease the occasions of strong discretion or at least make it plain when they are upon us, in which case he too favors deference to other branches.⁵ In this way, jurisprudential considerations about the nature of the judgment required in certain kinds of controversial cases result in weak positions on judicial review and strongly textualist or historicist methodologies.

Dworkin's famous right-answer thesis demonstrates the flaws in this critique of judicial review. Where there is a right legal answer, and the interpretive process is properly understood as a reasoned pursuit of that right legal answer, judges are applying the law, not legislating.⁶ Perhaps the positions in the normative theory of adjudication – such as judicial restraint and textualism – can be justified, but not by the “no right answer” route. Dworkin's defense of the right-answer thesis and the refutation of the strong discretion thesis have many parts, but it is my view that the most important part is the defeat of what Dworkin now calls “status skepticism” as applied to hard cases.⁷ In other words, Dworkin's most important argument against these positions in the normative theory of adjudication actually involves characterizing these views as relying upon what is essentially a philosophical premise – which *Justice for Hedgehogs* refers to as status skepticism – and then offering a refutation of this philosophical premise.

Status skepticism is the view that, within the domain of legal interpretation, there are cases in which there is no demonstrably superior argument from applicable legal sources, and that in such cases, no one interpretive claim is really true, however strongly a judge may feel about his or her position. At the end of the day, the question facing the Supreme Court in *Brown* – Is segregated schooling a violation of the Equal Protection Clause?⁸ – can be answered in various ways, and there are clearly very strong arguments that segregated schooling is a violation of the Equal Protection Clause. But the statement that it *is* a violation of the Equal Protection Clause is not really *true*, according to status skeptics. In fact, there is no objective answer to the question of whether it is a violation of the Equal Protection Clause. Truth and objectivity do not really apply to the results of legal interpretation, although we sometimes speak as if they do. Skepticism about the capacity of statements within legal

⁴ LEARNED HAND, *THE BILL OF RIGHTS* 54 (Antheneum 1963) (1958) (claiming that the Supreme Court meant to “‘overrule’ the ‘legislative judgment’ of states by its own reappraisal of the relative values at stake”).

⁵ Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3, 13, 23 (Amy Gutmann ed., 1997).

⁶ See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 2, at 280-90.

⁷ RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (forthcoming 2010) (Apr. 17, 2009 manuscript at 26, 42-57, on file with the Boston University Law Review).

⁸ *Brown*, 347 U.S. at 493.

interpretation to be true or objective is thus one of the most important targets in all of Dworkin's work. We see in *Justice for Hedgehogs*, as we have now for more than a decade, a highly sophisticated philosophical analysis of similar sorts of skepticism directed especially toward moral discourse.

II. TWO RESPONSES TO STATUS SKEPTICISM

The concern I want to raise here is that *Justice for Hedgehogs* contains two quite different responses to status skepticism – one in its Part I on “Truth,” and another in its Part II on “Interpretation.” I suggest that the response in Part II undercuts what appears to be the best reading of the response in Part I. The good news is that Part II contains much that is promising. But I question whether it takes Dworkin as far as he wants to go. And, of course, we are also left to wonder whether the Part I response was the better bet to begin with.

The argument in Part I might be called “Bold Quietism” or “Confident Minimalism.” It is Davidson or McDowell,⁹ with the added reminder that there is nothing in metaphysics, semantics, or epistemology that we should take as disqualifying in any sense a domain of assertion that is capable of justification.¹⁰ His principal adversary is the external status skeptic, who memorably complains that there are no morally charged particles, or morons, that cause our moral beliefs and make our moral beliefs true.¹¹ Dworkin happily agrees with the status skeptic as to the implausibility of positing such metaphysical entities, but denies that the absence of such particles or entities justifies the external status skeptic in stating, for any moral sentence that he would affirm, that such a sentence is not “really true.”¹²

In prior work, I have labeled such a view “Coherentism,”¹³ and observed that because global coherentism in metaphysics, epistemology, and semantics has maintained numerous eminent supporters in light of the powerful arguments of Quine,¹⁴ Putnam,¹⁵ Davidson,¹⁶ Sellars,¹⁷ Wittgenstein,¹⁸ and

⁹ See generally DONALD DAVIDSON, *INQUIRIES INTO TRUTH AND INTERPRETATION* (1984); JOHN MCDOWELL, *MIND AND WORLD* (1994).

¹⁰ See DWORKIN, *supra* note 7 (manuscript at 94).

¹¹ *Id.* (manuscript at 17).

¹² *Id.* (manuscript at 27).

¹³ Benjamin C. Zipursky, *Legal Coherentism*, 50 S.M.U. L. REV. 1679, 1695-706 (1997).

¹⁴ See generally WILLARD VAN ORMAN QUINE, *WORD AND OBJECT* (1960).

¹⁵ See generally HILARY PUTNAM, *REASON, TRUTH AND HISTORY* (1981).

¹⁶ See generally DAVIDSON, *supra* note 9.

¹⁷ See generally WILFRID SELLARS, *Empiricism and the Philosophy of Mind*, in *SCIENCE, PERCEPTION AND REALITY* 127 (Ted Honderich ed., 1963).

¹⁸ See generally LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans., 3d ed. 1958).

Rorty,¹⁹ Dworkin was well positioned in the 1980s to embrace a confident coherentism in law. Consider this passage from *A Matter of Principle*:

So I have no interest in trying to compose a general defense of the objectivity of my interpretive or legal or moral opinions. In fact, I think that the whole issue of objectivity, which so dominates contemporary theory in these areas, is a kind of fake. We should stick to our knitting. We should account to ourselves for our own convictions as best we can, standing ready to abandon those that do not survive reflective inspection. . . . [W]e can give no sense to the idea that there is anything else we could do in deciding whether our judgments are “really true.”²⁰

In Part II on Interpretation, however, Dworkin does several things that have quite a different flavor. Most importantly, he implicitly rejects minimalism as to truth;²¹ he asserts that truth is an interpretive concept;²² he treats the correspondence theory of truth in a robust form to be tenable, cogent, and illuminating for the discourse of natural science,²³ and rejects it for interpretation and for morality;²⁴ he rejects holism for science but not for interpretation or morality;²⁵ and he invites philosophers to think about what a theory of truth could look like in these other areas. I draw these observations not from a few throw-away comments I have caught in the text, but from large, evocative, and central passages. For example:

We share a vast variety of practices in which the pursuit and achievement of truth are treated as values. We do not invariably count it good to speak or even to know the truth, but it is our standard assumption that both are good. The value of truth is interwoven in these practices with a variety of other values that Bernard Williams called, comprehensively, the values of truthfulness. These include accuracy, responsibility, sincerity and authenticity. Truth is also interwoven with a variety of other concepts: conspicuously the concept of reality but also the concepts of belief, investigation, inquiry, assertion, and argument, and also of a set of distinctly philosophical concepts including the concepts of cognition, proposition, assertion, statement, and sentence. We must interpret all of these concepts – the entire family of truth concepts – together, trying to find conceptions of each that make sense given its relations with the others and given standard assumptions about the values of truth and truthfulness.

¹⁹ See generally Richard Rorty, *Pragmatism, Davidson and Truth*, in TRUTH AND INTERPRETATION 333 (Ernest LePore ed., 1986).

²⁰ DWORKIN, *A MATTER OF PRINCIPLE* 172 (1985).

²¹ DWORKIN, *supra* note 7 (manuscript at 114).

²² *Id.* (manuscript at 111).

²³ *Id.* (manuscript at 113-14).

²⁴ *Id.* (manuscript at 114).

²⁵ *Id.* (manuscript at 99).

The familiar philosophical theories of truth are therefore best understood as interpretations of a great network of concepts and practices taken together.²⁶

This all comes as something of a shock to the system for three quite different and equally important reasons. First, it seems to turn against what is naturally understood to be a significant force implicit in Dworkin's coherentism and explicit in the views of many similar thinkers. The philosophical worldview of the first half of the twentieth century (or at least a passable cartoon of such a worldview), which led to emotivism or highly reductive theories in moral thinking, was one that engaged a robust truth-as-correspondence model of truth as to natural science and then viewed moral thinking as discredited because it failed to live up to that model.²⁷ Part of the reason Quine, Sellars, and the late Wittgenstein left many philosophers – including many moral philosophers – feeling quite relieved, is that they punctured the idea that a robust correspondence theory, a verificationist conception of meaning, and foundationalism in epistemology would work for natural science.²⁸ The reasons for treating other areas – ethics, aesthetics, psychology, and law – as second-class citizens subsequently seemed to evaporate.²⁹ Now, however, none other than Dworkin himself seems engaged by the prospect of a science/interpretation distinction, and attracted to the view that scientific discourse gets an easy pass for truth and objectivity discourse, but interpretation and morality cannot fit the same model.

Second, what is one doing when one endorses the claim that truth is an interpretive concept that we ought to explore in a variety of different areas, including interpretation and moral thinking? Surely, this is going off to study the qualities of wool and the shape of knitting needles; it is certainly not going back to our knitting.³⁰

Third, and most importantly, the embrace of truth-as-correspondence for science seems to me the beginning of a rescue for the status skeptic supposedly refuted in Part I. For it suggests that there is a way in which the concept of truth can be connected with the notion of being entrenched in an environment with mind-independent objects that one's internal representations are capable of matching or not matching. I shall refer to this as the "Furniture-of-the-Universe" conception of reality. If one took an interpretive view according to which the concept of truth is, in all domains, properly interpreted as permitting that "true" be legitimately employed only where the discourse is appropriately connected with reality in the sense of furniture of the universe, then that would render meaningful the external skeptic's statement that moral propositions are not properly said to be true.

²⁶ *Id.* (manuscript at 111).

²⁷ See Zipursky, *supra* note 13, at 1683-85, 1688.

²⁸ See *id.* at 1695-98.

²⁹ *Id.* at 1702.

³⁰ See *supra* text accompanying note 20.

III. INTEGRITY, TRUTH IN LAW, AND CONSTRUCTIVISM

All of these observations become both more benign and more interesting when we recognize that Dworkin does in fact have a well developed conception of what else truth could be, at least in some interpretive disciplines – especially in law. I think we can understand the argument first made in *Hard Cases*,³¹ and then beautifully developed in *Law's Empire*,³² as exactly that: an interpretive account of truth in legal interpretation. Chapter 7 of *Law's Empire* – Integrity in Law – states as follows: “According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice.”³³ We can understand this passage as an effort to say what it is for propositions of law to be true – what it is for the concept of truth to have a place with respect to legal discourse. The crux of Dworkin’s account is that it is *not* a bald pragmatist statement that truth is whatever it is best for us to say. The detailed account of how the enterprise of adjudication actually works, and how legal interpretations build upon prior interpretations, depicts in some detail how the practices of truth work in the domain of legal discourse (at least the legal discourse of courts). That account of how justification works in legal interpretive discourse goes hand in hand with an account of why a set of practices that is in some sense truth-seeking turns out to be a worthwhile practice, all things considered, notwithstanding that it does not really fit the truth-as-correspondence model. And that is not because our society arrives at the right politics if it follows Dworkin. It is because courts as institutions, and our legal practices more generally, are able to constitute an ongoing system that resolves conflicting claims by reference to entrenched principles. Because they do so in a concrete and ongoing manner that plausibly instantiates a conception of justice, integrity constitutes a special form of political virtue. If there is an individual rationality to knowing one’s way around the furniture of the universe, which in some sense grounds the truth-as-correspondence interpretation of truth for natural science, there is a similar fundamental social rationality suggested by integrity, which grounds the interpretation of truth in law.

The short way of putting my thesis is that, notwithstanding that Part I is called “Truth” and Part II is about “Interpretation,” it is actually Part II that contains the more interesting substantive suggestions about truth. And what it really suggests is that in at least some domains of interpretation, even though a correspondence interpretation of truth is not available, a constructivist notion is available. Although there is plenty both in Part I and elsewhere in Dworkin’s work to suggest he is hostile to constructivism, because it is not sufficiently full-blooded, I think there is no way around the view that *Law's Empire* presents a constructivist view, and he seems to suggest as much in the final

³¹ See Dworkin, *supra* note 1, at 1083-101.

³² See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986).

³³ *Id.* at 225.

pages of that book.³⁴ Moreover, when we get to the discussion of Morality in Part IV of *Justice for Hedgehogs*, Dworkin embraces a version of Kant.³⁵ In light of the influence of Rawls on Dworkin, it is hard not to suspect that this, too, should be seen as a step towards constructivism as an interpretation of truth in the domain of morality.

CONCLUSION

The disparity between the treatment of status skepticism in Part I of *Justice for Hedgehogs* and the treatment of truth in Part II raises a number of serious concerns about the defensibility of Dworkin's position. First, the depiction of integrity in legal interpretation is quite developed, subtle, and dependent on a sustained picture of legal institutions and the place of judges within them, as well as on the social value of a sort of convergent practice that tracks the past. Can a similar account be given for other areas of interpretation, and if not, does this undercut the availability of truth and objectivity for those other areas? Similarly, if we are to take a Rawlsian sort of constructivism for (some of) the moral domain, what are we to do for the domain of ethics and evaluative discourse more generally? Much of the discussion of these subjects seems to presuppose the kind of confident minimalism on metaethics seen in Part I, but I have suggested that Part II of *Justice for Hedgehogs* generates reason to worry about minimalism for interpretation in light of Part II's examination of the differences between interpretation and natural science, and in light of Dworkin's announcement in Part II that he believes it is both cogent and desirable to develop a notion of truth distinct from truth-as-correspondence. Minimalism in metaethics is driven in large part by the philosophical contention that there is something incoherent about even raising the metaethical question of whether truth-as-correspondence works in some domain of discourse, like ethics. And yet by rejecting truth-as-correspondence for interpretation, and entertaining what he regards as promising alternatives to such an understanding of truth in interpretation, Dworkin casts doubt on his commitment to such deflationary premises.

Second, if truth is to be interpreted differently in different areas, and if legal interpretation is quite clearly not within the truth-as-correspondence model but rather in a constructivist model, are there assumptions about how truth and objectivity function in the first model that do not apply to the second, or vice versa? Especially serious is the question of whether bivalence – the principle that well-formed sentences are either true or false (which does not quite work in correspondence areas) – will apply in constructive domains. Of course, this is of great concern with regard to the question of whether there is a single right answer in hard cases. The capacity of legal discourse to sustain cogent and coherent justifications aimed at finding a right answer, and the virtue of a system that does so, does not, in and of itself, speak to the question of whether

³⁴ *Id.* at 410-13.

³⁵ Dworkin, *supra* note 7 (manuscript at 162-73).

judges should *sometimes* treat the cases before them as not having a right answer; as requiring the exercise of choice in a sense quite different than that which the phrase “application of the law” usually connotes. One could (as I am inclined to do) take the argument from integrity to be sufficiently strong to lead to the view that there is truth in many hard cases, notwithstanding that no sources answer the question decisively, and that moral argumentation runs to the core. But a truth-as-correspondence conception of truth in the mold that Dworkin imagines for science tends to support a firm commitment to bivalence tempered only by presupposition problems, vagueness, and ill-formedness in predicates. It is not immediately obvious why a different conception of truth for interpretation would not lead to a softer position on bivalence. In light of the role of the critique of status skepticism in defending judicial review and in attacking certain positions in the normative theory of adjudication, this concern is especially serious.

Third, Dworkin plausibly connected the notion of truth with the notion of truthfulness, sincerity, and accuracy. I have recently argued that one of Hart’s worries in *Positivism and the Separation of Law and Morals*³⁶ was that judges and legal academics characterizing the law should display the qualities of truthfulness and candor – as I called it, “veracity” – in legal interpretation.³⁷ If Dworkin is serious about offering an account of truth in legal interpretation that connects with such notions, he must address the widespread perception among lawyers that a classic, positivistic approach toward legal interpretation and law is far superior in its capacity to capture those virtues than approaches which are as heavily dependent on theory and on moral principle as Dworkin’s. Moreover, the very insistence that there are always (or almost always) right answers in hard cases is viewed by many lawyers and judges as inconsistent with what forthrightness and candor would typically lead them to say on a variety of unsettled questions of law.

The foregoing concerns lead to an overarching set of questions concerning: whether the adventurous foray of Part II on Interpretation was ill-advised; whether Dworkin ought to have clung fast to the “stay-home-knitting” minimalism of Part I; whether – as Rorty appears to think³⁸ – truth and objectivity do not lend themselves to very good questions; whether Dworkin’s efforts to capture a unified account of ethics and morality would be better facilitated by such a minimalist approach; and whether there are unnecessary philosophical perils created by a science/interpretation distinction and the implied revitalization of a robust truth-as-correspondence model in science. Although what I have tried to phrase here is a sort of quandary for Dworkin, let us not lose sight of how ironic it is to be presented with such a problem: in his

³⁶ H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

³⁷ Benjamin C. Zipursky, *Practical Positivism Versus Practical Perfectionism: The Hart-Fuller Debate at Fifty*, 83 N.Y.U. L. REV. 1170, 1171-72 (2008).

³⁸ See Rorty, *supra* note 19.

endeavor to reassure modernists that a unified understanding of the normative domain is possible, Dworkin has provided not one but two plausible ways of dealing with the elusive problems of truth and objectivity in normative discourse. The tension between minimalism and constructivism about normative domains such as moral discourse and legal discourse does not appear to be benign, however. For what it appears to indicate is a less than complete satisfaction with either one.