Demystifying Dworkin's "one-right-answer" thesis. Stephen Guest.

The Humean Principle

The idea that "what the law is" is not determined by empirical evidence will come as a surprise to many. For it is common to think that the content of a statute (the propositions that are true) exists only because empirical evidence of the historical sort shows there to be such a statute (eg the Homicide Act 1957 in England). This rather straightforward idea is supported by the widespread but simple-minded assumption in the Anglo-American jurisdictions that true propositions of law are historical "givens" independent of moral choice and that, for example, "legal systems" retain their identity even if they lack any moral worth (the problem of the "evil legal system"). The sooner this understanding of law – known by many rather loosely as "legal positivism" – disappears, the better for us all. For even the well-known legal philosophers who have been interpreted as most forcefully endorsing this "historic-independence" idea of law, clearly did so not because the empirical evidence forced that conclusion upon them but because they thought there were *moral* reasons for assigning legal questions to matters of historical fact. Bentham did, I believe, and so did Hart. Bentham thought the most important principle – the guiding principle of our construction of political and legal concepts - was not historical but moral and that it was the overriding, supreme moral "Principle of Utility" that distributed meaning between them.[1] Bentham clearly thought that seeing the law in this "positivistic" way would contribute to the Greatest Happiness of the Greatest Number. In his own version of this argument, Hart thought that the choice for how we saw law should be based on good "practical" reasons, and these turn out to be straightforward moral reasons such as presenting law so as to allow the ordinary citizen to discern and confront the "official abuse of power".[2] There will be little progress from much contemporary inconclusive and muddled thinking about how we should identify law until there is a wide-spread understanding of the moral force behind what Bentham, Hart and Dworkin said on how we should approach the question of "what the law is".

The general philosophical problem may be summed up in Hume's injunction that judgements of value are different from judgements concerning empirical fact. Hume did not mean that enquiries into empirical facts are irrelevant to making judgements of value but rather that the existence of empirical facts is insufficient to establish the truth of any value judgement. Hume can be placed on a wider footing. What Dworkin calls and endorses "the Humean Principle"[3] requires a judgement of relevance or significance of any set of empirical facts before such facts may serve to help instantiate any value judgement concerning them. Empirical facts themselves say nothing at all. We need instead to make sense of such facts, using our judgement in selecting those facts that are significant and relevant. Bare description alone will not do and judgements concerning whether a human "institution" exists, or whether some rulers are "authorised", or what is "social", or "accepted", or, indeed, what constitutes a "set" or "group" of empirical facts, presupposes value judgements that invest those bare facts with meaning.

Although it is a difficult task to argue for a value without referring ultimately to particular empirical facts, eg such as the existence of particular paintings, or notes of music, or to the actual practices of judges, I think Cohen is right in his paper "Facts and Principles" to say that no facts figure in the ultimate expression of any value proposition although in showing what is morally or aesthetically valuable it is necessary to refer to facts.[4] The abstract moral principle, say, that "we should respect

others as we respect ourselves" receives its most practical application in judgements about which particular policies, strategies or acts are unjust. The crucial point is that even at these more concrete levels, it is still true that no empirical fact is sufficient to determine what value is rightly applied.

It is, however, important to note that nothing in the idea of "fact" itself necessitates that its truth be empirically determined, or otherwise "provable" and "certain", in spite of a general understanding to that effect. Modern philosophical analyses of fact and truth establish what I think is a coherent relationship between truth and fact that has nothing to do with the significance of empirical truth: eg. famously, Strawson: "facts are what true propositions (when true) state",[5] and Tarski: "[the statement] "p" is true if and only if p"" (1935). In their view (and the view of many others) truth, rather unexcitingly, concerns the relationship between propositions and what makes them true, and it does not, and need not, provide an account of what justifies their truth, or from what particular genre or domain of judgement that justification arises. If a proposition is true – on whatever grounds – declaring it to be true is an assertion only that the proposition is justified, not how it is. Since I think our moral views are in many cases fully justified – for example that torturing children for pleasure is morally wrong - I believe such views can assert *facts*. (I might be wrong; that torturing children for pleasure might be morally permissible in some cases is something I have to concede because I cannot be proved wrong; but I find it impossible to make any such case). At any rate, if value propositions can be true, it would follow that the assertion that "only facts can be true" would be insufficient to distinguish fact from value. Believing that "fact" equates with "empirical" and/or "analytical" fact is not a problem of philosophy but a symptom of the grip that science has on people's understanding of the extent of knowledge (to the detriment of reasoned thinking about art and morality).

There is nevertheless a subtle interplay between empirical propositions and value judgements which is why I think Dworkin in general refers to evaluative propositions as "interpretive". We cannot make value judgements about the worth of a painting unless we have an actual painting in mind. Identifying that painting as a painting is itself the result of an evaluation because we must be familiar with the idea – or concept – of what a painting is "as a work of art" before we can make the appropriate critical remarks about it. It is interpretation "all the way down" as Dworkin says. Likewise with social practices. To say whether a promise is genuine we need to be aware of a practice of promising. It is the same for making decisions about the formation of a legal company, or the legal meaning of theft.[6]

This vision of law contrasts with science because the relation between empirical evidence and the scientific propositions that the evidence confirms is fundamentally different. In science, empirical proof confirms or disproves scientific truth but in law, empirical evidence does not so confirm or disprove the truth of legal propositions. Take, for example, the way it is a characteristic part of legal argument in most jurisdictions for lawyers to distinguish questions of "fact" from "law". A legal proposition expresses a hypothetical statement "If D – an identifiable person – has dishonestly appropriated property belonging to another with the intention of permanently depriving the other of it", then D has committed the criminal offence of theft (English Theft Act 1968, s.1). The question whether D, suitably identified both in fact and law, was "dishonest", whether he "appropriated", whether it was "property", whether that property "belonged to another" and whether D "intended permanently to deprive", are all mostly questions of law. All of these different constituents of theft have long and controversial histories; nothing is fully settled

about the meaning of theft. In putting those arguments of law, historical facts about what judges have said in the past, what academic writers have said, what words are generally understood to mean, will require evidence in the form of empirical facts. But such facts are not decisive in identifying what the law is for the judges have to make decisions on what the law requires or permits, not on what "the facts" establish. Evidence proves what occurred, but law argues for what liability follows from what occurred.

Dworkin affirms the Humean principle prominently and forcefully in *Justice for Hedgehogs* and I believe that his acceptance of this principle makes sense of the whole of his work, not just on law but on ethics, morality and politics. Dworkin's contribution to morality in the widest sense in which it derives from personal ethics (the nub of the Kantian strain of his work)[7] and governs sub-branches in politics and law was overwhelmingly moral. He did not analyse "what was there" for he thought the idea of describing an "external" world of law does not make sense; instead, he engaged in the creation of those moral ideas that should govern, shape and develop the core of our moral concepts, applicable to legal practice.

The "shoe-laces" strategy

Dworkin's views on the "one-right-answer" thesis require more careful consideration than they have been given to date. In approaching his endorsement of objectivity in matters of value, it is important to see that there is pretty well universal acceptance that there are true value judgements (as there is pretty well universal acceptance that we, each of us, exist). For example, no-one (do I have to add, "sensibly and honestly"?) thinks that child torture for fun is morally permissible. Further, nothing appears to be gained by denying that this can be expressed in the form "child torture is wrong" is true. (I would emphasise I'm talking about the real world, not raising a philosophical problem). It turns the world on its head to suppose that the judgement that "child torture is morally permissible" is merely a matter of taste, as much a matter of choosing peanut butter over tuna for a sandwich filling. In matters of aesthetic judgement, too, it is ridiculous to think that a judgement about the worth of a great painting by Rembrandt (justified by reasons to which others can respond) is "merely" a matter of taste.[8] So we can say that Dworkin's views about the objectivity of value is widely shared at the very least from a non-philosophical point of view. That says something for the descriptive but less important flank of his account. In Dworkin's terms, it "fits".

However, second, the important justification for objectivity of value is not descriptive but evaluative. We should ask whether, independently of whether there is some descriptive truth in the objectivity thesis, there is *value* in thinking of value as capable of being objectively understood. I won't make an extensive case here for that value, partly because the general idea is appealing and partly because it is only necessary for me here to show the thrust of Dworkin's account. It should be enough to ask whether there is value in praising, criticising and judging art in ways serious enough to suppose that one could be mistaken, or fallible, or led by false belief in judgement, and in ways that encourage appreciation of this vital dimension of human existence. What would be the point in assimilating all judgements about art to the level of taste? In the exercise I'm engaged in, we may, but what would the value in that be? The best I can do is suggest some would see value in debasing art in pursuit of some conception of equality. And in the particular case of moral value, is there moral value in thinking that human individuals and human institutions should be

assessed from a moral point that requires similar concepts of mistake, fallibility and true belief? Again, what would be the point of a decision to assimilate all moral judgement to matters of subjective taste? On moral value, I cannot begin to see what such a value could be.

I find it useful to think of the apparent circularity in the argument for value from value as the "shoelaces" strategy. It picks itself up by its own shoelaces. The Humean principle forbids an argument that begins in empirical truth and, if we accept, as we surely must, that moral truth is not analytic (how could it be: abortion is morally permissible because that is what "abortion" means?) the argument must begin in value.[9] Is that so strange? But that strategy is difficult to appreciate if you are convinced that the only way to see truth is empirically or analytically. Do not assume that the centre for truth is science. Look at value from value's point of view.

It is a useful exercise to try to see what truth could be in science from value's point of view.[10] Propositions of science are true only if they further the value of science? What is this value (beyond that of elegance and furtherance of knowledge)? Leiter – expressing a common view shared by some philosophers - who claims a "realist" position in denying objectivity to value judgements, justifies it by reference to what he obviously thinks is the *value* of science which, he says, is "to deliver the goods". He seems unaware of the nature of his argument because he cites as instances of the value of science that it, for example, "sends planes in the sky" and that it "has eradicated certain cancerous growths".[11] By employing value to show that it is true that value has no truth value Leiter is disappointingly contradictory. The problem in general terms with his approach is that it assumes that reality has only one form, that of the empirical world. But morality and art are as real as the empirical world, just different, requiring a different set of reasons to see what is true in the world of value.

The reality of value bears its strongest analogy with the reality of science in its inescapability: you cannot help but make moral judgements and you cannot help but justify them. The idea that morality is a matter of "feeling" or "expression" alone does not only not make sense on the moral grounds for moral objectivity I've hinted at, but that idea simply does not accord with our experience of morality. The "external" realist who denies the possibility of moral truth because it is not empirically or analytically demonstrable denies truth to major propositions such as that expressed in "murder is morally wrong". If it is not true that "murder is morally wrong", then it must be true that "murder is morally permissible". If it is not true that "murder is morally permissible" then "murder must be morally wrong", and so on. Even anarchists and nihilists assert moral positions. The reason is that "meta-ethical" jaunts of this sort are attempting the impossible, denying that ordinary human experience requires us to live our lives with others, making decisions that govern our actions. In sum, no theoretical, logical, abstract, whatever, reason will persuade the most intelligent person to give up thinking that torturing children for pleasure is morally wrong.[12] That is the kind of reality that is analogous to the empirical reality of the domain or genre of science.[13] That is not to say that value propositions are matters of taste – the fact that no person will give certain beliefs up – but that the importance of such a reality demands the same sort of commitment as to the fact, say, that the ground beneath our feet is solid. It is not surprising therefore that, like propositions of science, propositions of value require justification.

The "unity of value" is a corollary of the "one-right-answer" thesis. It is that because there is no "external reality" by virtue of which value propositions are true or false, values have to be constructed out of value (the "shoelaces strategy"). That means that someone has to do it. Value objectivity independent of physical reality

does not mean subjective "whim" or "fancy" but the construction of a good argument. "Anti-realists" say we "make up" our values but, as Dworkin says, it is "an entirely bizarre assignment. How can they be values if we can just make them up?"[14] This part of Dworkin's theory makes sense from the lawyer's standpoint: a legal argument makes no sense to the other side, or to the judge, when it is inconsistent or incomplete (the latter case refers to the possibility there may be an unexamined inconsistency). A confused case is no case, or worse. You must present your case for the truth of a value proposition (the case for your client) in a way that is defensible against a claim from the other side. That lawyer-like mode of argument is one that Dworkin characteristically employed. Striking examples are his arguments for limited abortion and euthanasia in *Life's Dominion*. There he self-consciously seeks reconciliation between two fundamentally opposed views first justifying what he claims are the principles common to each view and then showing why he thinks the conservatives over-emphasise the important principle that the foetus, or the almost brain-dead person, is nevertheless the result of human and natural creation.[15] A person "making sense of", that is constructing a case for a particular proposition of value, must attempt to make his final argument consistent in logic (including completeness) to avoid the charge that his argument is confused. Conversely, pointing out to an opponent that his argument is inconsistent is a very powerful way of showing that his argument lacks drive and point.

Dworkin is consistent in denying that there are "facts about the world" that present external conflicts of morality to us. But he doesn't deny the existence of apparent surface conflicts between values where they can be explained by some abstract account that reconciles them. And sometimes we will conclude that there are "no-right-answers" and that some values are, in some cases, incommensurable. But he does not consider conflict or incommensurable values to be a decision out of our control (what he calls the "default" position). Rather, in his view, it is then that the argument gets difficult. We have a responsibility to push on. If we think that the "external" forces conclusions upon us that will make us adopt the position that our ability to make rational moral judgements has been outstripped. In this case we will fall into the trap of making compromises, or "trading" our values off against one another and this would renege our responsibility to make a proper moral judgement.

We should remember that Dworkin's view about the unity of value arose from his criticism of Berlin's bleak view that liberty and equality were in irreconcilable conflict. Berlin's view arose from his sociological study of the world that, he said, "we encounter in ordinary experience".[16] But all this was to ignore the Humean principle. Berlin surely could not have thought he was deriving the morality of liberty and equality from the empirical "pluralistic" experience of "ordinary experience".

To give force to the fairly straightforward interpretation I have placed on Dworkin's unity of value thesis, we can look at the well-known English case of *Fisher* v. *Bell*.[17] In this case, a statute made it a criminal offence to offer to sell flick-knives. The aim of the statute was to prevent an increase in the circulation of flick-knives from Europe. In *Fisher*, the House of Lords (the highest appellate court then) decided that this statute did not impose criminal liability where flick-knives with price-tags attached were displayed in a Soho shop window. They justified their decision by pointing to the law of contract which said that displaying goods this way in a shop did not constitute and "offer to sell' but rather an "offer *to consider an offer*" made by someone entering the shop. Obviously, this decision was publicly criticised for stifling police powers to prevent the circulation of flick-knives. Of course, we could explain it by saying that House of Lords sought unity of value by deciding that "offer

for sale" meant the same in all compartments of law, thereby preventing a conflict between the criminal law and the law of contract. But this is not the only possible unifying interpretation. Another could be that the categories of contract and criminal law serve different purposes and so in the context of the case, what contract law said was irrelevant. I think a third possibility gives a better explanation. It is that a more abstract principle of morality requires that in the criminal law, where the individual's liberty is at stake, a possible ambiguity (or controversy) about whether a criminal stature imposes liability should be resolved in favour of the defendant. In all three cases of resolving this case, you can see that the aim at presenting a consistent account of the law is an operative part of the reasoning.

Conclusions

i. The most common academic criticism of Dworkin's work concerns his so-called "one-right-answer" thesis, and that criticism exclusively focuses on the undemonstrability or unprovability of his various evaluative theses. This criticism, note, uses rather than denies the Humean principle, asserting that because value judgements are neither scientific nor analytic, they are incapable of demonstrability and thus not capable of truth. And so the arguments against Dworkin are generally based on an assumption that the truth of legal propositions cannot be generated by value judgements.
ii. The major argument for seeing truth as the object of at least legal propositions is the moral worth (probably but not necessarily in moral impact) in understanding value judgements to be objective. Those who wish to persist with the common criticism of Dworkin on value need to face up to the power of the moral argument and answer it. They can either deny the Humean distinction (very difficult), or they need to say what the better moral arguments are that oppose integrity and its theory of legal rights.[18]
iii. Since the ultimate justification for any evaluative argument must itself be evaluative, it is not surprising that Dworkin thinks that there is no room for meta-value theories, those accounts of value (more commonly of moral value) that attempt to lever evaluative truth onto some "externally" secure position of demonstration. Generally speaking, these "Archimedean"[19] attempts rely on the demonstrability potential of scientific and analytic propositions.
iv. The unity of value thesis is designed to counter the "external" conflict apparent in Berlin's work on liberty. Once we appreciate that the Humean principle dispenses with that confused idea, it is easy to see that arguments of value require consistency to be convincing, although consistency can be achieved by asserting (with justification) that some values, in some situations, may be incommensurable.

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[1] See Bentham's *Fragment of Government* (1776) eg, where he says that it is the "principle of utility" that should order the arrangement of the jurisprudential materials; he is explicit that it is not a matter of historical arrangement.
[2] Hart *The Concept of Law* 1961 Oxford UP ch.IX, particularly 208-9.
[3] *Justice for Hedgehogs* 2011 Harvard UP *passim.*
[4] G.A. Cohen "Facts and Principles" *Phil. & Pub. Affairs* 31 2003, 211
[5] See "On Referring" (1950) *Mind* 59, 320.

[6] I prefer to think of Dworkinian "interpretation" as simply evaluation: law is an "evaluative" concept, like justice, like morality, like law, like beauty.
[7] See *Justice for Hedgehogs* ch.11 "From Dignity to Morality".
[8] One test for distinguishing judgements from matters of taste is that your taste can't be mistaken. You can change your taste, and you can wonder why your taste was so bad before but you can't say your taste before was mistaken or wrong. But you can say about the Rembrandt painting, or your previous view about abortion was wrong, or mistaken.
[9] See *Justice for Hedgehogs passim*.
[10] Science is not just "the empirical" but gets a lot of its sense from the values of knowledge and prediction - and elegance (see *Religion Without God* 2013 Harvard UP).
[11] "Law and Objectivity" in *The Oxford Handbook to Jurisprudence and Philosophy of*
Law ed. Coleman and Shapiro. Oxford UP. 2002, 985-6.
[12] Unsurprisingly, Dworkin thinks that the meta-ethical theory of physical determination on our actions (the "causal" thesis) has no bearing whatsoever on the question of our moral responsibilities which must assume free will. See *Justice for Hedgehogs* chs. 4 and 10.
[13] Also summed up in a phrase Dworkin often used - "you'd better believe it". See "Objectivity and Truth: You'd Better Believe It" *Phil. & Pub. Affairs* 25 1996, 87. The "realist"-"anti-realist" debates about objectivity use "reality" to mean "empirical reality" I think, which is unfortunate.
[14] *Justice for Hedgehogs*, p.9.
[15] See particularly *Life's Dominion; An Argument About Abortion, Euthanasia and Individual Freedom* 1993 New York: Knopf. ch.1 and *passim.*
[16] *Four Essays in Liberty* Oxford UP 1969 p.168. Berlin's phrase suggests the sociologist Weber's "the world as one finds it".
[17] [1961] 1 QB 394
[18] The modern arguments notably appear in the Hart-Fuller debate (1957) 71 593, *Harvard LR* 93, (Hart's reply is echoed in *The Concept of Law* 1961 Oxford UP); in Finnis *Natural Law and Natural Rights* 1980 Oxford UP; in Kelsen surprisingly in his Preface to *A General Theory of Law and State* (1945). It appears throughout Dworkin's work of course but particularly in his comparison of "conventionalism", "pragmatism" and "integrity" in *Law's Empire* 1986.
[19] See *Law's Empire*, ch.2.