Comments

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LCB

Law Is Local

I am very sympathetic to this paper's project. It is a pleasure to see a sustained, constructive effort like this to cast a difficult and intriguing line of argument in the most plausible form possible. Too often we proceed, if not quite with caricatures of straw, then with only the most plausible reading we can easily refute.

Dworkin's account of legality is notoriously difficult to explicate. It is supposed to stand somewhere between positivism and natural law -- to be a "third theory" of the law. Until I read Law's Empire , and now this paper, I had thought I had a handle on how that might be so. Now I am not so sure. Or rather, I am now quite sure of one thing: it is no favor to Dworkin to accept his own polemical characterizations of positivism and conventionalism, because that leaves no ground for a third theory. Here is what I mean:

I had thought that Dworkin's theory accepts, from positivism, the idea that law is local -- that questions of legal validity are decidable wholly within a given legal system, without appeal to substantive extralegal principles -- moral, theological, or purely rational. It accepts, in other words, the positivist doctrine that every legal system is an identifiable, autonomous, human social institution, localizable in a fairly small region of human history. Dworkin's

theory rejects from positivism, however, "the model of rules" -- that is, the notion that a legal system can best be explicated as a system of rules which is always seriously indeterminate (leaving room for a strong form of official discretion), and which may be seriously at odds with fundamental moral norms.

From natural law theory, I had thought that Dworkin's account accepts the view that the law includes fundamental substantive norms (not reducible to rules) in terms of which there is always guidance to be gotten on questions of legality -- guidance which, for a judge of Herculean abilities, would always yield a right (or rather a "best") answer even in hard cases. And I had thought that Dworkin's argument suggests, at least, that for "mature" legal systems such as our own, these fundamental legal norms will always be congruent with the moral setting in which the system operates, in the sense that these norms will have come, over time, to reflect the most widely shared views, within the citizenry, about categorical or overriding principles -- about which principles should be trumps. What Dworkin rejects from natural law theory, I had thought, was the notion that these fundamental principles have to be universal, or immutable, or the necessary truths of pure practical reason, or the product of an all-things-considered sort of practical wisdom. Law's empire, for Dworkin, is separate from those things, and thus from some features of, or characterizations of, morality.

Now of course it is clear why Dworkin might want to reject this characterization of his views -- especially if he is insistent about rejecting the

label 'conventionalism.' Because of course what I have described just is a complicated form of conventionalism -- one that is very similar, in fact, to the most plausible, constructive reading of Hart's version of positivism. After all, Hart deals deftly with Fuller (by way of a discussion of "the minimum necessary content" of law), and anticipates Dworkin's model-of-rules criticism by distinguishing mandatory from non-mandatory rules -- a distinction that maps rather well onto Dworkin's well-known distinction between rules and principles. Moreover, a fair reading of Hart's account of the rule of recognition would be immune, it seems to me, from the difficulties Mr. _____ raises on pp. __. Of course the rule of recognition is vague; even primary rules are, in Hart's parlance, open-textured. And of course the precise content and application of the rule is subject to dispute among those who accept it. But that is true of Dworkinian legal principles as well -- at least among everyone other than Herculean judges.

(And that does appear to be a significant difference between Hart and Dworkin: Hart might welcome an analogy between a legal system and a language, here. Both are conventional -- practices that can be explicated in terms of rule-based behavior in which the rules have an "internal" character we may call acceptance. We can plausibly be said to "accept" the deep, "secondary" rules of a language we speak even if we cannot articulate them. Indeed, this is so even if Herculean grammarians find that there is no completely determinate way to articulate the deepest rules because fluent speakers of the language do not use (or accept) exactly the same deep rules;

rather there is among speakers, at bottom, only an overlapping consensus (to coin a phrase). This obviously opens the possibility that some questions of surface grammar will not be answerable in terms of appeal to the deep grammar, and that prescriptive grammarians will, in those hard cases, have to invent, rather than find, the answers. Dworkin would presumably resist this analogy -- but not, I had supposed, because he rejects the idea that law is at bottom conventional. How could it be otherwise without being subordinate to some conception of natural law or morality?)

Mr. _____ says part of Dworkin's resistance to conventionalism (or positivism) is that it cannot give a deep enough justification or legitimation of legal rules. Let me end with one observation on that issue. The idea is that an appeal to a mere convention (such as general acceptance of a rule of recognition) is not enough to answer the question of legitimacy. Such an appeal, in effect, merely repeats the rule, when what is often being requested is a justification of the rule. Well of course that is true, but it is important to note that it will also be true of "law as integrity" when it appeals to the deepest principle in a given legal system: people may ask what justifies adherence to that principle, and because it is the deepest principle in the system, there can be no principled answer from within the system. The question is then whether answering the question by saying that legality is ultimately grounded in convention is somehow inferior to answering by repeating the deepest principle in the system -- at least if that principle is one of "special, personal and equal concern."

I have two brief remarks to offer. First, I suggest to you that an attempt to legitimate law by appealing to convention is, in our legal practice , an appeal to very deep principles indeed: namely the principle of consensus, as underwritten by the notion of moral autonomy. The legitimating idea in these appeals is that we are all autonomous agents in the sense that we have the power to define what counts as right conduct for ourselves -- at least within the bounds of any "natural duties" we may have. And when we achieve consensus among ourselves on what we define as right conduct, we have achieved something of great practical importance -- something well worth preserving. Conventions are thus legitimate just to the extent that they reflect consensus of a sort underwritten by the scope of the autonomy principle. These are principles that are internal to our system of law in the sense that they express something inherent in our legal practice: that human laws can be both positive (i.e., laid down by human beings for themselves) and binding for that very reason. I suggest that such an appeal to consensus is in fact an appeal to a principle of special, personal and equal concern, in Dworkin's sense.

My second remark is this: Dworkin's options appear to be these: On the one hand, he can retain the view that law is local -- that legal reasoning is a limited form of practical reasoning (one that is limited in scope or structure, for example, such as etiquette or medical advice or micro-economic analysis is limited). And in that case his theory of law, while interestingly different from Hart's, will be a kind of conventionalism. On the other hand, Dworkin can insist that law is not merely conventional. And in that case, it seems to me, he

will have to acknowledge that it is at bottom simply a special case of all-things-considered practical reasoning. That will make his theory a form of natural law.