

# ... CHAPTER 17

## The Concept of Legal Interpretation

### 1.0 LEGAL INTERPRETATION A REALITY

Earlier we put forth some views on law and legal interpretation that might seem quite nihilistic. If the judge rules one way, that ruling is the law; if he rules the other way, *that* ruling is the law.<sup>319</sup> Of course, a later judge may overturn a ruling on the part of a previous judge. But until that happens, the first ruling stands. As we discussed, the fact that a later judicial ruling is needed to neutralize the first only confirms the view that judicial rulings constitute, and therefore do not interpret, the law.

Without *rejecting* any of these points, I now wish to show that they don't have the nihilistic consequences that they might seem to have and that they don't warrant anything like the now widely rejected "legal realism" advocated at the beginning of the last century. (Legal realism is the view that judicial interpretation isn't answerable to *any* objective-standards and that it is therefore *mere* legislation. The law is whatever the judge's indigestion makes him feel like *saying* that it is.)

Here, more exactly, is what I would like to show. Even though judicial rulings create, and do not identify, the law, some rulings are still better than others. I am not making the trivial and obvious point that some rulings are *morally* better than others or do more social good than others. I mean that some judicial decisions are truer to existing law than others.

In fact, judicial decision *x* can be *more* evil, and can do much *more* social harm, than decision *y*, even though *x* is truer to existing law than *y*. I will further argue that this last fact is consistent with the fact that judicial decisions define, and do not interpret, the law and also with the fact that laws are assurances of moral protections. The next few pages will show why we should give no credence to any appearance of paradox that might be generated by the preceding claims.

### 2.0 WHAT IS LEGAL INTERPRETATION?

There is a tendency to give one of two answers to this question. First, there is the idealistic answer (held by Blackstone): To interpret a law is simply to identify what the law already is; judges do not create, but merely discover, law. Then there is the cynical answer (held by the self-described "legal realists"): Whatever the judge says is *ipso facto* the law; therefore so-called legal interpretation is mere legislation and thus isn't interpretation at all.

We've seen why the idealistic view must be rejected. We've seen that the judge's ruling is *ipso facto* what the law demands and that, consequently, legal interpretation doesn't consist in *identifying* existing law. So the legal realist is right to this extent.

But it would be unwise to embrace the view that judicial interpretation is *mere* legislation and isn't answerable to objective standards. It seems a plain fact that some judicial rulings embody a correct understanding of the verbiage found in books, while other rulings embody spurious understandings of that

<sup>319</sup>Dworkin himself (1986: 2) writes: "the law often becomes what judges say it is."

same verbiage. This is not to say that *all* judicial rulings are either completely right or completely wrong. But it is a fact of every trial lawyer's life that some judges are more likely than others to rule in a manner consistent with the material found in the relevant books.

So there is reason to believe *both* that Blackstone's idealism is false *and* that the same is true of the nihilistic approach taken by the (so-called) legal realists.<sup>320</sup> I would now like to propose a third view.

### 3.0 WHAT IS LEGAL INTERPRETATION? A HYPOTHETICAL THAT MAY HELP US ANSWER THAT QUESTION

Let *N* be a nation whose population is composed of two ethnic groups, the *X*'s and the *Y*'s. The *X*'s dominate the political activity in *N*. In that nation, there is an evil law *L* that allows only *X*'s to vote. Many of the *Y*'s have *X*-blood (inevitably, a certain amount of inter-breeding has occurred). At the same time, for various cultural reasons, *X*'s are very dismissive of those who are not *entirely* of *X*-ancestry. This leads those who are part *X* and part *Y* to identify with the *Y*'s. In other words, it leads those who, in terms of genetics, are part *X* and part *Y* to be 100% *Y* in terms of psychology and cultural affiliations.

Of course, *L* exists because the *X*'s wish to retain their hegemony. *L* can thus be seen as an assurance to the *X*'s that their right to retain power, and their consequent expectation of a certain quality of life, will be protected. (*L* thus conforms to our analysis of law.)

One day, a person named Smith who is genetically half *X* and half *Y* attempts to vote. Culturally and psychologically, Smith is a *Y*, not an *X*. The wording of *L* leaves it entirely unclear whether Smith ought to be allowed to vote, since *L* was written at a time when *X*'s and *Y*'s had not yet mated and, therefore, when the line between the two groups was sharply drawn. (*L* speaks without qualification of "*X*'s" and "*Y*'s," and makes no allowance for those who are of mixed heritage.) The decision goes to Judge Jones. Being a moral and forward thinking person, Jones says that Smith can vote. His reasoning is as follows:

(JR<sup>321</sup>) *L* is ambiguous on this particular issue. When confronted with an ambiguous law, a judge is *ipso facto* to take its meaning to coincide with that of any given of its disambiguations. In such a case, the judge isn't violating his professional responsibilities by deciding to disambiguate the law on strictly moral grounds. (By hypothesis, he cannot do so on *legal* grounds. So if he doesn't do so on moral grounds, his way of disambiguating the law is wholly arbitrary.)

But the official government attorney appeals this decision, and the case goes to Judge Brown, who sits on a higher court. Brown rules that Smith cannot vote. Brown's reasoning is this:

(BR<sup>322</sup>) The letter of *L* leaves it open whether Smith can vote or not. So in a narrow, technical sense, *L* is open on the question of whether Smith may vote or not. But the purpose of *L*—

<sup>320</sup>I say "so-called" because they should really be called the legal *anti*-realists. What the judge says is *ipso facto* correct. This means that the judge's "interpretation" isn't answerable to any objective reality.

But, of course, the self-described legal "realists" meant to convey that *they* were realists about the nature of the law, not that legal interpretation (so-called) *itself* embodied some kind of realism about the law.

<sup>321</sup>Short for "Jones' reasoning."

<sup>322</sup>Short for "Brown's reasoning."

the reason it was brought into existence—is to ensure that *X*'s, and *X*'s only, may vote. Genetically, Smith is only half *Y*. But *culturally* he is 100% *Y*. For this reason, permitting him to vote would be contrary to the spirit of *L*. So denying Smith the right to vote is, whereas giving him the right to vote is not, consistent with the spirit (if not the letter) of *L*.

### 3.1 EVALUATING THIS SITUATION

It is obvious that Jones' decision is *morally* better than Brown's. But which of these two decisions is better *as a legal interpretation*? Answer: Brown's. But why?

Sadly, Brown's reasoning is on the mark. *L* is an assurance of a certain kind. It assures the *X*'s that some of their freedoms will not be abridged. Since *L* was first issued, society has changed in a relevant respect—the line between the *X*'s and the *Y*'s is now genetically blurry. Given those changes, Brown's decision is a natural adaptation of *that* particular assurance to contemporary society. By contrast, Jones' decision is not a natural adaptation or extension of that original assurance.

Suppose I ask you to buy me a pack of cigarettes. You go to the store. They are out of cigarettes, but they do have cigars. (Let us assume that there is no other place to purchase tobacco-products of any kind.) So you buy me cigars. *Technically*, you have failed to comply with my request. From the standpoint of formal logic and literal meaning, you no more succeeded in complying with my request than you would have if you had brought me a candy-bar. But you were right from a pragmatic or psychological viewpoint to bring me cigars; and, from that same viewpoint, you would have been wrong to bring me a candy-bar. People who want cigarettes typically have a violent craving for nicotine. For this reason, given a choice between having *no* tobacco, on the one hand, and having a cigar, on the other, a smoker will not hesitate to choose the latter. So when we consider the psychological and social realities in which my request is embedded, it is clear that your decision to bring me cigars was the right one, even though, from a purely logical or semantic standpoint, you no more succeeded in complying with my request than if you had brought me a soft-drink.

### 3.2 EVALUATING THIS SITUATION (CONTINUED): SOME RELEVANT POINTS ABOUT SPEECH-ACT-THEORY

In general, human speech-acts—assertions, promises, threats, assurances, blandishments—must not be understood in narrowly logical or semantic terms, but rather in broader psychological and social terms.

A corollary is that, in so far as such speech-acts are vague or incomplete, they must be completed in a way that befits not only their literal meanings or their narrowly logical properties, but also their psychological and social underpinnings.

Since laws are issued by, and embodied in, speech-acts (usually, but not necessarily, identical with the depositing of verbiage in certain books), everything we just said applies to them. This is what I meant when, a few paragraphs ago, I said that “in this context, consistency is to be understood in a cultural or psychological, as opposed to narrowly logical, sense.”

### 3.3 REVISITING THE JONES-BROWN SCENARIO IN LIGHT OF THESE POINTS

As we noted, Jones' decision is morally wholesome, whereas Brown's is evil. But this rather confirms our point that it is Brown's decision that is the *legally* correct one. After all, the original assurance was

evil. It is therefore to be expected that the same would be true of a correct (so-called) interpretation of it—one that is true to its spirit.<sup>323</sup>

None of this is discrepant with our analysis of law. *L* is a governmental assurance of protection of a moral good. It assures the *X*'s that their freedom will not be abridged in a certain way. As we've seen, any protection of freedom is a good, albeit one that may be incompatible with a far greater good.

We may conclude that legal interpretation is a principled endeavor, and is answerable to objective facts—facts about the history and culture of the relevant political organization.

### 3.4 WHY JONES' DECISION, THOUGH THE WRONG ONE, LEGALLY SPEAKING, WOULDN'T HAVE CREATED A CONTRADICTION WITHIN THE RELEVANT LEGAL SYSTEM

But there is one other point to make in connection with the Jones-Brown scenario. We saw that Brown's decision is *legally* better than Jones' but let us now suppose that Jones' decision had prevailed. In other words, let us suppose that the government didn't appeal Jones' ruling. Would that have created some kind of *contradiction* within *N*'s legal system? More precisely, would it have resulted in a situation where that legal system comprised two laws *x* and *y* such that *x* permitted what *y* forbade?

No. We'd have a system that didn't give the right to vote to those who were *entirely* of *Y*-ancestry, but did give that right to those who were partially of *Y*-ancestry. There is obviously nothing contradictory about such system.

Of course, as we saw, Jones' ruling is inconsistent with the spirit of the law that he is interpreting. But that ruling didn't result in there being some one mode of conduct that is both legal and illegal; it didn't result in there being two laws such that the one permitted what the other forbade. Given only that Jones ruled as he did, there is no reason why it isn't logically possible to comply with all of the laws in the system in question. So, *pace* Fuller, contradictions are not, or at least not necessarily, created by judicial rulings that embody false understandings of the relevant law.

### 4.0 LEGAL INTERPRETATION AS PRECISIFICATION, AS OPPOSED TO THE DISCOVERY OF PRE-EXISTING REALITIES

But this last point raises an important question. How can a decision that embodies an erroneous legal interpretation *not* result in a contradictory legal system? Remember what we said in connection with *Riggs*. If the judge rules that the young man is not entitled to the money, it is illegal for the bank-manager to open the safety-deposit box. If the judge rules that the young man *is* entitled to the money, then it is illegal for the bank-manager *not* to open the safety-deposit box. The judge's ruling defines legality.

Judicial rulings create legal obligations. So, in effect, such rulings create laws. Given a law *L*, an erroneous judicial interpretation of *L* is presumably one that forbids what *L* permits or permits what *L* forbids. So an erroneous judicial decision is one that creates a law *L\** that forbids what *L* permits or that permits what *L* forbids. In the last section, we said that an erroneous legal interpretation does *not* create such an inconsistency. Something must give way here.

<sup>323</sup>Of course, given the points made earlier regarding the non-binary nature of morality, each of the occurrences here of the terms "perfidious" and "virtuous" must be taken to be preceded by a phonetically unrealized "relatively."

There is yet another problem. The judge cannot be interpreting the law if he is creating it. In Chapter 9, Sections 6.0–6.4.1, we saw that a judge's interpretation of a law is *ipso facto* correct, at least for the time being, suggesting that judicial interpretations is *legislation*. How is this to be reconciled with the point, defended a moment ago, that legal interpretations have an objective basis? So, in this work, I have evidently asserted both that the judge is, and is not, interpreting the law.

#### 4.1 WHY EVEN THOUGH LEGAL INTERPRETATION IS NOT MERE LEGISLATION, AN ERRONEOUS LEGAL INTERPRETATION DOES NOT RESULT IN A CONTRADICTION WITHIN THE RELEVANT SYSTEM

Legal interpretation (so-called) is neither interpretation nor legislation. So what is it? The answer:

(L<sub>1</sub>) Legal interpretation is delineation.<sup>324</sup>

In this context, I am using the word “delineation” in the technical sense in which logicians use it. I will now explain what that sense is, and also what L<sub>1</sub> is supposed to mean.

If you say “Harry is bald,” that is consistent with Harry's having one hair, or two hairs, or three hairs. . . . but not with his having a million hairs. But for many numbers  $n$  between (say) a hundred and ten-thousand, it is unclear whether “Harry has  $n$  hairs” is consistent with “Harry is bald.” There are many values of  $n$  such that there doesn't seem to be any fact as to whether a person with  $n$  hairs can truly be described as “bald.”<sup>325</sup> So, it would seem, the predicate “bald” doesn't have precise truth-conditions.

A “delineation” (or “precisification”) of the sentence “Harry is bald” would be an assignment of precise truth-conditions to it. So a delineation of that sentence would be given by a proposition like: “*Harry is bald*” is true iff Harry has exactly 1,200 hairs or less.<sup>326</sup> A logician who assigns precise truth-conditions to “Harry is bald” is not exactly saying what that expression currently means. Rather, he is *giving* that expression a precise meaning that complements, but doesn't replicate, the meaning that it already has. The logician is “precisifying” or “delineating” the meaning of that sentence. Being an act of meaning-stipulation, rather than meaning-identification, a delineation cannot, strictly speaking, be correct or incorrect.

At the same time, there is *a* clear sense in which delineations are answerable to objective standards and in which, consequently, one delineation can be objectively better than another. A bit of fiction will make this clear. According to logician *A*'s delineation of the term “bald,” a person is “bald”

<sup>324</sup>Duncan Kennedy, Professor of Law at Harvard University, has spent his career arguing that, since the judge's verdict is *ipso facto* law, legal interpretation is no different from legislation. Kennedy thus describes himself as an “unrelenting legal realist.” Nowhere in his published work does Kennedy acknowledge that there is a third possibility, namely legal (so-called) interpretations are instances of what logicians refer to as “precisifications” or “delineations” (these terms being synonymous). And when, during a personal exchange, I brought this possibility to his attention, he said that these terms are just euphemisms for “legislation” and that any attempt to show otherwise was “right-wing sophistry.”

<sup>325</sup>In the next section, we will scrutinize this claim, and find that it isn't quite the right way of putting the matter. But, in this context, the inaccuracy is harmless and is necessary for exposition.

<sup>326</sup>Strictly speaking, whether someone is bald isn't a function solely of how many hairs he has. It is also a function of, possibly among other things, the thickness of his hair-follicles and of the size of his scalp. Even if  $n$  is smaller than  $m$ , someone with  $m$  hairs may be bald whereas someone with  $n$  hairs is not bald. This could be the case if, for example, the hair-follicles of the person with  $m$  hairs were extremely thin, whereas the hair follicles of the person with  $n$  hairs were extremely thick. But in this discussion, for the purposes of exposition, let us pretend that whether one is bald is a function *solely* of the numbers of hairs that one has.

iff he has less than one hundred hairs. According to logician *B*'s delineation of that same term, a person is "bald" iff he has less than a million hairs. Even though neither delineation corresponds *precisely* to existing usage of the term "bald," it is obvious that *A*'s delineation is, whereas *B*'s delineation is not, consistent to a high degree of approximation with our intuitive judgments as to when a given object is appropriately described as "bald." So even though delineations are acts of legislation, as it were, and not of description, some delineations, there is a clear sense in which some delineations are truer to the facts than others.

#### 4.2 SOME RELEVANT FACTS ABOUT LINGUISTIC MEANING: A STORY WILL HELP US MOVE FORWARD

You are afraid that the neighborhood bully is going to beat you up. Because I am a better pugilist than the bully, I am able to protect you from him. Hoping to convey this to you, I say "I assure you that I will protect you from the neighborhood bully: you have nothing to fear." As it happens, you don't speak English, and thus have no idea what I am saying.

Have I assured you of anything? No. I have *attempted*, but failed, to give you an assurance. So far as an "assurance" isn't understood, it isn't an assurance at all. Of course, my words have a definite meaning. But because they don't succeed in assuring you of anything, no assurance has been given. It is irrelevant that you *would* have been given an assurance *if* you had had the relevant information.

In general, if *A* is an attempted assurance, then to the extent that it is unclear what it is that *A* assures, or who it is that is on the receiving end of that assurance, *A* is *not* an assurance. This is a consequence of the fact that "assure" (like "know") is a "success"-verb. If you are not *in fact* assured by my words, then I have given you no assurance. It is irrelevant whether it is my fault or yours that my attempt to assure you failed.

It should be pointed out that "threaten" is also a success-verb. I say to you "if I see you in this neighborhood again, I'm going to break your legs." Unbeknownst to me, you don't speak a word of English. Under these circumstances, I have *tried* to threaten you. But, it seems to me, I haven't succeeded in doing so.

Given any speech-act—whether it is an assertion, a promise, a threat, etc.—so far as it is unclear what is meant by it, that speech-act is a failure. It could be that the speech-act in question is entirely free from vagueness, and that, so far as it is not understood, that is entirely due to incompetence on the auditor's part. Nonetheless, a speech-act is a failure so far as it isn't understood, it being irrelevant why it isn't understood.

Laws are assurances. Those assurances are typically (though not necessarily) made by depositing certain ink-marks in certain books. As we've seen, to the extent that an "assurance" is unclear, there has been no assurance.

#### 4.3 SOME HELPFUL SCIENCE-FICTION

In the year 2206, the U.S. legal system is not significantly different from how it is now. (Obviously there have been *some* changes. But the basic framework has remained intact.) In that year, there come into existence robots that are psychologically very similar to humans. Their intelligence-level is the same as ours, and they have more or less the same emotions and values. These robots come into existence very suddenly, and there is a period of a few years during which their status under U.S. law is unresolved.

During that interim period, robot Gloxo is arrested one day for some petty crime. Of course, any human being in Gloxo's circumstances would have various legal protections. He'd have the right to remain silent, the right to an attorney, and so forth. The legal system assures every human being of such protections. This is not to mention that, under that system, any human being would have the right not to be beaten or killed.

But does the U.S. legal system give *Gloxo* any such assurance? Have robots been guaranteed these protections? No. As we saw, whenever there is any *question* as to whether somebody has been given a certain assurance, the answer is *ipso facto* "no." So given that it even needs to be asked whether Gloxo enjoys legal protection, it *ipso facto* follows that he does not.

This is not hard to corroborate. By hypothesis, there is no verbiage concerning robots, even those with human emotions, in the relevant law-books. One will say that laws concerning robots are *implicit* in such verbiage and that, consequently, there *are* existing laws concerning robots, albeit hidden ones. But we've already seen why that view is a non-starter. If a judge rules that robots do not enjoy protections, then robots *ipso facto* don't enjoy them; and if a judge rules that they do, then they *ipso facto* do enjoy them. In neither case will there be a *contradiction* within U.S. law, meaning that, prior to the judge's ruling, there were no laws concerning robots. We will develop this point in a moment.

Of course, Gloxo is *morally* entitled to such protections. Further, there is a sense, soon to be explicated, in which a judge who ruled that Gloxo was *legally* entitled to such protections would be ruling correctly. Even though, in so ruling, he'd be extending U.S. law, that ruling would extend it ways that were more consistent than a contrary ruling with the principles embodied in existing law.

But it is a fact that, as of yet, Gloxo has no such assurance. It is easy to demonstrate this by developing a point made a moment ago. Suppose that the police beat Gloxo to death. Thanks to pressure from the ACLU, those police officers are brought to trial. The case goes to Judge Green. Green decides that, legally, robots aren't human beings and that the police therefore didn't commit homicide.

It is pretty clear that Green's decision is evil and, further, that it is inconsistent with the moral outlook embodied in the U.S. legal system as a whole. (Remember that Gloxo has human emotions, even though he is biologically non-human.) But it is also clear that Green's decision hasn't created a legal *contradiction*. His decision did not result in a situation where some law prohibited what some other law permitted. If Gloxo had *already* had some legal assurance that he had such rights, then Green's decision *would* have resulted in a situation where Gloxo both did, and did not, have certain rights. Since Green's decision did not have that result, it follows that Gloxo never had those assurances to begin with. For exactly similar reasons, if Green had ruled that, legally, Gloxo *was* a human being, that ruling wouldn't have created any contradictions within U.S. law.

#### 4.4 CLARIFYING THE NATURE OF LEGAL INTERPRETATION BY ANALYZING A VARIANT OF THIS SITUATION

Once again, suppose that Green rules that, legally, robots are not people and thus don't enjoy legal protections. (So the police who killed him are found not guilty of committing any crimes against a *person*.) As we've just seen, Green was not *identifying* what the law *already* said in connection with Gloxo or robots generally. So what was he doing, or at least attempting to do?

Prior to Green's ruling, human beings did have certain assurances under U.S. law. They were assured that they have the right to remain silent, the right to an attorney—not to mention the right not to be beaten or killed. These assurances are laws. (They are, respectively, the law that the police may not interrogate you without mirandizing you, the law that others may not beat you, and so on.) Let  $L_1 \dots L_n$  be these laws. There is no doubt about what *these* laws are. The question that Green must answer is not "what do  $L_1 \dots L_n$  say about robots?" The answer to that question, as we've seen, is "noth-

ing.” (That is why a judge was needed in the first place.) The question that Green must in fact deal with is (at least approximately) this:

*Green's question (GQ):* Let  $L^*_1 \dots L^*_n$  be a set of laws that are just like  $L_1 \dots L_n$  *except* that, unlike  $L_1 \dots L_n$ ,  $L^*_1 \dots L^*_n$  give *robots* the assurances that  $L_1 \dots L_n$  give to humans. And let  $L^\wedge_1 \dots L^\wedge_n$  be a set of laws that are just like  $L_1 \dots L_n$  *except* that, unlike  $L_1 \dots L_n$ ,  $L^\wedge_1 \dots L^\wedge_n$  *deny* robots the assurances that  $L_1 \dots L_n$  give to humans. Should I replace  $L_1 \dots L_n$  with  $L^*_1 \dots L^*_n$  or should I replace  $L_1 \dots L_n$  with  $L^\wedge_1 \dots L^\wedge_n$ ?

Green's "interpretation" of the law—his "interpretation" of  $L_1 \dots L_n$ —doesn't consist in his *identifying* those laws, but rather in his *extending* them in one way or another. Green is not *identifying* what the law already says in connection with robots. Green is replacing existing U.S. law with a body of law that, while not conflicting with hitherto existing U.S. law at any point, is not characterized by the same incompleteness as that law. Green is producing a *delineation* (or *precisification*) of U.S. law.

#### 4.5 THIS ANALYSIS INDEPENDENTLY CORROBORATED

In any literal and non-extended sense of the word "meaning," every English-speaker knows the meaning of expressions like: "you have the right to an attorney," "you have the right to remain silent," and so on. In fact, the laws that lie at the center of the most bitter legal controversies are typically very easy to understand ("abortion is legal," "people of the same gender cannot marry one another," "schools cannot teach creationism instead of evolutionary theory").

Of course, *some* laws are expressed in language that is hard to understand. In such cases, an expert may be needed to know what is literally meant by some statute, and *bona fide* interpretation would be necessary. But *legal* controversies generally don't involve difficulties relating to *that* sort of interpretation. The language of the Constitution, even the most controversial parts of it, isn't technical or otherwise hard to understand.

#### 4.6 SOME GENERIC POINTS ABOUT INTERPRETATION

Consider the sense in which Albanians do, whereas monolingual English speakers do not, understand Albanian sentences. *That*, it seems to me, is a paradigmatic and non-metaphorical use of the term "understand." Given that interpretation of the word "understand," it is very easy to understand the words "the right to bear arms shall not be infringed." The debates concerning the Constitutionality of gun-regulation don't have anything to do with understanding in this sense or even with anything that can naturally be put on a continuum with this sort of understanding.

Consider the case of a doctor who interprets the results of a test of respiratory capacity. A layperson doesn't know what is meant, in a quite literal sense of "meant," by the numbers and graphs on the computer printout of the test. The layman doesn't know what the "87" refers to. (Does it refer to his blood-oxygen level, to his ability to expel air from his lungs, to his ability to take air into his lungs, to his ability to keep air in his lungs, or to none of the above?) The layperson just doesn't know why there are discontinuities in the graph or why the graph slopes downwards. The doctor isn't there (merely) to give deep insight. He is there to say what those graphs and figures mean. He is there to say that the "87" refers to your blood-oxygen level, and so on.



Of course, *once* the doctor says what those graphs and figures mean—in the narrowly symbolic sense of “mean” just discussed—he then goes on to give the *meanings* of those meanings, so to speak. In other words, he says what the consequences are for your health that your blood-oxygen level is such and such, what you must do to improve your ability to intake air, and so on. So the doctor tells you what the print-out means in at least two senses of the word “means.”

But, in both cases, the doctor’s act of meaning-giving consists in his *identifying*, not creating, some existing reality. He is *identifying* the fact that your blood-oxygen level is low. He is *identifying* the fact that, if you do not increase it, your health will suffer. He is not to any degree legislating or otherwise creating any of these realities.

In “interpreting” the law, the judge isn’t doing anything comparable to any of those kinds of meaning-giving. Obviously the judge isn’t saying what the words “abortion is legal” mean in the narrow symbolic sense. Nor, as we have seen, is the judge identifying some fact about what the laws *actually*, though obscurely, assure people of. As we’ve seen, an obscure assurance is, to that extent, *no* assurance. So in so far as the law is obscure there is nothing to know. There is nothing comparable to a hidden tumor or an exotic virus.

Further, in “interpreting” the law, the judge *is* creating a new reality. If he rules one way, that is the law. If he rules the other way, *that* is the law. His interpretation never fails to line up with legal reality, meaning that it creates that reality. But a doctor’s interpretation of some test-results can fail dramatically to line up with medical reality.

Given *any* paradigm-case of interpretation—e.g., a physicist’s interpretation of meter-readings, a therapist’s interpretation of a patient’s behavior—everything we just said (*mutatis mutandis*) shows that it bears no significant resemblance to legal interpretation (so-called).

#### 4.7 THIS ANALYSIS MODIFIED TO ACCOMMODATE DIFFERENT STARTING-ASSUMPTIONS

Of course, some may insist that, in the scenario described a moment ago, Green *is* interpreting the old laws—that it is a paradigm-case of what we call “interpretation.”

Very well. In that case, our position amounts to this:

(L<sub>1</sub>\*) Legal interpretation is delineation. To interpret the laws is *not* to identify existing law. To interpret the law is to replace law that is incomplete in some respect with law that is not thus incomplete but otherwise coincides with the old law.

Given that *this* is what it is to interpret the law, it is clear why, no matter how Green rules, his ruling won’t create a legal contradiction; i.e., a pair of laws such that one permits what the other forbids. In general, it is clear why a judge can “interpret” a law in either of two opposed ways without necessarily creating any kind of contradiction within the system in question.

At the same time, our analysis makes it clear why this last fact is consistent with the presumption that some legal interpretations are better than others. Recall our cigarette-story. There was no way for you to comply with my request to buy cigarettes. Under the circumstances, the best that could be done was to comply with a request that was similar to it, namely: *bring me cigarettes or, failing that, some other nicotine delivery-system.*

The position that Judge Green is in with respect to existing law is similar to the situation that you are in with respect to my request that you buy me cigarettes. Green cannot *apply* existing law to the Gloxo-case. There is no law to apply, since all the existing laws are silent with respect to robots. The best that can be done under the circumstances is to apply new laws that are not comparably silent but that are otherwise identical with the old.

In *some* sense of the word “consistent,” some new laws satisfying that condition are going to be consistent with the old laws, and other new laws satisfying that same condition will not be. But here the word “consistent” doesn’t denote logical consistency. Since the old laws are silent regarding Gloxo, *any* laws that are not silent regarding Gloxo, but are otherwise identical with the old laws, will be *logically* or formally consistent with the latter. But some such laws will be inconsistent with the old laws in an extended psychological sense—in the sense in which, in the cigarette-story, your bringing me cigars is consistent with my request and your bringing me a candy-bar is not. Given what  $L_1 \dots L_n$  are, and given the attitudes of the people who made those laws, along with the mores of the culture in which they are embedded, Green would be guilty of *a* kind of inconsistency if he ruled that Gloxo had no rights. But in this context, the term “inconsistency” is not to be understood in narrowly logical or semantic terms, but in terms of broader psychological or cultural norms. Of course, that sort of psychological or cultural inconsistency isn’t sufficient for the existence of any sort of *legal* contradiction, since it doesn’t result in there being two laws such that one forbids what the other permits.

#### 4.8 WHY, CONTRARY TO WHAT LON FULLER SAYS, MISINTERPRETATIONS OF THE CONSTITUTION DON’T NECESSARILY CREATE CONTRADICTIONS WITHIN U.S. LAW

Given these points, it is clear why Fuller is wrong to say that (so-called) judicial mis-interpretations of the law categorically create *contradictions* within the law. The law needs to be “interpreted” in situations where it is unclear who has been assured of what. But, as we’ve seen, for it to be “unclear” whether the law assures Gloxo of the right to counsel, and so on, is simply for Gloxo *not* to have such an assurance. It isn’t for Gloxo to be assured that he *doesn’t* have that right. In other words, it isn’t for Gloxo to have some kind of negative assurance. It is for Gloxo not to be given any assurance, whether positive or negative. So legal interpretation is needed precisely when the system in question *fails* to issue an assurance and when it therefore fails to issue a law.

Of course, there *are* plenty of laws prior to the Gloxo-case, and these play a crucial role in the resolution of that case. Green’s decision isn’t made out of whole cloth. It consists in issuing a set of laws that is, in some respect, more complete than, *but otherwise coincident with*, those laws already in existence. The italicized clause shows to what a large extent his decision, though not identification of existing law, is constrained by objective standards and is thus not an expression of mere caprice on his part.

#### 4.9 WHY, DESPITE WHAT WE SAID EARLIER, THE CONSTITUTION IS A PART OF U.S. LAW (REVISITED)

As we’ve seen, it is simply not an option to say that legality can ever be distinguished from what is permitted by law or that illegality can ever be distinguished from what is prohibited by the law.

Given this fact, an argument can be made that the Constitution is *not* actually a part of U.S. law. Earlier (Chapter 9, Sections 6.0–6.4.1) we put forth this argument, and we concluded that, indeed, the Constitution is *not* a part of U.S. law.

What I now want to show is that, in light of our points regarding legal interpretation, we *can* hold onto the presumption that the Constitution is a part of U.S. law while also holding onto the obvious truth what is legal must coincide with what the law permits. (As we’ve seen, that obvious truth is simply inconsistent with the Blackstone-Fuller view that legal interpretations *identify* existing law.)

## 5.0 CHOOSING BETWEEN TWO DIFFERENT ANSWERS TO THE QUESTION “WHAT PLACE, IF ANY, DOES THE CONSTITUTION HAVE WITHIN THE U.S. LEGAL SYSTEM?”

Right now, before moving onto new material, let us make it crystal clear what position we have taken concerning the place of the Constitution in U.S. law<sup>327</sup>:

A judge's interpretation of a given law is *ipso facto* correct. (Cf. Chapter 9, Sections 6.0–6.4.1.) So judicial interpretation is really legislation. And to the extent that the judge's word is discrepant with the Constitution, the latter is inert in terms of defining legal reality, and is thus no part of the law. By the same token, so far as the Constitution is *not* thus inert, it is thanks only to some judge's (or legislator's) words. So in the final analysis, the Constitution is a part of U.S. law only in so far as it *influences* the decisions of judges and legislators. This means that the relation between the Constitution and the law is one of *causality* or *influence*, and not one of identity or constituency. So the Constitution is a cultural or social paradigm that has a great deal of influence on the law, while not actually being a part of it.

The conclusion of this argument is obviously a dubious one. But I would now like to argue

(1) There is independent reason to believe that Constitution isn't a law or body of laws

and

(2) Given the points just made concerning legal interpretation, we can accept all of the premises of the argument given in the last paragraph *while also* holding onto the presumption that the Constitution *is* a part of U.S. law.

I believe that (2) is much more important than (1), and I will thus provide a commensurately more developed argument for it.

### 5.1 AN ARGUMENT FOR (1)

Any legal system is embedded in a larger culture. Given this fact, there will inevitably be institutions that mediate between the law and the host-culture, while not themselves being veritable components of the legal system. Where such mediating institutions are concerned, it will sometimes be ambiguous whether they are veritable components of the legal system or are merely influences on it. The Constitution could be seen in such terms. This would accommodate the *apparent* fact that what the Constitution demands can be so discrepant with what is legal and illegal, and thus with what the law permits and forbids. (I use the word “apparent” because, if the argument to be given in the next section is cogent, those discrepancies are not actual.)

Some corroboration for this view is found in the following line of thought. In the U.S., legal reality (what people can and cannot legally do) typically has a certain consonance with the Constitution. Of course, legal reality is not *fixed* by the Constitution. (This is a point that we've stressed.) But, at least arguably, it is typically not hard to establish a reasonably solid connection between the one and the other. This gives credibility to the view that the Constitution is a veritable constituent of American law.

<sup>327</sup>What follows is not a quotation of an earlier passage. It is a synthesis of many different passages.

But there are other countries that have constitutions that don't have such a good fit with legal reality. When we look at the constitutions of other nations—e.g., the constitution of the U.S.S.R. or Nigeria or Pakistan<sup>328</sup>—we find that they don't have remotely the kind of role in the legal systems of those countries the U.S. Constitution has in our legal system. In fact, the U.S. seems to be more of the exception than the rule in this respect: In most countries that have a constitution, the constitution has *at most* a certain influence on legal reality, and obviously isn't constitutive of it.

Further, there are counterfactual scenarios in which, in the U.S., the Constitution comes to diverge more and more from legal reality, even though the basic political structure of this country hasn't changed. We could imagine a series of politically extreme Supreme Court decisions resulting in a progressive alienation of the Constitution from legal reality.

So while some of us may perceive it as a truism or tautology that the Constitution is a part of U.S. law, that perception may only reflect idiosyncratic and contingent facts about American history. That "truism" is, at best, a contingent empirical truth.

## 5.2 AN ARGUMENT FOR (2)

Let us begin by reviewing a now familiar story, along with some now familiar philosophical consequences of that story.

In *Riggs*, the judge had to decide whether the young man was legally entitled to the money. The judge decided that he was not. For the sake of argument, let us suppose that the young man appeals the case, and that it eventually finds its way to the Supreme Court. So the Supreme Court must decide whether, in ruling that the young man had forfeited his inheritance, the first judge was ruling in a *Constitutional* manner.

For reasons that we've seen, the Constitution doesn't say, even obscurely or implicitly, whether the young man is entitled to the money or not. (Incidentally, some might say that if we could look inside the minds of the framers of the Constitution, we would, or at least might, find that the Constitution *did* contain a definite position on cases like *Riggs*. In the last footnote of the present work, I discuss why this sort of psychological approach to the concept of legal interpretation is untenable.) So the question before the Supreme Court is not "what does the Constitution *actually* say about this case?" Rather, the question is, at least approximately, as follows.

*The Supreme Court's Question (SCQ):* Let  $C_1 \dots C_n$  be the laws that are *actually* issued by the Constitution. Let  $C^*_1 \dots C^*_n$  be laws that are just like  $C_1 \dots C_n$  *except* that, unlike  $C_1 \dots C_n$ ,  $C^*_1 \dots C^*_n$  say that the young man is entitled to the money. And let  $C^\wedge_1 \dots C^\wedge_n$  be laws that are just like  $C_1 \dots C_n$  *except* that, unlike  $C_1 \dots C_n$ ,  $C^\wedge_1 \dots C^\wedge_n$  say that the young man is not entitled to the money. Should we replace  $C_1 \dots C_n$  with  $C^*_1 \dots C^*_n$  or with  $C^\wedge_1 \dots C^\wedge_n$ ?

Before we close the argument, let us take a brief look back. Our earlier argument involved the inference from:

No matter how the judge interprets the Constitution, his word determines what is legal and what isn't, and thus what is law;

<sup>328</sup>These are tendentious examples, of course. And, of course, it is pretty clear (I think) that the U.S.S.R. didn't have a constitution except in a purely nominal sense, whereas the U.S. really does have a constitution. Nonetheless, it is suggestive that so-called constitutions can diverge so much from legal reality; and we don't have to look at extreme cases, like the U.S.S.R., to find examples of that sort of divergence. In any case, I am only trying to make a *Prima facie* case, not to provide an airtight proof.

to:

The Constitution is a part of U.S. law only in so far as the judge's word allows it to be—so it isn't really a part of U.S. law at all (it is merely something which *influences* U.S. law).

But that inference involves a non-sequitur if, as we have argued, SCQ correctly describes what it is for the Supreme Court to "interpret" the Constitution. If the Supreme Court's (so-called) interpretations of the Constitution are cases of filling in blanks in the laws actually present in the Constitution, while otherwise leaving those laws the same, then two things immediately follow. First, no matter *how* the Supreme Court rules, its ruling will be right. If Constitutional interpretation is *a* kind of legislation, then such interpretations cannot fail to constitute the law.

At the same time, the Constitution, and the laws found therein, *are* a part of U.S. law. Contrary to what we argued earlier, the reason that the Supreme Court's decision is *ipso facto* the one that defines U.S. law is not that the Constitution is *not* part of the law, but is rather that, by definition, the Court's interpretations (so-called) consist of filling in blanks in the law, and thus cannot come into conflict with existing law. The Court fills in the blanks in the laws *in* the Constitution: and *that* is why, even though the Constitution *is* a part of U.S. law, the Court's decisions do not (in any strict, logical sense) contradict the laws present in the Constitution. (The Court's decisions *may* contradict those laws in the extended sense discussed earlier—the sense in which, had you brought me a candy-bar instead of cigars, you would have been utterly failing to comply with my request.)

In conclusion, given our analysis of legal interpretation, we can hold onto the presumption that the Constitution is a part of U.S. law *without* doing so by embracing the absurd view, implicitly accepted by Fuller, that law and legal reality are distinct.

### 5.3 SOME RELEVANT POINTS RELATING TO PHILOSOPHICAL LOGIC

I would now like to give reasons of a strictly logical kind in support of our view that legal interpretation is a species of delineation; i.e., the legal "interpretations" extend, and do not identify, existing realities.

There is a debate in philosophical logic concerning whether there is objective vagueness; i.e., whether there is any proposition *P* such that there really is no fact as to whether *P* is true or not. Here is one widely accepted, and seemingly very reasonable, point of view on the matter:

(BH)<sup>329</sup> There are many values of *x* satisfying the following conditions. We have all the empirical information there is to have regarding the state of *x*'s coiffure. So we know exactly how many hairs *x* has, how thick they are, how much hair-free skin there is on *x*'s head, and so on. Further, we have no relevant linguistic deficits; i.e., we have as good an understanding as there is to have of the sentence "*x* is bald." It presumably follows that we know the identities of the concepts corresponding to the constituent expressions, in particular the word "bald." But, despite those facts, we feel that there is no non-arbitrary answer to the question "is *x* bald?"

There is a related fact. Obviously some people are bald and others are not. At the same time, there doesn't seem to be any number *n* such that a person with *n* hairs is bald whereas a person with *n* + 1 hairs is not bald. We cannot accommodate this apparent datum by saying that, for some values of *n*, a person with *n* hairs is definitely neither bald nor non-bald. That

<sup>329</sup>"BH" is short for "bald hirsute."

position would introduce an artificially sharp barrier between being determinately bald and being determinately neither bald nor non-bald (and also between being determinately neither bald nor non-bald and being determinately *not* bald). So it seems to follow that, for some numbers  $n$ , a person with  $n$  hairs is neither definitely bald nor definitely non-bald nor definitely neither bald nor non-bald. In a word, the vagueness of the predicate "bald" can no more be dealt with by seeing it as generating *three* categories—bald, not bald, and neither bald nor not bald—than it can by seeing it as generating just two categories (bald and not bald). For it is no less artificial to posit a sharp line between being bald and neither-bald-nor-not-bald than it is to posit a sharp line between being bald and not-bald.

Given this, it seems to follow that, for some values of  $n$  there is no fact as to whether a person with  $n$  hairs is bald or not bald. It isn't that such people are definitely in a no-man's-land between baldness and non-baldness. (We've just seen that such a position involves positing unrealistically sharp barriers between those who have and lack the property of baldness.) It is that there is no fact as to whether such people are bald: it is objectively indeterminate.

BH involves two muddles. One of these is a conflation of sentences with propositions and, more generally, of expressions with meanings. The other muddle concerns the relationship that a given proposition bears to its logical consequences. Let us begin by discussing this last point.

As Wittgenstein (1974, 1983) stressed, entailments correspond to *internal* relations. (As I am using the word "entailment" and "entails,"  $P$  entails  $Q$  exactly if, given  $P$ ,  $Q$  cannot be coherently denied. So  $x = 2$  entails  $x$  is greater than one, whereas  $x$  is a college professor in the U.S. does not entail, though it may otherwise confirm,  $x$  has an annual salary of over \$10,000.) For any  $x$ , the proposition  $x$  is a triangle entails  $x$  has three sides. This obviously reflects something about the structures of the concepts involved—*triangle*, *three*, and so on. (In this context, the term "concept" is meant to denote a non-psychological entity—the meaning of a predicate.)

Entailment relations are not circumstance-dependent. This is because such relations are grounded entirely in facts about the structures of the concepts involved. The very structures of those concepts guarantee the truth of the transition in question. Entailment relations, and analytic relations generally, are those that hold in virtue of facts about content alone. So they are content-internal and are therefore *individuating* of content. From this it follows—so I will argue—that, so far as there is indeterminacy, there is a failure to *identify* content, rather than a failure on the part of content to have a definite truth-value. I hope to show that the arguments presented earlier (to the effect that *there is* objective indeterminacy) overlook the content-internal nature of entailment relations; I hope to show that those arguments implausibly require that what a proposition tells you can be distinguished from what you can infer from its truth.

Propositions are paradigm-cases of contents. Given what we just said, it follows that propositions are individuated, at least in part, by their entailment relations: different entailments, different propositions. Of course, distinct propositions may entail, and be entailed by, the same propositions. This is the case with any two analytically equivalent proportions; e.g.,  $1 + 1 = 2$  and *triangles have three sides*. But there is no doubt that, for  $P$  and  $Q$  to be different propositions, it is *sufficient* that, for some proposition  $R$ ,  $R$  is entailed by the one proposition but not the other.

More importantly, the idea that propositions are individuated by their entailment-relations is consistent with the fact that *distinct* propositions may be analytically equivalent. Let  $P^*$  be the proposition for some  $n$ ,  $1 + 1 = 2$ . Each of  $1 + 1 = 2$  and *triangles have three sides* entails  $P^*$ . But the way in which  $1 + 1 = 2$  entails  $P^*$  is very different from the way in which *triangles have three sides* does so. In the one case, the series of inferences linking the two propositions is short and direct. (One needs only the principle of existential generalization to make the connection.) In the other case, the series of inferences is long and circuitous.

So the fact that  $1 + 1 = 2$  and *triangles have three sides* are different propositions is reflected in facts about their entailment relations. It isn't reflected in facts about *what* they entail, but it is reflected in facts about *how* they entail what they entail.

Given these remarks, it is easily seen that if, for any proposition  $p_1$ , where each of  $p_2$  and  $p_3$  entails/is entailed by  $p_1$  in the *same way*, then  $p_2$  and  $p_3$  would not only be analytically, but also *cognitively*, equivalent. In other words, they would be the same proposition. So even after we take into account the fact that analytically equivalent propositions can be distinct, there is still no denying that propositions are individuated by their entailment relations.

A corollary is that if  $P$ 's identity is fixed, it is determinate, for any proposition  $P^*$ , whether  $P$  entails/is entailed by  $P^*$  or not. Thus, in so far as it is indeterminate (in the sense of there being no fact of the matter, not in the sense of being unknown) *whether*  $p$  entails  $q$ , it is indeterminate *which* proposition  $p$  is. (Permit me to clarify the parenthetical remark in the previous sentence. It can be indeterminate, in the sense of *unknown*, whether  $p$  entails  $q$  without there being any question as to  $p$ 's identity. Until the 1930's, it was *unknown* whether the proposition  $1 + 1 = 2$  entailed *arithmetic is incomplete*. But there has never been any doubt as to the *identity* of the proposition expressed by " $1 + 1 = 2$ .")

So when it seems as though we are dealing with a case where there is no fact as to whether one proposition entails another, what is really going on is that we haven't settled the identity of at least one of those propositions.

At the same time, it does seem absurd to say that, for some number  $n$ , "Smith is bald" is true if Smith has  $n$  hairs and not true if Smith has  $n + 1$  hairs.

### 5.3.1 INDETERMINACY ALWAYS EPISTEMIC, NEVER OBJECTIVE, IN NATURE

Given these points, it seems natural, if not *de rigueur*, to take the following position. What we might take to be cases of objective indeterminacy are really cases where language *leaves it open* which exact proposition is meant by a given sentence. This is not to say that cases of non-linguistic indeterminacy turn out to be cases of linguistic indeterminacy. In other words, it is not to say that there is sometimes no fact as to what a given sentence means. (That would itself be a form of objective indeterminacy. For it would mean that some metalinguistic proposition of the form *sentence S has proposition P for its meaning* would be such that there was no fact of the matter as to whether it was. This, in turn, would mean that there was no fact as to whether  $S$  did, or did not, mean  $P$ . But this, it is easily seen, would be a straightforward case of objective indeterminacy.) It is to say that, in a case where we believe there to be no fact as to whether some proposition is true, language has determinately *failed* to assign a unique proposition to a given sentence.

Suppose that English semantics, taken in conjunction with a complete knowledge of the state of the top of Harry's head, leaves it open whether the sentence "Harry is bald" is true or not. So we know exactly how many hairs Harry has, and we also know exactly how thick they are, how large Harry's head is, and so on. (So we know precisely the ratio of hairy to non-hairy skin.) Let  $P$  be a proposition in which all of this information is embodied. So  $P$  is some proposition like *Harry has 3,876 hairs on his head, and the average thickness of these hairs is . . . and (consequently) the ratio of hair-covered skin on Harry's head to hair-free skin is such and such . . .* So even though we have all of this information—even though we know the truth of  $P$ —the rules of English semantics simply don't yield a verdict as to whether the sentence "Harry is bald" is true or not.

Here is the view that is generally, though not universally, held in connection with this sort of scenario. (It is the view I reject.) We say that there is a proposition—call it  $Q$ —such that  $Q$  is what is meant by "Harry is bald," but such that  $P$  does not entail the  $Q$  and  $P$  also doesn't entail not  $Q$ . Remember that  $P$  is a proposition giving the exact physical make-up of Harry's head—a proposition saying exactly how many hairs he has, how thick they are, and so on.  $P$  gives all the relevant information, and there is thus no relevant empirical fact that is not covered by  $P$ . Short of including the proposition *Harry is bald* or *Harry is not bald* (or some trivial variant of one of these, such as *either Harry is bald or there are square circles* or *either Harry is not bald or there are non-flying birds that fly*),  $P$  gives you every piece of empirical information that could conceivably be relevant.

Suppose we say that "Harry is bald" *does* encode a determinate proposition  $Q$ , but that, because Harry is a borderline case, there is no fact as to whether Harry is bald. (It is objectively "indeterminate.") In that case, given what we've said in the last few paragraphs, we must say there is no fact as to whether  $P$  entails  $Q$ , or as to whether  $P$  does *not* entail  $Q$ . But this conflicts with the fact that propositions are individuated by their entailment relations. What a proposition entails, along with how it entails it, is completely determinative of the identity of a proposition. So far as it is open what sentence  $S$  it is open what it says. And so far as it is open what  $S$  says, it is open what it means and, therefore, which proposition it expresses. By the same token, once a proposition *has* been assigned to it, it is no longer open what  $S$  entails. So, for any description of  $D$ , it is not an open question whether  $S$  is incompatible with  $D$  or, what is the same, whether  $S$  entails not- $D$ . Thus, given the facts,  $S$  is determinately true or determinately false, provided that there is some one proposition that is its meaning. Indeterminacy is not a property of states of affairs; it is a property of expressions. An expression has that property when no one meaning has been assigned to it.

### 5.3.2 INDETERMINACY ALWAYS EPISTEMIC, NEVER OBJECTIVE, IN NATURE (CONTINUED)

Of course, in some cases there is a determinate proposition whose consequences we may have trouble identifying. There is no doubt as to the identity of the proposition meant by the sentence "there are infinitely many primes," even though that proposition has infinitely many consequences that will never be known. But it is one thing to say that we don't *know* whether a given proposition entails some other proposition, and it is quite another to say that there is no fact of the matter. If we say that there is no *fact* as to whether proposition  $P$  entails proposition  $Q$ , then we are saying that a proposition's identity can be determinate even though facts about what it entails are not determinate. But such a position is incoherent, given that a proposition just *is* a piece of information and that pieces of information are individuated by their entailment-relations.

Here is what we must therefore say. Given any description of Harry's hair-situation, no matter how precise or exhaustive, the semantic rules of English don't license an utterance of either "Harry is bald" or of "Harry is not bald." It isn't that there is no fact as to what the rules of English semantics demand. There is a fact. They don't demand that "Harry is bald" is true, and they don't demand that "Harry is bald" is false. In this context, they don't demand anything.

There is nothing mysterious about this, and it doesn't require us to reject the law of excluded middle. If I say "I am going to the store," my words leave it open whether I am going by car or by bicycle. They determinately *don't* entail that I will go by car and they determinately *don't* entail that I will go by bicycle. They also determinately *don't* entail the negations of either of those propositions. We are dealing with garden-variety compatibility-relations, not with counter-examples to classical logic.

In connection with this, we mustn't say that the *concept* of baldness is such that, where some people are concerned, there is no fact as to whether it applies to them. (Here we must be careful to distinguish that concept from the words used to express it; so we must distinguish the property of baldness from the word "bald.") Suppose that there are some people such that there is no fact as to whether or not they fall in its extension. In that case, it follows straightaway that, for some possible object  $A$ , the proposition  $A$  is bald is such that there is no fact as to whether it is true. Thus, the idea that concepts may be indeterminate is equivalent with, or at least entails, the idea that propositions may be indeterminate. Since propositions cannot be indeterminate, as we've just seen, it follows that the same is true of concepts. So for any concept  $C$ , and any object  $x$ , the proposition  $x$  falls in the extension of  $C$  is either true or false. There is a fact of the matter.

This is not to say that the predicate "bald" is without meaning. It is replete with meaning. For any  $x$ , if you know that " $x$  is bald" is a true sentence, you know of infinitely many possible scenarios that



they are non-actual. (Among those scenarios is one where  $x$  has a million hairs, one where  $x$  has a billion and one hairs, and so on.) So, in virtue of knowing that “ $x$  is bald” is true, you have a non-trivial amount of information about the state of affairs that actually obtains.

But concepts and, therefore, propositions are *individuated* by their entailment-relations. Therefore, in so far as English semantic rules leave it open whether the predicate “bald” can be truly predicated of someone like Harry; and in so far as there is some proposition  $P$  such that, even after all the relevant empirical data is in, those same rules leave it open whether  $P$  entails, or is entailed by, “ $x$  is bald” (for some possible value of  $x$ ); to that extent, English semantics has not assigned a *single* concept to the word “bald,” but rather a family of concepts, any two of which overlap considerably (no two of them apply to a person who has a billion hairs), but no two of which are coincide.

This doesn’t mean that there is no fact as to what our semantic rules demand. There is a fact. Supposing that Harry is a borderline case, it is a fact that these rules *don’t* demand that the expression “bald” be predicated of Harry, and it is also a fact that those rules *don’t* demand that the expression “non-bald” be predicated of him. It isn’t that these rules demand that “bald” *not* be predicated of Harry. It is rather that they *fail* to demand that it be predicated of him (or that it not be predicated of him).

There is no need to reject bivalence to accommodate this. The rules of cricket don’t demand that I brush my teeth five minutes from now or that I not do so; those rules are compatible with each alternative. We are dealing with garden-variety cases of compatibility. We are dealing with a pair of propositions  $P$  and  $Q$  such that  $P$  doesn’t entail  $Q$  and such that  $P$  doesn’t entail not- $Q$ . (There is nothing mysterious about this. “Smith is tall” doesn’t entail “Mary is in Paris” or “Mary is not in Paris.”)

### 5.3.3 ASSURANCES, AND THEREFORE LAWS, OPEN-ENDED BUT NEVER OBJECTIVELY INDETERMINATE

Let us now take the next (and final) step in our argument. After we’ve taken this step, it will be clear what bearing these purely logical points have on the nature of law and legal interpretation.

Given *any* assurance  $a$ , there is some proposition  $p(a)$  such that  $a$  is kept (or honored) exactly if  $p(a)$  is true. Let us say that  $p(a)$  is the *validator* of  $a$ . Suppose I say to Jones “I promise to pick you up at the airport tomorrow.” (Let  $t$  be the date of the day following my utterance.) My words are not true or false. (Promises are not true or false, though they may be sincere or insincere.) But there is some proposition  $C$  such that my promise is kept exactly if  $C$  is true.  $C$  is the proposition: *At  $t$ , JM picks up Jones at the airport.*

Let us generalize this point. Since not all speech acts are assertions, not all speech-acts are true or false. But all speech-acts have *satisfaction*-conditions. (Imperatives must be obeyed; questions must be answered truthfully; promises must be kept; and so on.) And given any speech act  $a$ , there is some proposition  $V(a)$ , such that  $V(a)$  is true or false exactly if  $a$ ’s satisfaction-conditions are met. Of course,  $V(a)$  is the validator of  $a$ .

Since the validator of any assurance is a proposition, it follows straightforwardly from what we said a moment ago that there are no indeterminate validators. In its turn, this straightforwardly entails that there are no indeterminate assurances. So given any assurance  $A$ , given any individual  $x$ , and any privilege  $p$ , there is a fact as to whether  $A$  assures  $x$  of  $p$ .

Of course, there are cases where a so-called “assurance” leaves it open whether  $x$  may do  $p$  (for some values of  $x$  and  $p$ ). Let us illustrate this with a short story. At a department-meeting, I say “I assure all of you that you are welcome at my party.” But, for reasons to be described forthwith, my words leave it open whether I have assured department-member Roderick of anything. Roderick knows I dislike him, and thus has some reason to believe that, given the subtle and largely tacit understandings that govern verbal exchanges, Roderick didn’t fall within the scope of my assurance. But Roderick

also knows that I am reasonably forgiving, and also that I prefer to communicate directly rather than through innuendo. So Roderick has reason to believe that he *did* fall within the scope of my assurance, meaning that he *may* be welcome at my party.

Here our tendency is to say that I gave an assurance that is *indeterminate* with respect to the question whether Roderick falls under it. But this is exactly what we must *not* say, as it embodies the absurd idea that propositions, and pieces of information generally, are *not* individuated by their entailment-relations. For the sake of argument, suppose that I *have* given an assurance that is indeterminate on the question whether Roderick is welcome at my party. Let  $A$  be that assurance, and let  $R(A)$  be the validator of that assurance. For the reasons given a moment ago, there is a fact as to whether  $R(A)$  entails *Roderick is welcome at JM's party*.  $R(A)$  either entails that proposition or it doesn't.

Given that  $R(A)$  is determinate in respect of whether it entails *Roderick is welcome at John's party*, it follows that  $A$  is correspondingly determinate and, consequently, that Roderick either has, or has not, been given an assurance as regards whether he would be welcome at my party.

So the idea that Roderick *has* been given an assurance, albeit an "indeterminate" one, is inconsistent with the most fundamental facts about proposition-individuation (and, more generally, information-individuation). What we must therefore say is that I have *not* given Roderick an assurance, whether positive or negative. I have not assured him that he will be welcome at my party, and I have not assured him that he will not.

Of course, my words are not as informative as they should be. But this isn't because I have produced an "indeterminate assurance." It is because I have produced a determinate assurance that was *compatible* with Roderick's being welcome and also with his not being welcome. Under the circumstances, so as not to leave Roderick hanging, I *should* have provided an assurance that was *incompatible* with one of those possibilities. But the fact that I did not do so has nothing to do with my providing Roderick with an assurance that falls outside the scope of classical logic.

#### 5.4 USING THESE POINTS ABOUT LANGUAGE AND LOGIC TO THE QUESTION "ARE INSTANCES OF LEGAL INTERPRETATION (i) INSTANCES OF LEGISLATION (DISGUISED AS INSTANCES OF INTERPRETATION), (ii) BONA FIDE INTERPRETATIONS, OR (iii) INSTANCES OF DELINEATION?"

Obviously (iii) is the right option. Since laws are assurances, everything we just said in connection with the Roderick-situation applies to them. Since the validator of any assurance is either true or false, it follows that laws, being assurances, are determinate in every respect.<sup>330</sup> More formally, given any law  $L$ , and any person  $x$ , and any assurance  $A$ , either  $L$  determinately assures  $x$  of  $A$  or  $L$  determinately *fails* to do so.

In cases where we have a tendency to say that it is "indeterminate" whether  $L$  assures person  $x$  of  $A$ ,  $L$  *doesn't* assure  $x$  of  $A$ . This doesn't mean that  $L$  gives some kind of *negative* assurance to  $x$ ; it doesn't mean, in particular, that  $L$  assures  $x$  that he will *not* be given  $A$ . It means that  $L$  *fails* to give  $A$  to  $x$ .

Of course, not everybody will agree with our view that laws are assurances of rights. (For example, Hart would disagree with this.) But in the present context that doesn't matter. Everybody agrees that laws either prohibit or permit things. But given any speech-act that expresses a prohibition or a permission, the validator of that speech act is a proposition, and is thus determinately true or false. Given this, it follows, as we've seen, that the corresponding prohibition or permission is determinate in every respect.

<sup>330</sup> Another way of putting it is this. The *identity* of law  $L$  is indeterminate to the extent that it is indeterminate what it is that is assured by  $L$  or who precisely is on the receiving end of that assurance.

## 5.4.1 SOME SUBTLETIES RELATING TO THE POINTS JUST MADE

It seems pretty clear that, for some values of  $n$ , English semantics leave it open whether the sentence “a person with  $n$  hairs is bald” is true or not. It would be absurd to suppose that one of the semantic rules of English assigned truth to the sentence “a person with 43,243 hairs is bald” and falsity to “a person with 43,244 hairs is not bald.”

At the same time, we must also explain the fact that, setting aside all issues relating to linguistic competence and to empirical knowledge, we sometimes feel genuine hesitation as to whether to categorize somebody as bald. Two people who both speak English perfectly and who are both maximally well-informed about the state of Smith’s coiffure—about the number of hairs on his head, and their distribution and thickness, and so on—can have at least some tendency to disagree about whether it is correct to describe Smith as “bald.” *Prima facie*, this seems inconsistent with my contention that, in such cases, English semantics determinately leave it *open* whether Smith is bald. *Prima facie*, the fact that this sort of situation arises favors the view that English semantics doesn’t determinately *fail* to yield a verdict, but rather that it is *open* what kind of verdict, *if any*, is yielded. In other words, my position seems inconsistent with the fact that it is often open whether somebody is bald; my position seems to demand that, on each occasion, it is an open and shut case: “ $x$  is bald” is definitely true, definitely false, or definitely without truth-value. Put yet another way, my position seems inconsistent with the (apparent) fact that it is open whether “ $x$  is bald” is true.

I would now like to say why my analysis is consistent with the existence of situations of the sort just described, and is not guilty of the errors just described. We’ve stressed that, strictly speaking, delineations are neither true nor false. But, as we’ve also stressed, some delineations are better founded than others. As the phenomenon of heat came to be better understood, physicists were in reasonable agreement that the range of phenomena denoted by expressions like “temperature of 78°” (and, of course, their counterparts in other languages) had to be extended. But it was a matter of great theoretical controversy in physics exactly *what* those extensions were to be. (For expository reasons, let us henceforth speak of these past controversies in the present tense.) For some phenomena  $x$ , it is known among these physicists that, given its existing meaning, it is neither correct nor incorrect to apply the expression “temperature of 78°” to  $x$ . But, as the physicists involved well know, that doesn’t mean that it is a matter of caprice whether to apply that expression to  $x$ . There is an objective fact as to whether extending the meaning of that expression will, or will not, result in a more accurate and powerful theory. Given the laws of physics, given the logical structure of existing physical theory, and given what is *already* meant by the expression “temperature of 78°,” there is an objective fact as to whether choosing to apply that expression to  $x$  will or will not make our theories more accurate. That fact has nothing to do with anyone’s opinion; it is a function entirely of mind-independent logical and physical facts.

Of course, the expression “temperature of 78°” only means what we let it mean. But once it has been assigned a certain meaning, it is a matter of mind-independent objective fact whether a certain theory  $T$  is, or is not, enhanced by choosing to extend the meaning of that expression in a given way. When physicists argue about whether “temperature of 78°” ought to apply to  $x$ , they obviously aren’t quibbling about semantics; they are in agreement as to the fact that semantic facts are neutral. What they disagree about is whether, *given* those semantic facts and *given* the relevant mind-independent empirical and logical realities, a particular theory would be made more accurate (or otherwise better) by extending the meaning of that expression in a particular way.

At the same time, it would be easy to fall prey to the illusion that the debate concerns whether, given its *existing* meaning, the expression “temperature of 78°” *already* applies to  $x$ . In their heated back and forth, the physicists are probably not going to concern themselves with verbal niceties; they are not going to say anything like:

Although, given its current semantics, it is strictly speaking an open question whether the expression ‘temperature of 78°’ applies to  $x$ , it is nonetheless advantageous on theoretical

grounds to delineate that expression in such a way that it *does* apply to *x*." Rather they will just say "x is 78°" or "x is not 78°."

For reasons of brevity and efficiency, the structure of their debate will be falsely made to seem as though there is some fact about what is meant by the expression "temperature of 78°" and that the question is merely whether that existing meaning applies to *x* or not. Consequently, what is, in fact, a debate about how to delineate an expression—how to extend its meaning in a principled way—comes to look like a debate as to whether the *existing* meaning of some expression in fact applies to some phenomenon.

So while it remains clear that there is *some* kind of objective fact at issue, the actual nature of that fact is obscured: instead of being seen for what it is—a debate about whether, given the existing (incomplete) semantic realities, and given also the relevant, mind-independent physical and logical realities, theory *T* would be made better by extending the meaning of a certain expression in a certain way—the debate comes to appear to be one about what lies in the depths of the *existing* meaning of that expression.

These points apply to the situation, described earlier, where two linguistically competent and empirically well-informed people disagree about whether Smith ought to be described as "bald." First of all, *there is* a real issue. Their debate is not a debate about nothing. Their respective positions are answerable to objective facts. But—despite what the participants themselves may say about it—the debate is not whether, given its *existing* meaning, the term "bald" applies to Smith or not. It would be absurd to suppose that English semantics was so complete; it would be absurd to suppose that, given English semantics, Smith's having 43,243 hairs makes "Smith is bald" true and Smith's having 43,244 hairs makes that same sentence false.

Whether the participants know it or not, the debate is given by a question having at least approximately the following basic form:

Given what is *currently* meant by the expression "bald"; given the state of Smith's coiffure (the number, thickness, and distribution of his hairs); and given the various desiderata that a system of communication is supposed to satisfy (e.g., it is supposed to facilitate communication and also expedite thought); would those desiderata be *better* met by extending the meaning of "bald" in such a way that it did apply to Smith?

Once the desiderata just mentioned are clearly identified, there is an objective answer to that question. In other words, that question cannot be answered through stipulation, but only through examination of the relevant mind-independent logical (and empirical) relations.

Here we must echo a caveat made earlier. Obviously the word "bald" means whatever we let it mean. But *given* that it has that meaning; and *given* the various desiderata that we would like the English language to fulfill; and, finally, *given* the laws of psychology and possibly even of physics: *given* all of these things, it is entirely a matter of mind-independent fact whether or not certain extensions of the meaning of "bald" conduce to the fulfillment of those desiderata. When the two people debate about whether or not Smith is to be described as "bald," they *are* having a substantive debate, and their positions *are* evaluable in terms of objective (albeit extremely delicate and theoretical) facts.

At the same time, their debate might *appear* to be a strictly semantic one; it might *appear* to be a debate as to whether, given its *current* meaning, "bald" applies to Smith or not. Here we need only repeat (*mutatis mutandis*) what we said earlier. In their heated back and forth, the two participants are not going to observe the kinds of niceties that are the focus of theoretical treatises, like the present one. What comes out of their mouths is not going to bear any resemblance to:

Although, given the existing semantics of the term "bald," it is neither correct nor incorrect to predicate that expression of Smith, nonetheless, given the various desiderata that the English language is meant to satisfy, it is necessary to extend the semantics of the expression 'bald' so

that it *would* be correct to apply it to Smith; for, in light of the relevant empirical and logical interrelations, not making that extension would force the English language to deteriorate in respect of its ability to express such and such information while only expending thus and such effort (and so on).

Rather, what comes out of their mouths will be along the lines of: "Smith is bald!" or "I'm not so sure—he's kind of bald, but I think that, ultimately, he probably isn't bald." In general, for reasons of communicative efficiency, the actual structure of the debates between these two fellows will be suppressed, and what is actually a multi-dimensional debate about delicate mind-independent relations among semantic, logical, and empirical facts will come to seem like a fruitless and one-dimensional debate about whether the *actual* meaning of the term "bald" applies to Smith or not.

Given the obvious fact that the debate in question is *not* to be settled by looking into the depths of English semantics, and given that (by hypothesis) both participants know exactly how many hairs Smith has, many are quick to assume that the debate concerns propositions themselves: many are quick to believe that the *proposition* meant by "Smith is bald" is such that there is no fact as to whether it is true or not.

But such a position is absurd, given that the *identity* of a proposition is indistinguishable from its entailment-relations—given that entailment-relations are content-internal. Further, such a position warrants a massive and *ad hoc* complication of logic. Those who believe that *propositions* are objectively indeterminate; i.e., that *objectively* there is no fact as to whether they are true or false, are thereby rejecting the law of excluded middle, along with everything that it entails. There are a couple of reasons why, in my judgment, this would not be a wise course of action.

First of all, the law of excluded middle is equivalent with the law of non-contradiction, at least within classical logic. This suggests that, at the very least, those principles are not likely to be independent of each other (though the degree of interdependence depends on the system in question). Given that the law of non-contradiction is *uncontroversially* true, this in turn suggests that, if we discard bivalence (the principle that any proposition is determinately true or false), we are likely to end up with a system that *admits* true contradictions.

There is more to be said about *why not* to reject bivalence. When that principle is rejected, it is (often, though not always) because we feel hesitation or doubt about whether "bald" applies to Smith or not—because, in general, we aren't sure about whether some *expression* is applicable to some situation. But, it seems to me, rejecting bivalence for that reason is like a bookkeeper inventing a new system of arithmetic because he can't convert dollars into yen. Feelings of hesitation concerning words are not enough to warrant a reconstruction of logic or of our conception of meaning.

There is also the fact that, once you pick a logical system, you are stuck with it. You can't say that classical logic is wrong when we are talking about baldness, but right when we are talking about number theory. So if you accept non-classical logic to deal with the fact that we aren't comfortable describing Smith as "bald" or as "not bald," then you must stick with your non-classical logic when you are dealing with situations that obviously *are* binary; and your new system will inevitably fail to do justice to the intuitions that you have in connection with *those* situations. For example, depending on your specific choice of non-classical logic, you might end up saying that *no* statements (other than tautologies or tautological falsehoods) are either entirely true or entirely false.<sup>331</sup>

<sup>331</sup>Indeed, I have long suspected that if—with many philosophers and physicists—we take quantum uncertainties to warrant a rejection of two-valued logic, then given that all spatiotemporal phenomena are characterized, to some degree, by such relations, we end up in the absurd position of stripping *all* empirical statements of complete truth or complete falsity. In *Experience and Prediction*, Reichenbach (1938) made a similar point. Since he believed that quantum-theory did warrant a rejection of bivalence, Reichenbach was forced to say that *no* propositions besides tautologies were completely true or completely false. Reichenbach accepted this position, and developed a whole philosophical system to accommodate it. But it seems to me a datum that some empirical propositions are simply true and that others are simply false.

This is not to mention the point stressed earlier, namely, that non-classical logic is flatly incompatible with the fact that entailment relations are obviously relations of content. Given their circumstance-invariant character, there is no other plausible analysis of such relations.

We have seen, I hope, that by carefully distinguishing between delineation, on the one hand, and meaning-identification, on the other, we can accommodate all of the intuitions that motivate the belief in indeterminacy, without sacrificing the benefits with which an acceptance of bivalence (*any proposition is determinately true or determinately false*) provides us.

## 6.0 TWO BOLD CLAIMS

I will end this chapter by defending two rather startling claims:

Claim #1: It is possible, at least in principle, for the Supreme Court (or anybody tasked with the interpretation, so-called, of law) to rule one way at time  $t$ , and in a directly opposed way at time  $t^*$ , *while being right on both occasions.*

My argument will take it for granted that some legal interpretations (so-called) are objectively better than others. It is *vacuously* true that, if legal interpretation isn't answerable to objective standards, then all of the Court's decisions are correct, even if they contradict one another. And, of course, I am not interested in defending that vacuity.

Further, my argument for this does *not* involve an abandonment of any of the laws of classical logic. I am taking it for granted that, for any proposition  $P$ ,  $P$  and *not-P* is false. Given the right kind of deviant logical system, it is trivially true that self-contradictions (on the part of a court or anything else) can be true. And, to echo what I said a moment ago, my purpose is not to defend such a triviality.

Finally, my argument doesn't involve any commitment to the position that U.S. law is inconsistent. Obviously *if* U.S. law is inconsistent, then it is trivially true that the Supreme Court could be right to rule in opposed ways at different times. And, to echo the last echo, there is no reason, or need, to defend such a triviality.

My point is a strictly logical one and isn't intended to have any historical content. My point is only to show that—given classical logic, given a consistent body of laws, and given the view that legal interpretation is answerable to objective standards—a body tasked with interpreting the law *could*, in theory, rule one way at a given time and in an opposed way at some other time, and be right on both occasions. So, for example, given only that the Supreme Court rules at time  $t$  that corporal punishment in school is Constitutional, and rules at time  $t^*$  that it is unconstitutional, it doesn't follow that the Supreme Court was wrong on either occasion.

Claim #2: Originalism is viciously circular and therefore untenable. Originalism implicitly *defines* the expression "intentions of the framers" in terms of a certain conception of how the Constitution should be interpreted. Consequently, what originalism represents as historically based insights into Constitutionality are in fact artifacts of its own definitions.

### 6.1 CLAIM #1 DEFENDED

Some fiction will help us get started. In nation  $N$  (where English is spoken) the following verbiage is deposited in the law-books in the year 2006:

(\*) "All bishops must wear green shirts."

Let us suppose that the linguistic meaning of (\*) remains the same for next several hundred years. So the *intension* of the word "bishop" doesn't change. (Obviously its *extension* will change during that period.)

Before proceeding, we must make some general points that don't have any special relevance to the concept of law. (Readers familiar with Putnam (1975) and Burge (1979) will recognize the influence of these authors' work on the present discussion.) Whether one is a bishop is not a function solely, or even primarily, of one's intrinsic properties, but also of one's social liaisons. Given only that Bob and Twin-Bob are molecule for molecule twins, and that Bob is a bishop, it doesn't follow that Twin-Bob is also a Bishop. It could be that Twin-Bob lacks the relevant social liaisons.

There are some important corollaries. You can have a concept of what a bishop is—you can grasp the concept of bishophood, and can understand sentences like "there are fewer bishops than priests"—without knowing the exact criteria that someone must satisfy to become a bishop. I myself can understand the sentence like "Smith is a bishop," at least in some significant sense of the word "understand," even though I have little or no knowledge of the Church-internal apparatus that bestows bishophood on someone. A consequence is that if I perform some speech-act concerning bishops—if, for example, I say "find out the name of the oldest Bishop in Alaska"—there will be, at most, an inadequate representation in my own psychology of the conditions that must be satisfied if the success-conditions associated with my speech-act are to be fulfilled. (If a speech-act is an assertion, its success-condition is that it be true; if a command, its success-condition is that it be carried out; if a question, its success-condition is that it be answered truthfully.) There is nothing in my psychology that tells you in virtue of what, exactly, somebody is a bishop—nothing in my psychology that distinguishes real bishops from bishop-impersonators.

There is another corollary. Because the property of bishophood is, in part, relational, it follows that the non-relational components of that property may vary from time to time. To be a bishop is to be embedded in a certain social practice in a certain way. The *non-relational*, intrinsic properties associated with one's being thus embedded may vary from time to time. At time  $t$ , the Church may decide that only those with IQ's of over 140 can be bishops. At time  $t^*$ , it may be decided that even those of sub-standard intelligence can be bishops, provided that they are sufficiently pious. What is going on here is not that the property of bishophood *per se* has changed. There is some significant property such that, in virtue of being a bishop, a bishop of today has that property in common with a bishop of 1,200 years ago, even though the exact conditions that one must satisfy to become a bishop may well have changed over the centuries. (It is a matter of historical fact that the exact requirements for priesthood have changed over the centuries. It is not unreasonable to suppose that the same is true of the corresponding requirements for bishophood.)

There is no paradox here. To accommodate these facts we don't have to take the absurd position of saying that the *property* of bishophood has changed. (Although *instances* of properties are spatiotemporal, at least in some cases, properties themselves are non-spatiotemporal objects and therefore don't change.) Nor do we have to take the revisionist position of saying that the so-called bishops of the 1200's were not bishops in the same sense as the bishops of the 21<sup>st</sup> century. (So we don't have to say that, in the last sentence, the first occurrence of the word "bishop" means one thing and that the other occurrence of that word means something else.) Rather, what we say is this. Like many other properties, the property of being a bishop is one whose instances can be realized in different ways, and the conditions that realize possession of that property at time  $t$  may be different from the corresponding conditions at time  $t^*$ . So even though the property of bishophood *per se* cannot change, a person's having an IQ of 95 may be incompatible with his having that property at time  $t$ , and compatible with his having it at time  $t^*$ .

Someone is a bishop in virtue of his social-functional role. The conditions that one must fulfill to have that role may change from time to time. One possible reason for this is that, as the structure of society changes, so do the conditions that one must fulfill to have a certain role *in* society.

A bit of fiction will help us complete our argument. *SC* is the supreme court of nation *N*. In the year 2008, *SC* rules that people with IQ's of less than 140 are *ipso facto* not bishops, and are therefore not legally required to wear green shirts. In the year 2025, *SC* rules that Hobson's having an IQ of less than 140 does *not* disqualify him from being a bishop and that he *is* legally required to wear a green shirt. Given the points made in the preceding paragraphs, it follows *SC might* be ruling correctly on both occasions—even though (we may suppose) *SC* is operating within a coherent legal system and even though, as we have seen, judicial decisions have an objective basis. (I reiterate that, throughout this discussion, it is taken for granted that certain basic principles of classic logic hold—in particular, the law of non-contradiction.) In general, given only that some judicial body (that is a part of a coherent system of laws) rules one way at one time, and in a directly opposed way at some other time, it doesn't follow it is ruling incorrectly on either occasion.

Given what we said, another non-trivial point follows. Even if the members of the *SC* in 2025 know exactly what was in the minds of the people who wrote (\*), it doesn't follow they will know the actual content of (\*). This follows from the fact—noted a few paragraphs ago—that one can understand, and meaningfully utter, sentences like “Smith is a bishop” while having only a dim idea of the exact conditions that one must satisfy to be a bishop—while having, in particular, little or no knowledge of the Church-internal regulations conditioning the bestowal of bishophood on someone. In general, knowing the psychology of the lawmaker doesn't necessarily settle what the law in question is or how it is to be applied or delineated.

There is no *a priori* reason why what we just said about *SC* needn't be true of the Supreme Court. So—and this is a purely logical point, and may have no historical consequences at all—it is *theoretically possible* that, on some of the occasions where the Supreme Court reversed itself, its ruling was correct both before and after the reversal. It seems to me that this point is at least worth bearing in mind in discussions of legal interpretation, even though it is an open question to what extent it fits the behavior of any actual judicial body.

## 6.2 CLAIM #2 DEFENDED

A moment ago we saw *one* reason to believe that facts about the law-maker's psychology don't always have the relevance to questions of legal interpretation that one would expect them to have. In this section, I would like to present some other reasons for thinking this and, therewith, for doubting the veracity of a doctrine known as “originalism.” This is the position that the Constitution must be interpreted in light of the intentions of the framers.

First of all, the moment we speak of “the intentions of the framers,” we are already committed to some sort of idealization. (The need to address this point was brought to my attention by Peter J. Rudinkas.) There were various different framers—Adams, Jefferson, Washington, and so on. These people had numerically and qualitatively different minds. Surely Jefferson's intentions weren't exactly the same as Washington's. When we talk about the intentions that *they* had in connection with the future governance of the nation, we are already speaking in institutional, non-psychological terms (or, if you prefer, we are speaking in terms of institutional rather than personal psychology).

Whenever it is part of an expression that is meant to denote a *collective* attitude, the word “they” is in the same category as “the average man” or “frictionless planes.” In other words, in such a context, the word “they” denotes an idealization, not an empirical reality. From a psychologist's viewpoint, there is no *they*. There are only various individuals whose numerically and qualitatively distinct psychologies may converge in certain respects at certain junctures.

When we talk about “the intentions of the framers,” we obviously don't mean the intentions of the framers taken severally. Originalism is thus exceedingly dubious if the term “intentions” is understood in purely individualistic, psychological terms.



So if originalism is to hold water, we must take the expression “the intentions of the framers” to refer to the intentions of some kind of collective entity. But how are the intentions of that entity to be understood? Since, as we have seen, we cannot understand those intentions strictly in terms of the psychologies of the framers, it seems not out of the question that those intentions must be understood in terms of their social, and perhaps even their historical, role. But the socio-historical role of those intentions is inseparable from the socio-historical role of the Constitution. This suggests (though, I admit, it hardly establishes) that the originalist’s position collapses into circularity (or, if you prefer, triviality): Constitutional interpretations are to be evaluated in terms of the intentions of the framers, but the intentions of the framers are to be understood in terms of the historical and social role of Constitutional interpretation.

Here is a related argument. For the reasons noted a moment ago, the expression “the intentions of the framers” denotes an idealization. An idealization is, by definition, something that has no precise counterpart in the spatiotemporal world. So when we talk about “the intentions of the framers,” we are not talking about an empirical reality, but about some kind of theoretical construct. Of course, the theory embodied in one person’s use of that expression may be different from that embodied in some other person’s use of it. But it seems likely that, as a rule, the theories in question will *themselves* concern the role that the Constitution should have. If this is right, then it follows that originalism is guilty of vicious circularity or, if you prefer, of triviality.

A concrete example may help make it clear what this last argument amounts to. It is reasonable to predict that, at some point in the future, the Supreme Court will have to decide whether gay marriage (marriage between two people of the same gender) is protected by the Constitution. Suppose that, in connection with this issue, one of the members of the Court reasons thus:

(\*) If Jefferson had been asked whether the Constitution protected gay marriage, he would have said “no”; and the same is true of Washington and Adams . . .

(\*) is surely correct. I very much doubt that, during his lifetime, Jefferson would have condoned homosexual marriage. He might not even have acknowledged the coherence of the concept of such a marriage. But this proves nothing that is of relevance to Constitutional interpretation. For if, during their life-times, we had asked Jefferson or Washington whether African Americans should be allowed to vote or hold higher office, those luminaries might well have given us answers that wouldn’t correspond even remotely with later Supreme Court decisions—with decisions that even originalists regard as paradigms of sound jurisprudence. The same point holds in connection with the question whether the government should have the power to break monopolies, whether corporal punishment should be permitted in schools, and so on.

So when we talk about what Jefferson (or Adams or Washington . . .) *would* have said about such an issue, we are not talking about the actual Jefferson—the person who lived at a time when there was slavery and when it would have been unheard of for women to hold higher office. We are talking about what would be said by some idealization of Jefferson—by somebody who had Jefferson’s *basic* values, but whose own interpretation of those values wasn’t distorted by the temporal and cultural parochialism to which Jefferson, like all other mortals, was inevitably subject. So when legal theorists talk about “what Jefferson would have said,” they are not making an empirical statement about what the *actual* Jefferson would have said, but rather an *a priori* proposition about what he *should* have said, given his values (or what we believe to have been his values).

But the originalist’s intention in running counterfactuals like (\*) is to *derive* or expose Jefferson’s values, so as to generate an appropriate conception of Constitutionality. The originalist is thus caught in a vicious circle. He must use a counterfactual to identify the values on which his conception of Constitutionality is based. At the same time, he cannot run the counterfactual in question *until* he has identified those values.

## 6.2.1 AN OBJECTION TO OUR ARGUMENT

There is a possible response to this:

As you point out, the idiosyncrasies of Jefferson's psyche are irrelevant to issues relating to Constitutional interpretation. For this reason, I agree with you that, when discussing Constitutional issues, we must idealize away from those idiosyncrasies and must therefore speak of what Jefferson *should* have said, given his values, as opposed to what he actually might have said, given his peculiarities and limitations as a human being. But I disagree with your point that this exposes some kind of circularity in the originalist's position. Jefferson's values are definable *independently* of any views of Constitutional interpretation. Jefferson believed in certain things. For example, he believed that, with some obvious qualifications, people should be allowed to do as they wish and that, consequently, government should have a minimal regulatory role. While such views have obvious consequences as regards Constitutional interpretation, they can (and probably must) be understood *independently* of any such views. After all, the concept of small government is one that a person can fully grasp even if she has never heard of the U.S. Constitution. So your charge of circularity is under-argued.

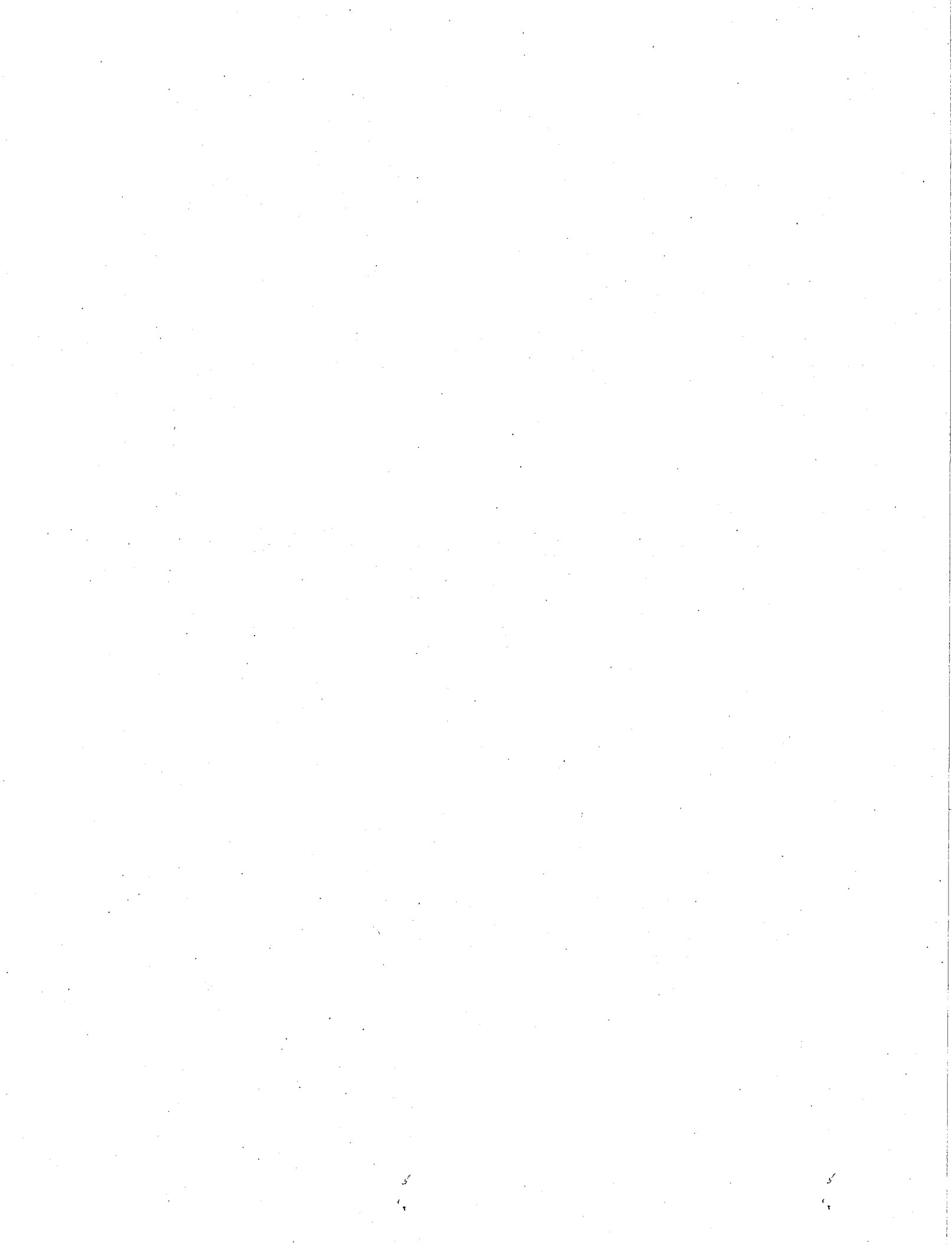
This line of thought simply displaces the problem onto an analogous problem. This, I will now argue, is because the expression "Jefferson's values" *itself* denotes an idealization, as opposed to a psychological reality. Consequently, talk of "Jefferson's values" in this context involves a circularity parallel to that discussed a moment ago.

Some science fiction will make this clear. We go back in time and ask Jefferson: "Should women be allowed to vote?" Jefferson says "no." Being creatures of the 21<sup>st</sup> century, we disagree with Jefferson. At the same time, we are (let us suppose) originalists; so we wish to reconcile his response with our belief that the Constitution should be interpreted in light of his intentions (along with those of Washington, Adams . . . who, we may suppose, gave the same answer as Jefferson in response to our question). We effect this reconciliation by telling ourselves that, in answering that way, Jefferson was not being true to his core values. It wasn't the *true* Jefferson speaking. Rather, it was a Jefferson whose inner goodness was marred by cultural baggage that was extrinsic to his character. (Compare: "The Smith I know wouldn't ever say such a thing—that was the bottle talking.")

But, like many complex human beings, Jefferson had many values; and while some of them may well have been fair-minded and egalitarian, others may have been retrograde and misogynist. So when we say that, in answering as he did, Jefferson was not being "true to his values," the word "his" doesn't denote the Thomas Jefferson the human being. Sadly, Jefferson's answer may have reflected who he really was. Rather, the word "his" denotes a Thomas Jefferson who has been purged of his ugly 18<sup>th</sup> century prejudices. But in that case, we are using the term "Jefferson" not to refer to the actual Jefferson, but to some idealization of Jefferson that corresponds to a certain conception of how the country should be run and therefore, presumably, of how Constitutional issues are to be settled. For analogues of the reasons given a moment ago, this entails that the originalist's position collapses into a vicious circularity (or an innocuous tautology).

Let us sum up. In discussions of Constitutional interpretation, one often hears claims about what Jefferson (or Adams, etc.) *would* have said about such and such (e.g., whether gay marriages should be legally recognized). But it is irrelevant what Jefferson *the actual person* would have said. Even the finest minds are marred by ugly biases. For all we know, Jefferson might have thought that any expression of homosexuality should be illegal or, on the contrary, he might have secretly thought that men should be legally required to abstain from relations with women and to marry other men. So when we talk about what Jefferson *would* have said, we are talking about what some kind of idealization of Jefferson would have said—some Jefferson who didn't suffer from the cultural limitations and

random neuroses that mar even the best of minds, including his. But it is more likely than not that the relevant idealization is going to incorporate a certain conception of Constitutionality, and this condemns to vicious circularity any attempt to derive a correct conception of Constitutionality from such counterfactuals. Once we start dealing with an idealization of Jefferson's psyche, as opposed to his actual psyche, we have replaced empirical propositions about Jefferson's psychology with *a priori* propositions about values. The result is, at least plausibly, that such counterfactuals presuppose certain conceptions of Constitutionality, and thus cannot substantiate any such conception.



## ... CONCLUSION OF PART 2

### The Moral Structure of Legal Obligation

If Smith and I were stranded on a desert island, and we thus both fell outside the scope of any legal system, I would have a moral, but not a legal, obligation to refrain from punching him. My *actual* legal obligation not to punch fellow citizen Smith is therefore distinct from my moral obligation not to do so. But, I argue, my legal obligation not to punch Smith is *a* moral obligation: it is a moral obligation to comply with a system of rules on which people depend for protections of their most basic rights—a system which builds highways and hospitals, prevents people from killing and stealing from one another, and holds physicians and other professionals accountable to certain ethical standards.

One may have a legal obligation to commit an immoral act. But, in such a case, one's legal obligation is not morally hollow. One's legal obligation to commit an immoral act is identical with one's moral obligation to comply with a system of the kind just described. Discharging that obligation *involves* committing an immoral act, but that obligation is not itself morally negative or morally hollow.

This last point demands elucidation. It is one thing to have an obligation to do *X*, and it is quite another to have an obligation the fulfillment of which *involves* doing *X*. A surgeon has an obligation to heal his patient. Fulfilling that obligation *involves* causing his patient to suffer. But a surgeon doesn't have an obligation to cause his patient to suffer. (In fact, he has an obligation to minimize his patient's suffering. A surgeon would be violating his professional obligations if he chose not to use anesthetic when there was no medical reason not to do so.) Similarly, fulfilling one's legal obligations may *involve* committing an immoral or morally neutral act. But it doesn't follow that legal obligations are ever immoral or amoral. If I have a legal obligation to do *X*, that means that I have a moral obligation the fulfillment of which *involves* my doing *X*. It does *not* mean that I have a moral obligation to do *X*. That is why a legal obligation to commit an immoral act may be morally wholesome. Hence the following argument is invalid—"given that one has legal obligations to commit immoral acts, it follows that legal obligations are not moral obligations"—and once this is seen, one of the more obvious obstacles to accepting a moralistic analysis of law has been removed.

Let us discuss a positive reason to accept such an analysis. A government is a success precisely to the extent that it serves the interests of those whom it governs. The same is therefore true of laws, given that laws are among the instruments of government. It follows that the concept of law is to be understood in moral terms, even though there are immoral laws.

Governments often behave in an unspeakably evil manner towards their own constituents; and oftentimes this misconduct involves, or even coincides with, the issuing of laws. On this basis, many have concluded that the concept of law is *not* to be understood in moral terms. But this line of thought involves a failure to make three important distinctions:

- (i) The distinction between individual and institutional frames of evaluation;
- (ii) the distinction between functional and purely factual frames of evaluation; and
- (iii) the distinction between suspensions of protections of rights, on the one hand, and positive violations of rights, on the other.

The *personal* success of a head of government may not involve his serving the interests of his constituents, and it may even involve his thwarting those interests. But a head of government is a success

as a head of government of state precisely to the extent that he serves the interests of his constituents. Given this, it follows that the objective of government—of *any* government—is to protect the interests of the governed. Stalin failed *as* a head of government precisely because he did not serve the interests of his constituents. It follows that the objective of the Soviet *government* was to serve the interests of its constituents—even though that may not have been the objective of Stalin or of any of the other senior officials composing that government. If a dictator issues a law that harms his constituents, he fails *as* a law-maker, even though issuing that law may help him achieve *personal* success of some kind—even though, for example, it may help him hold onto power. In general, one fails *as* law-maker if one issues a law that hurts those who are subject to it. This shows that the purpose of a legal system *per se* is to serve the interests of those who are subject to it—even though that may not be the objective of all, or even any, of the individuals who created that legal system. Distinction (i) thus removes one of the major reasons to reject a moralistic analysis of law.

Now let us discuss (ii). Even if everyone alive suddenly succumbed to liver-disease, and each person's liver stopped removing toxins from his blood-stream, there would still be a significant sense in which livers were to be understood as removers of toxins. If one accepts a strictly fact-based frame of evaluation, one is blind to this obvious fact; and one is *not* blind to it if one accepts a frame of evaluation that allows for functional categories. An analogue of this line of thought holds of law and government. Even if every government were thoroughly corrupt and exploitative, there would still be a significant sense in which governments were to be understood as protectors of rights, and in which the laws issued by governments were to be understood as attempts to provide protections of rights. Like hearts and livers, governments and the laws they issue are to be understood in functional, and not strictly statistical-empirical, terms.

The significance of distinction (iii) is to be understood in terms of the following argument. If a certain legal system doesn't prohibit anyone from violating Smith's rights, then Smith falls outside the jurisdiction of that system. There is legal obligation only where there is moral protection, and the moral core of one's legal obligations lies in this fact.

But there is an obvious objection to this argument. People have legal obligations under governments that harm them. Given this, it seems straightforwardly false to say that legal obligations under a government categorically presuppose receipt of moral protections from that same government. Here is where distinction (iii) becomes relevant. Suppose that Officer Smith beats me without cause. Even while I am being beaten, the government continues to protect my rights: anyone caught attempting to burgle my house or kidnap my children will be arrested; and it may even be other police officers who, acting in the name of duty, stop Smith from further beating me. Thus, Smith's misconduct is a case where a positive violation of my rights is superimposed on the continued existence of governmental protections of those same rights. The same thing is true of *any* case where one has legal obligations under a government that harms one. Thus, even though one may have legal obligations towards a government that harms one, it doesn't follow that legal obligation doesn't presuppose moral protection. So far as one thinks otherwise, one is failing to make distinction (iii).

Like the present author, Ronald Dworkin argues that the concept of law is to be understood in moral terms. His argument is that judicial decisions are often made on moral, as opposed to narrowly statutory, grounds. This argument is less than probative. If the judge rules that the money is Smith's, then the bank-manager is acting illegally if he refuses to give Smith the key to the safety-deposit box. If the judge rules that the money is *not* Smith's, then the bank-manager is acting illegally if he *does* give Smith the key. The judge may or may not make his decision on the basis of a moral principle. In either case, the law is what the judge says it is. This is the antithesis of the idea that there is any *necessary* relationship between law and morality, even though it is obviously compatible with the idea that the two may sometimes overlap.

We've already seen why law is to be understood in terms of morality, notwithstanding that Dworkin's argument for this conclusion is less than cogent. But if our criticism of Dworkin is correct, it seems to follow the legal interpretation (so-called) is mere legislation, and thus isn't interpretation

at all. But legal interpretation is *not* mere legislation, and this is perfectly compatible with the fact that the law is what the judge says it is.

A brief detour through the history of science may help to indicate the broader outlines of my argument for this. The layperson's concept of temperature has no application outside of what are, from a physicist's viewpoint, extremely narrow horizons. When physicists identified heat with molecular motion, they were not identifying the content of the layperson's concept of temperature. Rather, they were replacing the lay-person's concept with one that is consistent with it, within its narrow sphere of applicability, but is more precisely defined and also has a much wider sphere of application. Such principled extensions of existing concepts are referred to as "delineations" or "precisifications." Any judicial ruling is *ipso facto* an extension, not an identification, of existing law. But judicial rulings are *principled* extensions of the law. In other words, they are instances of *delineation*, not *legislation*. Just as some delineations of the concept of temperature ("a body's temperature is the sum of the velocities of its constituent molecules divided by the number of those particles") are truer to pre-theoretic data than others ("heat is dephlogistinated matter"), so some interpretations of law are truer to existing law than others.

Blackstone said that judges identify, and do not create, law. Austin described Blackstone's position as a "childish fiction." Given the argument just outlined—and, in fact, independently of that argument—we must agree with Austin. But given that same argument, we must *disagree* with the nihilistic view, held by the so-called "legal realists," that judicial interpretation is mere legislation, and isn't answerable to objective standards.

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