Interpretation and Legal Theory, Andrei Marmor

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Interpretation and Legal Theory

Andrei Marmor

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Interpretation may be defined roughly as the process of determining the meaning of, or imposing meaning upon, an object. This definition reveals the complex function of interpretation in legal theory and the dual nature of interpretation as both a practice and an explanatory theoretical concept. The *imposition* of meaning connotes an active, creative process employing the techniques of practical reasoning with fundamental goods, ends or purposes.[1] By contrast, the *determination* of meaning equivocates between an active sense of choosing one meaning among many, and a passive understanding or derivation of some real or objective meaning. In *Interpretation and Legal Theory*, Andrei Marmor analyses the complex nature of interpretation and examines the role and significance of interpretation in legal theory.

Interpretation is a central concept in Professor H.L.A. Hart's positivist theory of law. Hart argues that law is a system consisting of a union of primary and secondary rules. Primary rules are obligation-imposing, existing within a social unit, and generally obeyed and accepted through a "critical reflective attitude" by most members of the group. Secondary rules, in contrast, do not impose obligations or duties. Instead, they confer power, as exemplified by rules of legal change, adjudication, and legal recognition. Interpretation is necessary to apply linguistically expressed legal rules to particular factual situations.

Professor Dworkin's theory of "law as integrity" argues that law is not solely comprised of rules. Rules constitute one aspect of a legal system; however, in 'hard cases' unavoidable indeterminacies in the meaning of a rule will necessitate an appeal to standards that are not rules. Such standards include social policies and fundamental political and moral principles of a society.

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[1] J. Finnis, "On Reason and Authority in *Law's Empire*," (1987) 6 Law & Phil. 359 [hereinafter "On Reason and Authority"].

Interpretation, on this account, includes not only the use of policies and principles to determine which rules are relevant and what their meaning is, but also the application of these rules to particular judicial disputes.

The context for Marmor's study is the methodological position adopted by Dworkin in *Law's Empire*.[2] Dworkin criticizes analytical jurisprudence and specifically, Hart's legal positivism, as being an essentially semantic theory; grounded in an analysis of the meaning of the word "law." He claims that the analytical approach is committed to explaining "law" through an account of the meaning of the concept word "law."

Dworkin argues that the criteria for any given word's meaning is determined by the linguistic conventions governing the use of that word in ordinary language. Where two legal theories adopt different rules of usage for the word "law," they are employing different factual criteria to decide whether a statement purporting to be a valid legal norm is true or false. Consequently, the subject-matter of their respective theories is different. Theoretical arguments with respect to each other are "pointless in the most trivial and irritating way."[3] Dworkin's "semantic sting" asserts that unless competing theories adopt common factual criteria about the conditions of legal validity, there can be no significant debate or analysis about what the law is.[4] Yet, if rival legal theories accept common conditions of legal validity, theoretical debate is reduced to trivial arguments about the meaning of words in marginal cases.

Marmor asserts that Dworkin's "semantic sting" is really a reformulation of the argument against anti-realism or conventionalism. Legal positivism holds that law is necessarily source-based. The conditions of legal validity are determined by the social rules and actions prevalent in a given community. These conventions identify the source of law. The validity of a legal norm is derived from a source identified by relevant conventional rules. The anti-conventionalist argument claims that this view fails to explain the authoritative or obligatory force of law in controversial cases. Conventions manifest a pattern of agreement, a convergence of beliefs, practices, and attitudes, with their normative force being derived from this consensus. Once their meaning, and thus their application, become controversial, they have *ex hypothesi* exhausted their binding authority. Dworkin's theory of law as a social practice of constructive interpretation challenges this alleged theoretical inadequacy of legal positivism.

Interpretation and Legal Theory re-examines conventionalism in light of

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[2] R. Dworkin, *Law's Empire* (London: Collins, 1986).

[3] *Ibid.* at 44.

[4] *Ibid.*

Dworkin's interpretive challenge. The thesis advanced is that interpretation is an exception to the standard understanding of language and communication; it is necessary only where meaning is undetermined by rules or conventions. Marmor argues that in certain cases the identification and meaning of a legal norm, and hence its applicability, is clearly determined by conventional rules.

Interpretation is analyzed by an examination of the meaning imposed on the objects of an interpretive practice. Marmor argues first that Donald Davidson's "radical interpretation" theory fails to explain the role of interpretation in understanding an expression: "one does not interpret that which is *determined* by rules or conventions."[5] When the meaning of a statement is determined by an assumption that the communicator is employing the words according to conventional rules, interpretation is not necessary. Understanding, or explaining the meaning of an expression is conceptually distinct from interpreting a rule. Interpretation concerns those aspects of communication which are under-determined by rules or conventions. Semantics is useful only to elucidate the concept of interpretation; it fails to explain the function of interpretation in language.

Marmor argues that interpretation is better understood in terms of the pragmatic conception of meaning, which he terms the communication intention model. Like pragmatics, interpretation concerns the relationship between a communication intention and the meaning of the communication. Interpretation is the process by which an interpreter is able to understand a communicative expression where that meaning is not determined by the rules of language. Marmor's second thesis is that the meaning imposed by interpretive practice must be grounded in communicative intention.

In chapter 3, Marmor argues that Dworkin's theory of 'constructive interpretation' fails due to its rejection of the communication intention model. The normativity of law requires that participants in the social practice develop a complex interpretive attitude toward the requirements of the practice. In order to render intelligible the idea of norms or rules constituting a reason for action, a value or meaning must be imposed on a normative-based social practice. Thus, an internal viewpoint of normativity must be adopted. This imposition of meaning requires that interpretation be constructive and not restricted or guided by communication intentions.

Marmor summarizes Dworkin's argument as follows:

    1. Any interpretation presupposes certain criteria of success.
    2. The criteria of success can be either (a) mentalistic, based

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[5] A. Marmor, *Interpretation and Legal Theory* (Oxford: Clarendon Press, 1992) at 22.

on the communication intention model, or (b) value
dependent, based on the constructive model.
3. On any plausible account, the mentalistic answer (a) is only
an instantiation of the constructive model (b). Hence
4. The constructive model is the only plausible candidate for
(1), that is, the criteria of success in all forms of
interpretation.[6]

Marmor rejects the above argument on two grounds. First, premise (2) is
not exhaustive. The incommensurability of a complex variety of possible
interpretations precludes presenting an object of interpretation in one "best
possible light." The existence of a multiplicity of competing interpretations
means that constructive interpretation is not the only alternative to the
mentalistic model.

Second, evaluative judgements are of two different kinds, identifiable by
distinguishing their respective contraries: descriptive statements, and neutral
statements. Any descriptive theory is inherently normative or evaluative, and,
thus, neutrality in theoretical explanation is not possible. The basic function of
every theory is to evaluate the date it purports to explain. It does not, however,
follow from non-neutrality that the evaluation is moral or even aesthetic. "Best"
does not mean "morally best" but rather "best example of its kind." Since legal
theory may have a plurality of aims or purposes, a multiplicity of criteria for the
"best example" of any given object of interpretation exists necessarily. "Best"
presupposes a unified notion of the purpose of interpretation. In the absence of a
defensible realist theory of natural kinds corresponding to every concept word,
this is possible only by utilizing rules or standards grounded in convention.

Chapter Five is an argument against what Marmor terms "Semantic Natural
Law" theories. These theories propose that a semantic analysis of "law" will
reveal its meaning as a real or natural kind of entity whose essence and
constitution are independent of social conventions. The existence of law as a
real entity renders false any account of law as posited phenomena. Thus, law
cannot be explained as a product of social convention or authoritative will.
Marmor responds that law is essentially a cultural product, and thus a semantic
realist account of law as a natural entity must be rejected.

Chapter Six employs Joseph Raz's analysis of legal authority to
demonstrate that communication intentions are essential for the identification of
legal norms. Raz identifies two features of. 'authority-capacity':

First, a directive can be authoritatively binding only if it is, or
is at least presented as, someone's view of how its subjects

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[6] *Ibid.* at 51.

ought to behave. Second, it must be possible to identify the
directive as being issued by the alleged authority without
relying on reasons or considerations on which the directive
purports to adjudicate.[7]

According to this view of legal authority, Dworkin's coherence theory of
constructive identification fails to explain the normative binding force of law.
Although this argument rejects constructive identification of legal norms, it does
not establish that communicative intention is essential, or even relevant to
determining the content of authoritative directions.

Chapter Seven advances Marmor's argument that conventional rules of
language determine meaning in certain classes of expressions, and that
interpretation is necessary only where meaning is undetermined or under-
determined. Marmor adopts Hart's positivist distinction between easy cases and
hard cases. In easy cases, an issue can be decided by identifying existing legal
standards and by applying the commensurate standard to the facts. In hard
cases, the meaning of existing legal standards is not sufficiently determinate to
decide that issue. Accordingly, interpretation is necessary to give a determinate
meaning to legal rules.

Hart employs a theory of meaning for which any given concept-word
distinguishes a core of certain, determinate meaning from a penumbra of
uncertainty. On this account, every concept-word is a linguistic sign with both a
definite meaning, and a set of imperfect, indeterminate meanings. Where the
core meanings of the words constituting legal rules are sufficiently determinate
to be applied decisively to a legal dispute, this is an 'easy case.' Hart's
distinction asserts that the linguistic formulation of legal rules renders their
meaning dependent on the meaning of concept-words used in these
formulations. Meaning is determined by the function of a word in language.
Hart argues that every word has standard instantiations where its application is
conventionally accepted and its meaning is clear and determinate. This is the
"core of meaning." Where the application of a word to facts cannot be
determined by the conventional rules of language, the meaning of that word may
be said to be uncertain and indeterminate. This is Hart's "penumbra of
uncertainty." In these cases, the relationship between fact and concept-word
must be determined by non-linguistic standards and criteria, such as the
presumed purpose or communication intention.

Hart's view is grounded in Wittgenstein's theory of indeterminacy of
meaning as a basis for distinction. Wittgenstein rejected the Fregian view of
determinacy of sense, arguing that the meaning of words is completely overt and

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[7] *Ibid.* at 114.

manifest in their use in ordinary language. Thus, no theory of meaning for a natural language can be constructed. The inherent vagueness of language, however, does not entail that all meaning is indeterminate. In *Philosophical Investigations*[8] Wittgenstein employed the notion of "family resemblance"[9] to describe the relationship between various phenomena which have "no one thing in common which makes us use the same word for all."[10] They are linked by virtue of sharing numerous and complex similarities. Despite the absence of any single element which can be univocally predicated of each instantiation, concept-words are successfully employed in language such that their meaning is communicated. The effective use of concept-words in the absence of univocally predicated common elements is evidence of a degree of agreement regarding judgments about the word's applicability to certain facts. The common criteria for correct understanding constitutes the core of meaning for the concept-word.

Dworkin's argument that interpretation is necessary in law is grounded in the claim that an epistemological gap exists necessarily between a rule (sign) and its application (action). This gap, it is claimed, can be bridged only by an interpretation of the rule. Wittgenstein rejected this idea of a necessary gap. Knowing the meaning of an expression is not an inner state of mind, but rather an ability to employ the word according to the conventional rules of language. Language is a rule-guided, hence normative, activity. Rules explicitly guide action, provide standards of evaluation, and fulfill explanatory roles in making actions intelligible. The relationship between a rule and its application to facts is a normative, grammatical relationship, internal to the conventional rules that govern language as a practice.

On this account, interpretation would be unable to bridge the alleged gap between rules and actions. The meaning of rules as signs is determinable only by the way rules are applied to facts (actions). To follow a rule is not interpretation since a sign's meaning cannot be determined by another sign. If the meaning of a rule is so indeterminate as to be incapable of determining which actions are in accord with it, no interpretation of the rule can do this either. The underlying theme of Wittgenstein's theory is that the quest for completeness or exhaustive criteria in determining meaning is incoherent and misleading. An explanation is adequate if it clarifies existing misunderstandings; it need not address and clarify every potential misunderstanding. Accordingly, an understanding of a rule need not remove all

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[8] L. Wittgenstein, *Philosophical Investigations*, Eng. trans. by G.E.M. Anscombe, 2nd ed., (Oxford: Blackwell, 1958).

[9] *Ibid.* at Section 67.

[10] *Ibid.* at Section 65.

possible doubts with respect to its application to facts.

Interpretation must be clearly differentiated from understanding the meaning of a rule. Moreover, a complete understanding need not consist of a statement of necessary and sufficient conditions for every possible use of the concept-word in language. Legal rules can be simply understood without the use of interpretive hypotheses about their purpose. The core of certainty in the meaning of a rule presents cases where the rule can be applied immediately to facts. These cases are identified by the determinate meaning of the concept-word/sign as dictated by the conventional rules governing the use of these terms.

The final chapter attempts to reconcile the role of intention, specifically legislative intent, in the authoritative application of statutes. Statutes are paradigmatic legal rules since communicative intention is more easily traced to an identifiable source. This argument would apply by analogy to any legal norm in the form of a rule. Marmor has argued that conventional rules regarding the use of concept-words in language provide a determinate core of meaning for each term. This allows for the clear and unequivocal application of these rules to facts where common understanding and agreement about use permits their application. Outside this core of meaning, the application of the rule will be determined by an interpretive process. This interpretation will, however, be dependent on and guided by communication intention. Hence the intention of the communicator is an essential and central element of interpretive activity.

The argument that concept-words have a core of determinate meaning which is determined by conventional rules guiding their use in language is a fundamental tenet of Hart's legal positivism. In such cases, the definition of a word "may make explicit the latent principle which guides our use of a word, and may exhibit relationships between the type of phenomena to which we apply the word and other phenomena."[11] In *Natural Law and Natural Rights*, Professor J.M. Finnis has adopted this view, rejecting the insistence on a flatly univocal meaning as a failure to recognize the real and systematic multi-significance of theoretical terms.[12] He terms the core or focal meaning of a concept-word the "central case." It is this distinction, between focal meaning (central case) and uncertainty (imperfect instantiations) of a concept-word, that grounds the theory of meaning that Dworkin rejects. The 'semantic sting' has no force unless this theory of meaning is rejected.

Several of Marmor's most effective criticisms of Dworkin's theory of constructive interpretation have been discussed also by Professor J.M. Finnis.[13]

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[11] H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), at 14.

[12] J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), at 9-11.

[13] *Ibid.* See also Finnis, "On Reason and Authority" *supra* note 1.

First, Dworkin's incorrect characterization of the semantic element of on analytic jurisprudence as "vicious semanticism" is the result of Dworkin's failure to distinguish between the instantiation of law in a given community ("the Law") and the concept of law ("law").[14]

Second, Dworkin's theory of "law as integrity" argues that constructive interpretation will always result in a uniquely correct answer in every legal dispute.   Dworkin employs two incommensurable criteria of judgement however: "fit" (with past political decisions) and "justifiability" (inherent substantive moral soundness).   The absence of any metric which could commensurate the different criteria precludes a best or uniquely right interpretation.[15]

Third, Dworkin's theory does not account for the legitimacy of political authority, and accordingly, fails to explain the normative binding force of legal norms. "Law as integrity" fails to explain how a legal norm could constitute a reason for acting according to its substantive requirements.[16]

Finally, Dworkin's anti-conventionalist position does not allow for the creation and application of rules whose legal authority is directly grounded in their source. He denies that convention or consensus may be a valuable device for solving problems in coordinating the actions of human agents living in community. This denial sets up a false choice between conventionalism and decisions based on independent convictions. This view fails to understand that it is not agreement *per se* that justifies the authority of rules and standards created by convention, but rather the underlying aims that motivate the actors to participate in, and to uphold the convention.[17]

In Dworkin's defence, Marmor can be criticized for not understanding the fundamentally different purposes of legal positivism and Dworkin's theory of interpretation. Both Hart and Raz are involved in describing law as a social phenomenon. Hart is attempting to describe and explain what is treated as law in a given community at a given time.   By contrast, interpretation is an essentially normative theory offering prescriptive guidance regarding a judge's judicial or legal duty in any particular legal dispute.[18]

Marmor has written a thorough discussion of the role of intention in the identification and application of legal norms to factual disputes. He presents several of the arguments central to the Hart–Dworkin debate in a clear and succinct manner, and evaluates critically the underlying theories of meaning

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[14] *Supra* note 1, at 368.

[15] *Ibid.* at 370-376..

[16] *Ibid.* at 376-378.

[17] *Ibid.* at 378-380.

[18] *Supra* note 12, at 21.

utilized by each theorist. Marmor's project is to establish that communication intention is a central element when indeterminacy of language makes interpretation necessary. *Interpretation and Legal Theory* provides a comprehensive analysis of this essential aspect of the Hart-Dworkin debate, and is a noteworthy contribution to contemporary jurisprudence.