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Alternative Methodologies in Contemporary Jurisprudence: Comments on Dworkin

Philip Soper

I have two brief points to make. Both involve recent developments in jurisprudence, by which I mean by and large the subject that Ronald Dworkin has just been discussing. Indeed, the first point is little more than an acknowledgement of the debt that is owed to Dworkin, not only for his specific contributions to this field, but for the implications of his work for law teaching generally.

I will make the first point by defining what I shall call a philosophical question. Philosophical questions are distinguished by two features: first, the apparent resistance to resolution; despite philosophical or academic discussion which may go on for centuries; second, the continued interest in the question despite this apparent inability to reach a resolution. How these two features can both co-exist is itself, of course, a philosophical question which at an earlier point in this century some thought to have answered by claiming that all such questions were meaningless. That answer has now been more or less accepted as just one of the possible answers, so that the problem of explaining how questions can continue to be interesting though apparently unanswerable remains a lively and fascinating one—unanswerable is not, after all, the same as unenlightening.

In legal philosophy, the greatest debt we owe to Ronald Dworkin is that he has restored a question about how judges do and should decide cases to the level of a philosophical question. No one who attended law school before Dworkin's articles began to appear (about 15 years ago) can fail to appreciate the shift in basic assumptions. My own memories of that period include classes, conducted in some cases by people still active in the area, in which the suggestion that judges might actually be finding the law, as they purported to in their opinions, was not simply greeted with skepticism; it was treated as equivalent to the suggestion that perhaps the world after all really was flat. I use the analogy deliberately, not because I think empirical questions are the opposite of philosophical questions, but to emphasize the extent of the change that has occurred. Whether one is persuaded by Dworkin's model of judging or not, at least it is sufficiently plausible to now

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require defense and debate by those who continue to maintain the earlier, skeptical views.

The significance in terms of legal education, it seems to me, is potentially very great. Speaking again from my own experience, many students, I find, come to law school prepared to reject moral skepticism or at least to recognize that the truth of the moral skeptic's claim is an open and thus interesting philosophical question. Those same students often instinctively embrace the legal skeptic's claim (in the moderate version that insists judges often must legislate). But they do so largely because they have never been presented with a plausible alternative model, at least not until they confront the literature of the last fifteen years. Failure to challenge in the classroom this implicit student assumption about the correctness of legal realism or legal skepticism is a bit, I think, like refusing to teach the Copernican theory—even though it fits the facts better—just because it does not fit one's own pet theory about how the planets rotate—in this case, how judges decide cases.

My duty as a panelist requires that I now move on to an area of possible disagreement in connection with the second development that has occurred in the last fifteen years. The second development constitutes by and large the subject of the remarks that we have just heard. It is a methodological development, characterized by increasing attention to the preliminary question of the nature of the enterprise in which we are engaged when we make claims about the connection or lack of connection between such notions as legal and moral obligation.

Dworkin is correct, I think, in suggesting that the various approaches to jurisprudence that he described at the beginning of his talk can be seen as competitors rather than as independent approaches. But even viewed as competitors, it is important to remember that we have never been very clear about what kind of competition it is—what will count as a test of truth in trying to decide which of these competing models is most accurate. Let me then briefly offer a somewhat different view from that of Dworkin's of the four major stages we have gone through in terms of methodology. At the conclusion, I shall suggest that, even if the enterprise that is now emerging is largely the one that Dworkin describes, there is still room for disagreement about how one carries out that enterprise.

I begin where Dworkin did with John Austin, whose approach I will call definitional because that is what those who disparage it call it. The definitional approach combined a descriptive claim and a conceptual claim. The descriptive claim consisted largely of a reminder of the differences in function and sometimes in origin between legal and moral norms. The conceptual claim was that certain of these differences were sufficiently important to have been embodied in our language as the key to what we mean by "law" or as the essence of what we mean by "legal obligation." Many people think that this conceptual aspect has now been discredited by theories such as Wittgenstein's, so that whatever the modern enterprise is, it cannot be definitional. But just as Mark Twain was unwilling to allow himself to be declared dead before his time, so there are signs (as we saw in John Finnis's presentation) that the enterprise associated, after all, with figures such as Plato and
Aristotle is resisting, like any good philosophical question, this twentieth century attempt at dismissal. I will come back to that in a moment.

Definition, duly discredited, was replaced in this century by two other approaches which differed from each other in that each took a different component of definition as its starting point. The first approach eliminated the troublesome conceptual aspect of definition altogether and became pure description. This approach reached its high point in such claims as this: "legal obligation" simply means different things to different people—nothing more can be said about it than that. Some mean what Austin thought the essence of it was, namely that one risks certain sanctions if one fails to comply. Others mean only that this is the way to report the rules that we have accepted. Still others, particularly judges within the legal system, mean that these are rules that in some sense can be justified. The task for legal theory under this approach is simply to describe these various "points of view" and make no further claims.

The second alternative to definition (and thus the third methodological approach) correctly perceived that description alone could not account for continued arguments about the nature of law because these arguments did not rest on different perceptions of the phenomenon. Accordingly, this approach turned to the discredited conceptual branch of definition and tried to shore it up, for example, by replacing claims about the "essence" of law with claims about the "focal case" or the "central point" of law. Most of these revised approaches seem difficult to distinguish from the original, definitional approach—another sign of the resistance of definition to being dismissed. I think, in fact, there is still a great deal to be said for the definitional enterprise. In particular, it is not, it seems to me, primarily an evaluative enterprise. A large part of what we are doing in definition is reporting the evaluations of others as reflected in the linguistic schemes in which people connect experience and the impact of experience on purpose with their linguistic distinctions. To that extent, to suggest that definition is evaluative ignores the role of fact and preexisting linguistic schemes in explaining, for example, what we mean by "law."

But even if completely clarified and carried out, definition will not explain what is now becoming the crucial approach to jurisprudence. This emerging fourth approach I shall call a coherence or substantive approach, though I am not sure it differs from what Dworkin calls the interpretive approach. In my view it combines the best of both the descriptive and the revised definitional approaches in the following manner.

First, like the descriptive approach the new approach accepts that what we mean by legal obligation can vary depending on one's point of view. And like the descriptive approach no further attempt is made to insist that one of these points of view is the central or focal one. Second, one of these points of view is, nonetheless, selected as standing in particular need of conceptual clarification. The point of view in need of clarification is that of the official, the judge, the community—the insider who accepts the legal system and claims that the State is justified (morally justified) in imposing sanctions, and that citizens ought to act in certain ways just because something is the law—by which one means just because of the official status of certain stand-
ards or directives. The crucial problem for the coherence approach is one of consistency. Are claims such as these about the moral justifiability of what is done or demanded in the name of law internally coherent? This question seems rather obviously to require investigating simultaneously both legal theory and moral theory, which is why I call it a substantive as well as coherence approach.

Dworkin's interpretative method by and large seems to belong to this last-described enterprise insofar as he argues that a particular model of law is more consistent with the moral claims we make in the name of law than are others. But, in my view, that is still only half of the job. What one wants to know is not whether a certain model of law is more consistent than other models with the moral claims we attach to "law," but whether it in fact supports and justifies those moral claims. To know that, one cannot avoid asking the substantive questions of political theory: Under what circumstances is the state's exercise of power or the state's demand for citizen compliance justified? Only when we answer those questions will we know whether we must either tone down the claims we make in the name of the law, or, alternatively, alter what we tend to call law.

If coherence, in short, is our goal we must do more than compare legal theories with each other. We must also check moral theory to see whether even the legal theory that comes closest—even the interpretation that is best—has managed to cross the finish line in a way that justifies what we do to others in the name of law.