

Theory, Interpretation, and Law: Some Worries about Dworkin's Account of Their Relation

Lisa Van Alstyne
University of Chicago

ABSTRACT. This paper explores Ronald Dworkin's influential theory of constructive interpretation. It points out that this theory admits of two readings, which I call the "undemanding" and the "demanding" conceptions of constructive interpretation respectively. As I argue, Dworkin's own presentation of the theory equivocates between these two conceptions, the former of which is utterly unproblematic, but the latter of which incorporates certain philosophical prejudices as to what it must mean for a practice to be purposive.

As I argue in this paper, there is an equivocation in Ronald Dworkin's theory of interpretation between two very different conceptions of "constructive interpretation." Roughly speaking, on the *undemanding* conception, constructive interpretation is a matter of choosing the interpretation of a given practice that places the practice "in the better light." On the *demanding* conception, by contrast, it is a matter of choosing the interpretation of a given practice that places it in the better light by assigning to the practice the more attractive external normative engine. As I will argue, if we are operating with the *undemanding* conception, the claim that interpretation normally takes the form of constructive interpretation is essentially a truism. With his embrace of the *demanding* conception, however, Dworkin

imports into his theory of interpretation a set of assumptions about what it means for a practice to have a point (or to express a value or principle) that are of questionable validity in the case of a great number of practices, including many of our most important legal practices.

This paper will come in five parts. In parts 1 and 2, I trace how Dworkin frames the “problem” his theory of interpretation is meant to address. As we will see, his primary *explanandum* of concern is what he calls “theoretical disagreement” in the law. However, in order to clarify this phenomenon, he first attempts to elaborate a more general theory of interpretive disagreement as it may occur in any social practice or tradition (whether legal or nonlegal) in order to develop a framework for understanding the legal species of this genus. The name Dworkin gives to this more general theory is “the theory of constructive interpretation.” In parts 3 and 4, I introduce the two conceptions of constructive interpretation operative in Dworkin’s text, where these represent very different kinds of answers to the “problem” he has set out. Finally, in part 5, I argue that, in his embrace of the demanding conception of constructive interpretation, Dworkin exhibits an allegiance to a particular model of ethical and legal theory, one that belongs to the tradition of legal thought represented by figures such as Bentham and Posner (for whom to vindicate a legal practice as being purposive is to see it as having an instrumental point) as opposed to that represented by figures such as Aristotle and Kant (for whom some legal practices stand as canonical examples of practices that exhibit a noninstrumental purposiveness).

I. “THEORETICAL DISAGREEMENT” IN THE LAW

My aim in this part of the paper is to familiarize the reader with the specifically *legal* phenomenon Dworkin sets out to explain (what he calls “theoretical disagreement” in the law). We will look first to how he defines this category of disagreement and then to a series of examples that fit this description.

We speak of Dworkin’s having a “theory of legal interpretation,” and it is appropriate to do so. However, it is important to keep in mind that this theory gets off the ground, not as a response to all and only those aspects of legal practice that one might ordinarily speak of as involving interpretation, but rather as a response to what Dworkin calls “theoretical disagreement” in the law. Dworkin defines “theoretical disagreement” in the law as occurring just when those whose task it is to say what the law is use “different tests” to make this determination. He introduces this idea in the following passage from near the beginning of *Law’s Empire*:

Lawyers and judges seem to disagree very often about the law governing a case: they seem to disagree even about the right tests to use. One judge, proposing one set of tests, says the law favors the school district [in the case of *Brown v. Board of Education*] . . . and another, proposing a different set, that it favors the schoolchildren. . . . If this really is a

third, distinct kind of argument, different both from arguments over historical fact and from moral argument, what kind of argument is it? What is the disagreement about?¹

Dworkin is surely right that the use of different tests to determine what the law holds is a commonplace in legal practice. Indeed, it occurs regularly in a wide variety of branches of the law, from tax law and the law of the seas, to human rights law and the law of contracts. Let us consider three examples of this widespread legal phenomenon. In our first example, the dispute over what is the right test to use to determine the truth of a given legal proposition takes the form of a dispute over what is the formal process necessary for the enactment of a law. (This first example will be fictional. By contrast, the following two examples will involve actual legal controversies.)

ALABAMA SPEED LIMIT

Imagine that there is a proposal in the Alabama state legislature to lower the maximum speed limit for travel on the interstate from what it is now (70 mph) back to what it was in 1987 (55 mph). When this proposal is put to the vote, two-thirds of the legislature votes in favor. Some people now claim that it is a law of the state of Alabama that the maximum speed limit is 55 mph. However, other people contend that the successful bill is not yet a law. In their view, for the bill to become a law, it must not only receive the requisite number of votes in the legislature, it must also be published in the state's official statute book. And, in the meantime, they fully intend to keep driving at speeds up to 70 mph.

Alternatively, theoretical disagreement in the law might take the form of a disagreement over what is the better construal or specification of a given legal standard. The two examples to follow both fit this description. Below we will look at an example that features a provision of the US Constitution. But let us first consider an example that features a provision of the common law of England.

Those who are familiar with *Law's Empire* might recognize the particular common law case I will turn to (namely: *McLoughlin v. O'Brian*) as offering an example of theoretical disagreement in the law as a case that figures in various connections in that book. (Dworkin himself draws upon this case for a number of different purposes, one of these being to provide an example of theoretical disagreement in the law.) For such readers, let me just note in advance that my description of the disagreement at the heart of this case is based on my own reading of the case materials and differs substantially from Dworkin's.²

MCLOUGHLIN V. O'BRIAN

This is a case that was initially decided by a trial court in 1976. It was then taken up four years later by the Court of Appeal and it received its final disposition two years after that in the House of Lords. What I will focus on here is an interpretive disagreement that obtained between, on the one hand, members of the Court of

Appeal and, on the other hand, members of the House of Lords. This disagreement led the latter group of judges to vote to overturn the verdict delivered by the former group of judges.

In the headnote to the opinion delivered by the Court of Appeal, the events that led to Mrs. McLoughlin's original action against Mr. O'Brian are described as follows:

The plaintiff's husband and four children were involved in a road accident at about 4 p.m. on October 19, 1973, when their car was in a collision with a lorry driven by [the defendant]. The plaintiff, who was two miles away at the time, was told of the accident at about 6 p.m. by a neighbor, who took her to the hospital to see her family. There she learnt that her youngest daughter had been killed, and she saw her husband and the other children, and witnessed the nature and extent of their injuries. The plaintiff alleged that the impact of what she had heard and seen caused her severe shock resulting in psychiatric illness.³

When this case comes before the Court of Appeal, a number of factual and legal questions have already been settled. It has been determined by the trial court that (1) the defendant's conduct was negligent, (2) the defendant's negligent conduct caused the road accident that was responsible for the injuries sustained by the plaintiff's family members, and (3) the plaintiff did in fact suffer a genuine case of "nervous shock" as a result of what she heard and saw when she went to the hospital to see her injured family members. The only question before the Court of Appeal is whether the harm Mrs. McLoughlin suffered at the hospital was among the "reasonably foreseeable" consequences of the defendant's negligent conduct.

At the time of this case, it was a long-established feature of English accident law that those found guilty of negligent conduct would be held legally liable for (and would thus have to pay compensation for) only the "reasonably foreseeable" results of that conduct. All parties to this tort case, at all of its stages as it works its way up the hierarchy of the English court system, agree that this is the appropriate standard for assessing the defendant's liability. Between the judges of the Court of Appeal and a contingent of members of the House of Lords, however, there is a significant disagreement as to how this standard is to be interpreted.

The judges of the Court of Appeal begin with the observation that the decided cases in this area display a clear pattern. Injury by shock has been deemed "reasonably foreseeable" only when sustained *at or near the scene* of the accident caused by the defendant's negligent conduct *at the time of the accident or shortly thereafter*. As these judges see it, their duty as judges is to adhere to the specification of the foreseeability standard that is operative in the decided cases. Since what happened to Mrs. McLoughlin did not happen at or near the scene of the accident at the time of the accident or shortly thereafter (rather, it happened at the hospital and some two hours later), their verdict is that she is not entitled to compensation by the defendant.

By contrast, a contingent of members of the House of Lords do not feel constrained to follow this particular pattern in the decided cases. In their view, their duty as judges is to return to the foreseeability standard itself—in all of its

abstraction and without introducing any judicially contrived narrowing of that standard—and to arrive at their own independent judgment as to whether the kind of thing that happened to Mrs. McLoughlin was a reasonably foreseeable result of the kind of negligent conduct the defendant was guilty of. As it happens, each of the judges in this contingent is of the opinion that indeed what happened to Mrs. McLoughlin was among the reasonably foreseeable consequences of the defendant's negligent conduct. Accordingly, they vote to reverse the decision of the Court of Appeal and the defendant is ordered to compensate Mrs. McLoughlin for the nervous injury she sustained at the hospital.⁴

THE SEDITION ACT CONTROVERSY

In the United States, interpretive disagreements in the area of constitutional law tend to garner the lion's share of public attention because they can often touch upon issues of national importance. Let us consider one such disagreement, dating back to a time when the country and its Constitution were still quite young.⁵

By the late eighteenth century, party politics was already well established in the United States and relations between the two parties were characterized by a deep mutual hostility. (The two parties at that time were the Federalists, led by Alexander Hamilton, and the Republicans, led by James Madison and Thomas Jefferson). By 1798, due to recent events in Europe—in particular, the French Revolution and its violent aftermath—this mutual antagonism had built to a fever pitch. The Federalists loathed what they took to be the political ideals embraced by the Republicans (whom they suspected of sympathizing with those responsible for the bloody “mob-rule” in Paris), and vice versa. (For their part, the Republicans saw their Federalist opponents as being overly enamored of the British model of centralized government with power concentrated in the hands of “elites.”) At that time, the Federalists held the greater share of power at the national level. They held the presidency and had a working majority in both houses of Congress. However, they felt themselves to be under assault by a torrent of intemperate criticisms being aimed at them, not only by their Republican opponents in Congress, but also by these politicians’“enablers” in the press. (They regarded one publication, *The Aurora*, edited by Ben Franklin’s grandson, as being particularly vicious and dangerous.)⁶

Such was the tenor of the times when the Federalists managed to push through Congress the Sedition Act of 1798. This act held (in part):

That if any person shall write, print, utter or publish . . . any false, scandalous, and malicious writing . . . against the government of the United States, or either house of the Congress of the United States, or the President of the United States . . . with intent to defame [them], or to bring them [into] contempt or disrepute, [. . .] then such person shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.⁷

The lawfulness of this act was passionately disputed, both when the act was being debated in Congress and after it secured passage. Both parties to this dispute,

that is, both the act's critics and its defenders, accepted the following conditional proposition:

The Sedition Act is lawful only if it is consistent with the First Amendment's requirement that "Congress shall make no law . . . abridging the freedom of . . . the press."

The two sides were sharply divided, however, over how to construe the constitutional provision in question.

Both the Federalists and the Republicans maintained that, in crafting the First Amendment, the "Framers" had intended to put a certain distance between the new American constitutional regime and the traditional English common law system. Their disagreement was over just how great a distance between these two legal systems the Framers had intended to create. It had been a longstanding tradition in England that publishers were legally required to submit to an official censor any material they wanted to publish. If the censor approved the material, the publisher would be granted a license to publish it. If anyone published material without having been granted a license, he was seen to have committed a criminal act for which he could be fined or jailed or both.

On the Federalist view, the purpose of the First Amendment was only to do away with the government's ability to require that a publisher first receive a license before he put any material before the public. On this view, the government would retain the legal authority to punish a publisher were he to publish anything of a seditious nature, that is, were he to publish something that some jury could be convinced was a threat to, or defamatory of, the government.

On the Republican view, by contrast, the Framers meant to deprive the federal government of all of the tools that were wielded under the English common law to suppress speech that was critical of the government, not just the requirement of a license but also the threat of punishment (were published material to be judged seditious). Albert Gallatin, a senator from New York, eloquently expressed the Republican point of view when he said that it was "an insulting evasion" of the Constitution to tell the people that "we claim no power to abridge the liberty of the press," but "if you publish anything against us, we will punish you for it."⁸

The question of the Sedition Act's constitutionality never came before the Supreme Court (which, as it happens, was at that time staffed exclusively by Federalist judges). However, various lower courts treated the act as law and many publishers were successfully prosecuted under it. The Federalist victory was, however, both pyrrhic and short lived. The national election of 1800 was a landslide victory in favor of the Republicans. Large portions of the public had been outraged by what were widely regarded as abusive prosecutions of members of the press, and they responded by voting the Federalists out of office.

With the help of these examples, we should now have a fair grasp of what "theoretical disagreement" in the law is. What we need to look at next is how Dworkin proposes to go about the task of shedding light on this phenomenon. As we will

see, his first step in the prosecution of that task is to zoom out from this topic that is already quite vast to one that is considerably more so.

II. INTERPRETIVE DISAGREEMENT IN LIFE

Dworkin's explanation of "theoretical disagreement" in the law takes the form of first providing an account of the generic phenomenon of interpretive disagreement *per se* as it may occur in any social practice or tradition. Once he has armed himself with such an account, he then goes on to consider the special case of interpretation in the law.⁹ Dworkin calls his account of the generic phenomenon of interpretive disagreement a theory of "constructive interpretation." As he tells us, the theory of constructive interpretation is meant to be valid for "an important set of circumstances that includes theoretical argument in law." What are these circumstances? They are the circumstances that obtain, Dworkin tells us:

when members of particular communities who share practices and traditions make and dispute claims about the best interpretation of these—when they disagree, that is, about what some tradition or practice actually requires.¹⁰

Disagreements that fit this description are certainly common in the law. But they are also extremely common outside of the law—that is, in connection with nonlegal practices and traditions. Indeed, they are a pervasive feature of our lives. Here is a small sample of the sorts of questions that tend to elicit the relevant kind of interpretive disagreement: What is required of a (good) parent/mother/godfather/hospice worker/zookeeper? What would a (good) Christian/Jew/Muslim do in this situation? Can a film count as a (good) western if no guns appear at any point in the film?¹¹

Let me offer a couple of comparatively more fully developed examples of interpretive disputes that occur in the context of one or another nonlegal practice. Our first example concerns the practice of marriage (where what is at issue is not the legal institution of marriage).

INFIDELITY

Imagine that there is a couple living in Paris in the 1950s. We can call them "Jean-Paul" and "Simone."¹² They think of themselves as being married, despite the fact that they have not gone through any formal legal process to gain that status. As it emerges, however, they have different conceptions or interpretations of marriage, that is, different understandings of what marriage, properly understood, requires. For Simone, marriage requires, among other things, sexual fidelity. Hence, when she discovers Jean-Paul's many infidelities (when she reads some of his correspondence), she regards his behavior as a betrayal of the marriage. When they discuss the matter, however, Jean-Paul is unrepentant. He argues that monogamy is a misguided "bourgeois" value and that the higher conception of marriage is one that repudiates it.

In *Law's Empire*, Dworkin makes heavy use of an extended example involving a dispute about the demands of courtesy. (This extended example is an important vehicle for the exposition of his theory of constructive interpretation.) We will look at how Dworkin fashions his courtesy example below. Here, I present my own example of a dispute about the demands of courtesy.

COURTESY

The following is an exchange between a man, Frank, and his wife, Cindy:

FRANK: I have to say, Hans was the perfect guest. He was just so supremely courteous.

CINDY: Why do you say that?

FRANK: Well, for one thing, when I took him down to the faculty club and introduced him around, he remembered the name of every person he was introduced to. We even laughed a bit over his charming habit of referring to people using their formal title. He would say things like: "as Professor Stein said" or "the answer to Dean Rockefeller's question is . . ." And, then, he's just been gone a little over a week and I've already received a hand-written 'thank-you' note from him saying how honored he was to have the opportunity to address us and suggesting that I come to speak at his department next fall.

CINDY: Uh-huh. I guess you could say he was courteous in a sort of Prussian, status-tracking, form-regarding way. But, in the ways that really matter, he wasn't courteous at all, quite the opposite. Don't you remember that he just started in instructing me on *how* he liked his laundry done, when he had never even asked me if I were willing to do his laundry in the first place? And then don't you remember how he figured out that it would be inconvenient for him to fly on the day he had originally planned. So he just changed his ticket, without consulting us, and as a result I had to find someone else to teach my class so I could drive him to the airport (since he had made it clear that it would make him nervous to the point of apoplexy if he had to take a cab).

It seems clear that our two speakers here, Frank and Cindy, are operating with rather different understandings of what (true) courtesy requires. If we had to try to summarize how their respective interpretations differ, we might say that, for Frank, courtesy is primarily a matter of adhering to certain prescribed forms, whereas for Cindy, it is primarily a matter of showing consideration for others in whatever way is appropriate to the context you find yourself in.

Taken together, these first two sections of the paper are designed to track how Dworkin frames the "problem" his theory of interpretation is meant to address. As we have seen, this is the problem of providing a fully general theory (that is, a theory that applies to all practices of any description, whether they be legal or non-legal) of how participants in a shared practice can disagree over what the practice in question really requires.

III. THE UNDEMANDING CONCEPTION OF CONSTRUCTIVE INTERPRETATION

Dworkin's answer to the "problem" of interpretive disagreement is given by his famous theory of "constructive interpretation." The exposition of this theory is an elaborate matter; it unfolds over the course of a lengthy chapter of *Law's Empire*. However, Dworkin offers a capsule summary of the theory in the following passage:

[C]onstructive interpretation is a matter of imposing purpose on . . . [a] practice in order to make of it the best possible example of the form or genre to which it is taken to belong. . . . A participant interpreting a social practice, according to that view, proposes value for the practice by describing some scheme of interests or goals or principles the practice can be taken to serve or express or exemplify. Very often, perhaps even typically, the raw behavioral data of the practice—what people do in what circumstances—will underdetermine the ascription of value: those data will be consistent, that is, with different and competing ascriptions. [.] If the raw data do not discriminate between these competing interpretations, each interpreter's choice must reflect his view of which interpretation proposes the most value for the practice—which one shows it in the better light, all things considered.¹³

When commentators undertake to identify the core commitments of Dworkin's theory of constructive interpretation, they typically reproduce this passage (or some portion of it) without comment, as if its meaning were simply transparent. As I will argue, however, the passage—and the entire theory it epitomizes—invites two very different readings.

In the remainder of this part of the paper, I will lay out what I will call the "naïve reading" of Dworkin's theory of constructive interpretation. Drawing on Dworkin's own language, we might summarize what this reading comes to in the following way:

Very often, a practice will be susceptible of more than one interpretation. When this is so, participants in the practice can be said to face a choice as to which interpretation they will embrace. What governs this choice, in the case of each interpreter, is his or her own view as to which interpretation of the practice represents its "higher form"—in other words, which interpretation of the practice "shows it in the better light."

Though such a conception of constructive interpretation in one way might seem to make heavy use of the notion of form—it insists that it is each interpreter's judgment as to what counts as the higher form of the practice that will guide his choice of interpretation—note that in another sense it makes no assumptions whatsoever as to the form the different competing interpretations themselves will take.¹⁴ On this reading, an interpretation represents one of multiple possible forms of a practice. The interpreter is said to choose what he regards as the higher form, that is, the interpretation which makes the practice good of its kind. However, there are no requirements in play that constrain what is to count as a possible interpretation.

There is no template that would dictate that an interpretation must have such-and-such features. (As we will see below, this neutrality is absent on the second reading of Dworkin's theory.)

What the theory speaks to, on this first reading, is just the question of how, or on what basis, the "choice" between competing interpretations is made. What governs this choice, according to the theory, is the individual interpreter's own convictions as to which of the competing interpretations of a given practice represents its "higher form."¹⁵ Hence, what constructive interpretation contrasts with is the "choice" of an interpretation of a contested practice on some basis other than the fact that one regards a given interpretation as representing the higher form of the practice. For example, one might deliberately embrace the interpretation of a given practice that one regards as representing the lower, less valuable, form of the practice. For instance, someone who deplores the practice of marriage might argue that, properly understood, marriage requires a certain kind of gendered division of labor (with the woman pursuing the "domestic arts" and the man pursuing a paid profession). In the case we are imagining, she does not favor this interpretation because in her view it represents a higher form of marriage. Rather, she favors it because she thinks it reveals an ugly truth about marriage, one which, when exposed, will help to kill off a pernicious institution. (We might call this "destructive interpretation.") Indeed, people can favor one interpretation over its rivals for an endless variety of reasons. For instance, an attorney might be guided in her choice of interpretation, not by the question: "What is the higher form of the legal practice at issue in the instant case?" but rather by the question: "Which interpretation of this practice favors my client?" Or a judge might be guided in her choice of interpretation by the question: "Which resolution of this interpretive question is more likely to lead to my reelection?" (We might say that these are instances of "self-interested" interpretation.)

I will not pursue this line of thought very far here, but, for my own part, I think there is a good argument to be made for the claim that the attitude that is proper to constructive interpretation (on this reading)—namely, the attitude of seeking, where possible (that is, where interpretive questions arise) to make a given practice good of its kind—is something like the default (or normal) attitude that we inhabit vis-à-vis practices to which we are committed. It may also be the case that this "constructive" attitude enjoys certain kinds of logical priority over other modes of interpretation (such as destructive or self-interested interpretation). For instance, it seems plausible that you have to have constructive interpretation in order to have a viable practice at all, so that there is a sense in which constructive interpretation stands as a condition of the possibility of the other modes of interpretation.¹⁶ Also, it may be the case that in many instances an interpretive claim (of the form, what practice P requires is such and such) will only gain a hearing if it purports to be an interpretation that someone could make in the constructive mode, as a genuine effort to make the practice good of its kind. For instance, in the *McLoughlin* case, an attorney for the truck-driver defendant could not argue

to the judges that they must embrace a particular specification of the “reasonable foreseeability” standard simply because this is the interpretation of negligence law that favors his client. Rather, he must seek to show that this is the specification of that standard that represents the higher form of negligence law itself (as compared with the forms of negligence law represented by competing interpretations).

Setting such questions aside, what bears emphasizing, if we are to get into focus the equivocation in Dworkin’s theory of constructive interpretation, is just how inclusive, how irenic, the theory is on the naïve reading. As indicated above, on this reading, the theory does not make any assumptions as to the form the competing interpretations of a practice must take. Recall that Dworkin’s original explanandum is ‘when people disagree as to what the law holds because they employ different tests to make this determination’. As we have seen, he calls this kind of disagreement “theoretical disagreement” in the law. In order to carve out the subject matter of his theory of constructive interpretation, Dworkin subsumes theoretical disagreement in the law within the much larger category of ‘when people disagree as to what any given practice requires, when properly understood’. On the naïve reading of Dworkin, interpretations themselves will take whatever forms the members of this more inclusive category of disagreement take. (Such disagreements just are “interpretive disagreements.”) A survey of the phenomena would no doubt reveal that disagreements of this kind take a variety of forms. Two of the forms commonly encountered are these: (1) cases in which there is disagreement as to whether a certain rule has authority for the practice at all (this describes our two examples Alabama Speed Limit and Infidelity),¹⁷ and (2) cases in which there is agreement that a certain rule is authoritative for the practice, but there is disagreement over what criteria to go by in determining what counts as conformity to the rule (this describes our two examples *McLoughlin* and the Sedition Act Controversy).¹⁸ I mention this diversity of forms primarily so that we will be in a position to notice what is distinctive about the particular form of interpretive disagreement that Dworkin tends to gravitate to.

The conception of constructive interpretation that emerges from the naïve reading of Dworkin’s theory can be said to be one that is relatively undemanding. On this reading, constructive interpretation is essentially a matter of “choosing” a side in an interpretive disagreement on the basis of one’s own view as to which interpretation represents the higher form of the practice. Judgments of this kind are utterly familiar and Dworkin’s invocation of them lends his theory a certain intuitive appeal. However, there is another conception of constructive interpretation that leaves a heavy footprint in Dworkin’s text, one that is considerably more demanding in the sense that it has a more complex definition. In particular, it makes certain assumptions as to the form the competing interpretations of a practice will take. I turn now to the task of laying out these assumptions. Later in the paper, in part 5, I will argue that these assumptions have the effect of undercutting Dworkin’s aim of providing a fully general model of interpretive disagreement, that is, a model that is valid for all social practices and traditions.

IV. THE DEMANDING CONCEPTION OF CONSTRUCTIVE INTERPRETATION

On Dworkin's preferred model of how interpretations themselves are constructed, the interpreter first climbs a ladder of conceptual ascent. That is, she settles on an answer to the question: What more general value or principle or capacity finds expression in the practice under interpretation? (For example, Dworkin will describe one exercise in interpretation as getting underway with the observation that the practice of courtesy is concerned with the value of respect. He will describe another as getting underway with the observation that negligence law is governed by the principle that, in its "system of property," a government must treat its citizens as equals. And he will describe a third as beginning with the observation that chess is an expression of the intellect.)¹⁹ The interpreter then embraces one or another *transcendent* theory of that more general value or principle or capacity, and it is this theory that is seen as determining her view as to what the original practice requires. As I am defining the term here, a "transcendent" theory of a value or principle or capacity is one that presupposes that it is a matter of indifference which particular practices embody or express the value or principle or capacity in question. On this model, then, in order to arrive at a view as to what a particular practice really requires, one identifies its underlying value or principle or capacity and then asks oneself what does that value or principle or capacity really require (just as such, and not as expressed or instantiated in any particular practice)?

One place where Dworkin's attachment to this model is on display is in the context of the main example he uses to drive the exposition of his theory of constructive interpretation. In this example, Dworkin invites the reader to imagine that disagreement has broken out in a given community over what the practice of courtesy really requires.²⁰ The members of this community are said to have divergent interpretations of the practice of courtesy. According to Dworkin's elaboration of the example, however, their disagreement is really about "the correct interpretation of the idea of respect." As Dworkin characterizes the example:

[T]he ordinary debates about courtesy in the imaginary community [...] have the following treelike structure. People by and large agree about the most general and abstract propositions about courtesy, which form the trunk of the tree, but they disagree about more concrete refinements or subinterpretations of these abstract propositions, about branches of the tree. For example, at a certain stage in the development of the practice, everyone agrees that courtesy, described most abstractly, is a matter of respect. But there is a major division about the correct interpretation of the idea of respect. One party thinks respect, properly understood, should be shown to people of a certain rank or group more or less automatically, while the other thinks respect should be earned person by person. The first of these parties subdivides further about which ranks or groups are entitled to respect; the second subdivides about what acts earn respect. And so on into further subdivisions of opinion.²¹

In Dworkin's imaginary example, those who disagree about what the practice of courtesy requires disagree because they embrace divergent transcendent theories of respect. (These are theories, each of which purports to be valid for all expressions of respect, regardless of the particular practice within which these expressions may occur.) Thus, for example, if someone believes that it is a rule of courtesy that men should open doors for women, Dworkin's discussion invites us to understand the ground of such a belief in the following way: This is because he is possessed of a transcendent theory of respect that holds, among other things, that (1) marks of respect should be shown to persons not on the basis of individual achievement but, rather, on the basis of group membership and (2) women are among the groups entitled to respect. Similarly, if someone else disagrees about what courtesy requires, this is because she holds a transcendent theory of respect that has an incompatible set of commitments.

As a model of interpretive disagreement in general, this model faces a number of different obstacles. What about practices that express more than one fundamental value, such as chess—which is so often described as being a *game* of the *intellect*, suggesting that it should embody the virtues of a good game as well as those of an activity that disciplines the intellect? What about legal practices that are governed, not just by multiple values, but by values that are (often) in competition with one another? For present purposes, I want simply to bracket the concerns raised by these questions. This will allow us to focus on what I regard as a deeper, more intractable, problem with Dworkin's preferred model of interpretation, where this is a problem that attaches even to its “ideal case,” that is, a case of interpretive disagreement where the practice in question can plausibly be said to have a single, unified, underlying value.

The problem that lies at the core of Dworkin's preferred model of how the competing interpretations of a practice are themselves constructed is that it operates on the assumption that whenever someone holds a position of the form:

the better theory (or specification of the demands) of the value V as expressed in the context of practice P is . . .

this position is determined by a commitment of the form:

the better transcendent theory of V is . . .

In fact, however, this assumption is unwarranted. Very often, what one takes to be the correct answer to a question of the form “What does the value V require in the context of practice P ? ” will depend crucially upon the identity and character of the specific practice in question. For an illustration of this point, we can draw upon Dworkin's own imaginary example.

Suppose someone, we can call him Luke, is of the view that everyone deserves a decent burial, regardless of who they are or what they have done. (This is, of course, a common view. One place we find it explicitly thematized is in the western. How many scenes of climactic violence are followed by scenes in which the hero undertakes, at considerable cost to himself, to bury the man who has just

tried to kill him?) We can say that, in this context, Luke is of the view that respect is owed, not on the basis of individual achievement, but rather on the basis of group membership (where the relevant group is presumably that of the human race). If the assumption at the heart of Dworkin's preferred model were valid, then it would necessarily be the case that Luke's views about respect in the context of burial flow from a commitment to the effect that the correct transcendent theory of respect holds that respect is owed, not on the basis of individual achievement, but rather on the basis of group membership. In fact, however, it is hugely implausible that anyone should be possessed of a transcendent theory of respect that contains a commitment (either way) on this question (namely, the question: what is *the correct* basis for respect, individual achievement or group membership?). On this question, our views naturally divide across practices. They are, in this sense, practice-sensitive. For example, a person might hold that, for a specific range of practices or contexts, marks of respect are owed on the basis of group membership. (Think here of the respect owed to parents by their children, or the respect owed to officers in the military by those that serve under them.) But she could also hold, simultaneously and without inconsistency, that, for a different range of practices, marks of respect can only be earned on the basis of individual achievement. (Think here of the awarding of academic prizes or medals of valor.) As these examples suggest, there may also be a breakdown across practices of the other axes of differentiation that feature in Dworkin's "tree of interpretive disputes." For instance, someone might hold that in one context marks of respect should be awarded for one kind of achievement (say, scholarly excellence), whereas in another context such marks should be reserved for a wholly different kind of achievement (say, killing enemy soldiers).

As we can see from this example, an abstract value or principle can be subject to widely differing specifications (or elaborations of its requirements) depending upon the context or practice in which it finds expression. Indeed, it will sometimes be the case that, for a given interpreter, what counts as the correct specification in one context is just the *reverse* of what counts as the correct specification in another context. (We see this in the preceding example with respect to the question: Should respect be granted on the basis of group membership or should it be granted on the opposite basis: namely, that of individual achievement?) Let us consider an additional example where this kind of antithetical specification across practices can be seen to occur.

Consider the principle that in its system of property a government must treat its citizens as equals. (In his interpretation of negligence law, Dworkin first identifies this principle as the principle that underlies that body of law. He then sets about testing the merits of various transcendent theories of this principle.) There are certain questions we might confront about what kind of practical constraint this principle represents where it is arguable that the correct answer for one legal context is precisely the opposite of that which holds for a different legal context. Here is one such question: Is it consistent with this principle that a government's

treatment of its citizens should be predicated upon, or vary according to, their respective wealth? A strong argument can be made for the claim that in some legal contexts the answer is yes, the government can, consistent with the requirement that it treat its citizens as equals, treat citizens differently according to their respective wealth; in other legal contexts, however, the answer is no because to employ a “wealth-test” in one of these contexts is to violate the requirement of equal treatment.

The principle that a government must treat its citizens as equals is violated when citizens are subjected to differential treatment on an arbitrary basis. However, what counts as an arbitrary basis for the determination of our rights and duties in one legal context may count as a perfectly legitimate basis in a different legal context. For example, most people would think that for the purpose of setting tax policy it is perfectly legitimate for the government to use wealth as a factor in determining its citizens’ respective tax burdens (such that, for instance, those with greater wealth would pay more in taxes). (Ditto for a host of other legislative tasks such as determining access to food stamps or subsidized housing.) By contrast, most people would think that if the government were to make a citizen’s right to marry contingent upon his or her wealth (such that, for instance, only those with assets valued at a minimum of \$50,000 could legally marry), this would be for the government to extend or withhold that right on the basis of what is, for this purpose, an extraneous factor. Thus, to allow only the sufficiently wealthy to marry would be to violate the principle that the government must treat its citizens as equals. (Ditto for a host of other legal rights and privileges, such as the right to vote or the right to attend public school. In these contexts, most people would think, wealth is an excluded, or impermissible, factor.)

Let us now revisit the terms of Dworkin’s preferred model of constructive interpretation. On this model, an interpreter’s position on any question that may arise as to what a given practice (such as courtesy) requires is given by her preferred transcendent theory of the value (such as respect) she takes to underlie that practice. Her interpretive task is thus to explore the merits of the competing transcendent theories of that value and to select the one she finds most appealing. It is in the problem space defined by these competing transcendent theories that she is to exercise her various capacities for discrimination, evaluation, and choice. (Dworkin repeatedly suggests that philosophy will play a special role here, in delineating the alternatives and making clear their comparative merits.)

What this model envisions is a theory of a general value (such as respect) that is both transcendent, or practice-blind, and also fully practice-directive, meaning that it can settle any question that might arise as to what the value in question requires in the practice under interpretation. On reflection, it should be clear that, for most values, the model is simply inapplicable for there can be no theory of the value that answers to that description. As Dworkin recognizes, the question “what does value V require?” can be brought to bear at a number of different levels in the articulation of a practice, that is, at the core of the practice (as potentially informing

its most fundamental commitments), at its periphery (as potentially informing matters of comparative detail), and at any level in between. As I would argue, with a few notable exceptions, virtually any abstract value we can think of will be found to display some degree of practice-sensitivity. Somewhere along the line, as one progresses from core to detail in all of the various practices within the value's domain, the value will be seen to call for different specifications in the context of different practices. Whenever there is any degree of practice-sensitivity, however, the terms of the model cannot be satisfied. In all such cases, there will simply be no theory of this value that is both practice-indifferent and fully practice-directive.

Moreover, for many values, a split will occur very early on in this kind of progression. In other words, practice-sensitivity will show up with regard to some of the logically most basic questions concerning the normative profile of the various subject practices. In cases of this kind, any theory of the value that is genuinely valid across its entire domain (as transcendent theory purports to be) will of necessity be highly abstract or formal. For it must be silent on, or prescind from, any question that would be answered differently in the context of different practices. Where we would expect this kind of early divergence is precisely with respect to the sorts of values Dworkin likes to conjure with, where these are values (principles and capacities)—such as “respect,” “the principle of equality,” and “the intellect”—that subtend a large number of practices with very different characters.

V. TWO MODELS OF ETHICAL AND LEGAL THEORY

By embracing the demanding conception of constructive interpretation, Dworkin is aligning himself with a certain philosophical tradition. For the participants in this tradition, the aim of theory is to redeem a practice from the threat of vacuity (or of being a matter of blind prejudice or unreasoned habit) by showing that it stands in a means-end relation to some principle that can serve as an external normative engine for the practice in the sense that it is fully adequate to determine what counts as correct action and judgment within the space of the practice (at all levels of generality). For ease of reference, I will call this the “broadly Utilitarian,” or “Benthamite,” tradition in philosophy.

In classical Utilitarianism, what plays the part of the external normative engine is, of course, the principle of utility (or the greatest happiness principle). Thus, for instance, on the Utilitarian account of the practice of promising, the correct answer to any question that may arise within the space of this practice can be determined by reference to the principle of utility. Should X keep her promise to Y? If and only if that is the course of action that most effectively promotes the goal of maximizing utility. Are promises made under duress binding? If and only if that is the rule that most effectively promotes the goal of maximizing utility. And so forth.

In the work of Richard Posner (who famously adapts the Utilitarian approach, applying it to a wide range of practices but with a special focus on legal practices),

the part of the external normative engine is played by the principle of wealth maximization.²² Thus, for instance, on Posner's theory of negligence law, the correct answer to any question that may arise within this practice can be determined by reference to the principle of wealth maximization. Should the defendant truck driver in the *McLoughlin* case be required to compensate Mrs. McLoughlin for her injuries? If and only if that is the course of action that most effectively promotes the goal of wealth maximization. In cases of negligent driving, is the defendant legally liable only for injuries sustained at or near scene of the accident or does her liability extend to injuries sustained at some considerable spatial remove? The correct rule is the one that most effectively advances the goal of wealth maximization. And so forth.

On the demanding conception of constructive interpretation, for any given practice, what plays the part of the external normative engine is one or another transcendent theory of its underlying value, where the "choice" or assignment of engine is to be made on the basis of the two criteria of fit and justification.²³ Thus, for instance, in chapter 8 of *Law's Empire*, Dworkin stages a competition between rival "conceptions of equality" in order to determine which of these should be recognized as being the true engine of negligence law, in place of Posner's principle of wealth maximization (which Dworkin finds to be wanting on the dimension of justification). Among the candidate engines for negligence law that Dworkin considers are such views as Libertarianism, Utilitarianism, and his own signature theory of "resource equality." Unsurprisingly, it is the theory of resource equality that emerges as the winner of this competition.

It is a striking feature of explanatory projects belonging to the Benthamite tradition that, while they find their original motivation in the perception that there is some serious defect or deficiency affecting (some target range of) the concepts and principles that figure in our ordinary deliberations (hence the perceived need for an external normative engine), typically they come around to the conclusion that, in practice, we can do no better than to rely upon these same old concepts and principles. The arguments by which they achieve this turn can vary, but one of the most popular is that given by the following line of reasoning:

The theory tells us what kind of empirical information is decisive for identifying the correct course of action. Ordinarily, however, we are not in possession of the relevant information. Moreover, we can really make a mess of things if we attempt to reason using the correct principles ("correct" by the lights of the theory) but in the absence of adequate information. Happily, however, the theory can endorse our continued use of the familiar folk principles because, as it turns out, these are the best means available to reasoners like us (with limited information, limited time, etc.) for promoting the end embraced by the theory.

The *locus classicus* for this line of reasoning is, of course, Utilitarianism. It is the standard Utilitarian story for why we should continue to obey principles such as the one that enjoins us to keep our promises. But we find the same line of reasoning in both Posner and Dworkin (though each will add different refinements, as befits

their respective Benthamite projects). For instance, where Posner will observe that judges are not trained as economists, Dworkin will observe that it would be unwise to encourage people to speculate as to whether other people have more or less than they should have, as measured by the ideal of resource equality. In this way, each takes his own path to the conclusion that we should just continue to rely upon the familiar concepts and principles of tort law, what Dworkin (tellingly) refers to as “the various doctrines about reasonableness, contributory negligence, and *the other baggage of tort law*.²⁴

We find a very different model of ethical and legal theory in the philosophical tradition that dates back to Aristotle. Aristotle’s project in the *Nicomachean Ethics* was to develop a taxonomy of ethical categories and to show where different acts and practices fall within this taxonomy. (This project is taken up and furthered by both Aquinas and Kant, each of whom will elaborate the Aristotelian categories in their own preferred idiom.) In recent years, legal scholars have tapped into the resources of this tradition in order to shed light on the fundamental character of various areas of modern legal practice.

The kind of understanding the Aristotelian taxonomy seeks to confer is the kind we have when we grasp what are the parts of a thing and how are these parts related to the whole. Accordingly, what the taxonomy sets out is a system of part/whole or species/genus relations. Aristotle begins his discussion of justice by identifying justice itself as a distinct part of virtue as a whole.²⁵ He then observes a distinction between two different species of justice, namely: “distributive justice” (which concerns justice in the distribution of burdens and benefits) and “corrective justice” (which concerns justice in “transactions”). “Distributive justice” is a matter of getting (only) one’s fair share, whether of goods held in common (such as grazing rights) or of responsibilities toward the political community (such as the requirement to pay taxes or the requirement to perform military service). By contrast, “corrective justice” is concerned with what justice demands when two parties are bound together in a particular way, namely: where what one party has done constitutes an injury to the other.²⁶

Aristotle divides “corrective justice” into two parts. In one part, the parties are bound together by an agreement (such as an agreement to sell or to rent). In the other part, the element of prior agreement is absent, the parties are in this sense “strangers.” As a number of contemporary legal scholars have argued, the legal practice that corresponds to the former (agreement-involving) part of corrective justice is contract law. The legal practice that corresponds to the latter part of corrective justice (the part that concerns injury to a “stranger”) is tort law.²⁷

Tort law as a whole is commonly divided into two parts: “intentional torts” and “unintentional (or accidental) torts.” Finally, there are two categories of accidental torts: negligence torts and strict liability torts. Strict liability torts concern cases in which injury is said to stem from one or another form of “abnormally dangerous” activity (such as the keeping of wild animals). Negligence torts concern the standard case of accidental injury, that is, the case in which one person injures

another (not while engaged in a “high-risk” activity but) just in the course of going about the business of life.

On the basis of this set of classifications, we can say that the underlying principle of negligence law is the principle of corrective justice. This principle can be stated as follows:

If one party's conduct constitutes an injury to the other party—that is, if it counts as a violation of the other party's rights—then the “doer” (or author) of the injury must make the sufferer of the injury whole by compensating her for the losses the injury has imposed upon her.

The familiar provisions of negligence law can then be seen as rendering this principle more determinate as befits its application in the specific ethical/legal context at issue, namely, that of standard cases of accidental harm. For instance, the “reasonable man” standard and the requirement of “reasonable foreseeability” set out (in very broad terms) the conditions under which conduct resulting in accidental harm amounts to a violation of rights. What I am entitled to demand of my neighbor (as a matter of legally enforceable rights) is just that he take reasonable precautions to prevent forms of harm that are reasonably foreseeable. For instance, say my neighbor operates a bakery next to my home. When he runs the automatic mixers, the noise disturbs me. This harm is fully foreseeable, but I am not entitled to have him take every possible precaution (such as installing expensive sound-proof walls, or getting rid of the automatic mixers and doing everything by hand) to prevent it, only those precautions that a *reasonable person* would take (for instance, only running the mixers at certain predictable times, and never at night). Similarly, I can't demand that he conduct himself so as to protect me from all possible harm, only those forms of harm that are *reasonably foreseeable*. Suppose that in the normal course of business bakeries emit a certain substance into the air. I develop a skin rash as an allergic reaction to this substance, but there are no previously known cases of any sort of adverse reaction to it. In this case, I cannot claim that my neighbor's conduct was a violation of my legal rights since what happened to me was not among the reasonably foreseeable consequences of his conduct.

Of course, these familiar provisions of negligence law, which serve to introduce further content into the principle of corrective justice, are themselves highly abstract. This makes for the possibility of the kind of interpretive disagreement we encountered in the *McLoughlin* case, where one group of judges was ready to accept the further specification of the “reasonable foreseeability” standard found in previous cases (in these cases, for harm to count as “foreseeable” it had to occur at or near the scene of an accident, and at the time of the accident or immediately thereafter), and another group of judges rejected this attempt to define “foreseeability” more narrowly.

On the undemanding conception of constructive interpretation, when we disagree as to what a given practice really requires, this is because we disagree as to which specification of its requirements places the practice in the better light—that is, we disagree as to which of the competing interpretations represents the

higher form of the practice or makes it good of its kind. Such disagreements are, of course, utterly commonplace. Some will be of comparatively little moment. Others will have considerably higher stakes. In some instances, it will appear to at least some parties to the disagreement that a proposed interpretation is not just a less desirable form of a practice, it is at odds with the very point of the practice. (Surely, some would have this view of our fictional Jean-Paul's claim that the norm of sexual fidelity should be dropped from the practice of marriage. Similarly, various legal scholars have argued that it would be inconsistent with the point of tort law to recognize a "duty to rescue.")

In gravitating to the demanding conception of constructive interpretation, Dworkin incorporates into his theory of interpretation the Benthamite demand that, on pain of being revealed to be a matter of blind habit or unreasoned superstition, a practice must be shown to have a point in a very particular sense. It must be shown to stand in a means-end relation to some goal or principle that serves as its external normative engine. As I would argue, in the case of a great many practices (including such practices as friendship and marriage), this Benthamite demand for an instrumental point is spurious. It is demonstratively so in the case of the many legal practices that serve to embody the principle of corrective justice. For these practices, we can say that their point is to bring this principle to bear on a specific category of cases, where the different categories represent the different ways in which private parties can harm one another (i.e., through carelessness, engaging in inherently dangerous activities, failure to honor an agreement, etc.).

NOTES

1. *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), 3–4. Of course, Dworkin takes a special interest in those cases in which judges (or other participants in a legal system) not only (1) use different tests to resolve a legal case, but also (2) take themselves, in so doing, to be determining what the law already is. (Dworkin favors the kinds of cases that involve both of these elements because he thinks they present a special kind of challenge to the legal positivist, who must take the position that in all such cases the judges' self-understanding must be mistaken.) However, it seems clear that Dworkin means to include within the category of "theoretical disagreement" in the law not only cases which involve (2), but also those which involve only (1).
2. On Dworkin's description, the issue dividing the judges in this case is that of "the proper role of considerations of policy in deciding what result parties to a lawsuit are entitled to have" (*Law's Empire*, 29). In my view, this is a very slippery handle by means of which to try to get hold of the real differences of opinion in this case. The problem is that, while judges on both sides of the disagreement do invoke the language of "policy" to express their views, there are such large and consequential differences among the judges as to what each means by "policy" that to rely on this language to summarize the case, without marking these differences of usage, is more likely to conceal than it is to reveal the actual point of contention.
3. [1981] Q.B. 599.
4. In defense of their preferred "test," the judges of the Court of Appeal emphasize the desirability of certainty in the law. It is a virtue in the law, they argue, when its content is well defined (so that citizens know just what is expected of them) and also stable. By contrast, in defense of their preferred "test," the members of the House of Lords emphasize the need for flexibility in the law, especially where it touches upon a region of human affairs that is itself dynamic, either in the

- sense that material conditions in that region are evolving or in the sense that our thinking about the relevant human affairs is evolving. (In the present case, several members of the House of Lords argue that what accounts for the particular pattern in the decided cases which their counterparts in the lower court want to treat as authoritative is an outmoded set of attitudes which are in fact prejudicial against those who suffer nervous shock.)
5. My account of the Sedition Act controversy and its historical context is based upon the discussion of these matters found in Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (Norton, 2004).
 6. Stone, *Perilous Times*, 35.
 7. An Act for the Punishment of Certain Crimes against the United States, 5th Cong. 2nd Sess., ch. 74 (1798). (As cited in Stone, *Perilous Times*, 36.)
 8. As quoted in Stone, *Perilous Times*, 41.
 9. In this paper, I am concerned to bring out an equivocation found in the first stage of the overall theory, that is, in the general account of interpretation. The central equivocation at this stage can be said to be about what it means to see a practice as being purposive. I would just mention, however, that I think there are also important equivocations that occur in the second stage of the theory, that is, the stage that purports to say what is distinctive of interpretation in the law. One of these concerns what it means to say that a legal decision is guided by considerations of principle (as opposed to, say, being arbitrary or guided by considerations of policy).
 10. *Law's Empire*, 46.
 11. As these examples suggest, different people, or groups of people, can give different answers to these sorts of questions (that is, questions which call for an interpretation of a given practice or tradition), but the different answers might also come from the same person (i.e., she might embrace different answers at different times, or simply consider different answers before settling on the one which carries conviction for her (for now)).
 12. While these two figures are *loosely* modeled on Jean-Paul Sartre and Simone de Beauvoir, I do not mean to imply that the scenario I sketch here is a faithful rendering of how these two historical individuals actually got into the particular human mess they found their way into.
 13. *Law's Empire*, 52.
 14. What I mean to say here is that, on the present reading, the theory of constructive interpretation introduces no new assumptions about the form an interpretation must take. It does, however, inherit from Dworkin's framing of the problem the theory is meant to address (that is, the problem of "theoretical disagreement" in the law as subsumed within the larger category of disagreement over what a practice really requires) a certain conception of what an interpretation of a practice is, namely: one among competing views as to what, properly understood, the practice requires.
 15. Presumably it would be in line with Dworkin's commitments in this area to say that considerations as to what would make a practice good of its kind can play a role, not just in determining which of the available interpretations of a practice one will choose, but also in coming up with possible interpretations in the first place (i.e., populating the list of available interpretations, prior to any act of "choosing" among them).
 16. I am indebted to Martin J. Stone for conversation on this point.
 17. In the former case, the disagreement is over whether in order to become a law a bill must first be published in the official record. In the latter case, the disagreement is over whether marriage requires sexual fidelity.
 18. The former case centers on the question: what counts as "reasonable foreseeability"? The latter centers on the question: under what conditions is a statute at odds with the constitutional guarantee of "freedom of the press"?
 19. The first two examples are from *Law's Empire*. The third is from the essay "Hard Cases" (in *Taking Rights Seriously* [Cambridge, MA: Harvard University Press, 1977]), where Dworkin offers an early version of the theory that will receive its mature formulation in *Law's Empire*. (Dworkin's theory of constructive interpretation continues to be an important weight-bearing element of his thought in a number of the many publications that succeed *Law's Empire*. In these later works, however, Dworkin is content to stand by the exposition of the view offered in that book. Indeed,

- in the later works, rather than rehearsing the view in any detail or reconstructing it in a new way, he will often simply refer his readers to the relevant pages of *Law's Empire*. See, for example, *Justice in Robes* [Cambridge, MA: Harvard University Press, 2006], 52 n. 5.)
20. Dworkin first introduces his courtesy example at *Law's Empire*, 47. The example then resurfaces repeatedly as Dworkin further elaborates his theory of constructive interpretation. One reason I have presented my own example of a case of interpretive disagreement in the context of the practice of courtesy (back in part 2) is because the contrast between my example and that provided by Dworkin can help to bring into view what is demanding about his demanding conception of constructive interpretation.
21. *Law's Empire*, 70.
22. See William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law* (Cambridge, MA: Harvard University Press, 2013), and Richard A. Posner, *The Economic Analysis of Law* (Aspen Publishers, 2011).
23. Dworkin introduces these criteria at *Law's Empire*, 66.
24. *Law's Empire*, 308. (My emphasis.)
25. For Aristotle's discussion of justice and its divisions, see especially Book V of the *Nicomachean Ethics*.
26. While their formal definitions can sound rather ponderous or technical, what distributive and corrective justice represent are just basic forms of fairness, each of which has immediate intuitive appeal. Even very young children are known to petition their parents seeking these forms of justice. A demand for distributive justice might sound like this: "You gave him one. Where is mine?" And a demand for corrective justice might sound like this: "She took mine. Make her give it back."
27. See, in particular, Ernest J. Weinrib, *The Idea of Private Law* (Oxford: Oxford University Press, 2012); Martin J. Stone, "The Significance of Doing and Suffering," in *Philosophy and the Law of Torts*, ed. Gerald J. Postema (Cambridge: Cambridge University Press, 2001); and Arthur Ripstein, *Private Wrongs* (Cambridge, MA: Harvard University Press, 2016.) I am indebted to these authors, not just for their analyses of particular bodies of law, but, more fundamentally, for their (different ways of) developing the theme that certain bodies of law can be understood as exhibiting a non-instrumental purposiveness.