



Law's Aim in *Law's Empire* (2008)

by John Gardner
Professor of Jurisprudence
University of Oxford
<http://users.ox.ac.uk/~lawf0081>

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Law's Aim in *Law's Empire*

JOHN GARDNER*

I

Does law have a purpose or point? Surely it does. The trickier questions are these: Does law have a *unifying* purpose or point? Does law have a *distinctive* purpose or point? Many think that, inasmuch as law has a unifying purpose – such as ‘the guidance of conduct’ – it is not a distinctive purpose. It is a purpose shared by many things that are not law. And inasmuch as law has more distinctive purposes – such as ‘being the final public arbiter of disputes’ or ‘monopolizing the use of force’ – they are not unifying. Each such purpose is the purpose of some law but not of all law. H.L.A. Hart’s book *The Concept of Law* is perhaps the best-known defence of this conjunction of views.¹ Although he accepts that law has purposes, Hart advances a non-purposeive

* Professor of Jurisprudence, University of Oxford, and Visiting Professor, Yale Law School. I have included some reworked material from a more ambitious (but unpublished) paper co-written with Elisa Holmes. Thanks to Elisa for helping to develop, and then to disentangle, our two projects. Thanks also to Jules Coleman, Scott Hershovitz and Maris Köpcke-Tinturé for showing the need to disentangle, and for many other helpful suggestions.

¹ H.L.A. Hart, *The Concept of Law* (Oxford 1961). On some of law’s distinctive but non-unifying purposes, see 38–41. On some of law’s unifying but non-distinctive purposes, see 189–95. See also Hart’s postscript to the second edition of *The Concept of Law* (Oxford 1994), at 248–9. (Subsequent references are to the first edition unless otherwise indicated.)

(and indeed non-functional²) account of what legal norms have in common that distinguishes them from other norms.

Ronald Dworkin belongs to a long tradition of writers who hold, by contrast, that law has some purpose that is both unifying and distinctive. His book *Law's Empire* is an unusual contribution to this tradition in that it stands for the view that law must have a unifying-and-distinctive purpose, but it does not commit itself to a final view on what this purpose is.³ In chapter 3 of *Law's Empire*, Dworkin provisionally attributes a purpose to law in order to 'organize[] further argument about law's character'.⁴ Even if he has this purpose wrong, he argues, *some* unifying-and-distinctive purpose for law must be relied upon if arguments about the nature of law are to get off the ground. We need 'a statement of the central concept of [our] institution that will allow [us] to see our arguments ... as arguments over rival conceptions of that concept.'⁵ To furnish such a 'conceptual statement'⁶ in the case of law, he says, we must find 'the most abstract and fundamental point of legal practice'.⁷ For law is an 'interpretive enterprise'⁸ and this means that those who are interested in finding out what (else) is true about law have to begin by taking an 'interpretive attitude' to their subject. This in turn means starting from the assumption that law 'has some

² For Hart, as for Kelsen, neither their intended nor their actual effects set legal systems apart from other normative systems. As Green aptly summarizes the Hart-Kelsen view, law is 'a modal kind and not a functional kind.' Leslie Green, 'The Concept of Law Revisited' *Michigan Law Review* 94 (1996), 1687

³ R.M. Dworkin, *Law's Empire* (Cambridge, Mass. 1986). Hereafter 'LE'.

⁴ LE, 93.

⁵ LE, 92.

⁶ LE, 92.

⁷ LE, 93. For present purposes I assume that nothing turns, for Dworkin, on the distinction between 'law' and 'legal practice'.

⁸ LE, 90.

point' that sets it apart and brings it together it as the particular interpretive enterprise that it is.⁹

Here Dworkin's argument proceeds transcendently. Unlike many before him, he does not try to show that law must have a unifying-and-distinctive purpose by showing what unifying-and-distinctive purpose law has. Rather, he tries to show that law must have a unifying-and-distinctive purpose by showing that we cannot make sense of law without assuming one. The question of which unifying-and-distinctive purpose law has can be settled later. Meanwhile we can make do with a provisional proposal that is pencilled in for the sake of argument.

So what purpose does Dworkin provisionally attribute to law for the sake of argument? The following purpose, he says, is 'sufficiently abstract and uncontroversial' to do the job:

Our discussions of law by and large assume, I suggest, that the most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way. Law insists that force [= coercion] not be used or withheld ... except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.¹⁰

Dworkin's Suggested Purpose, or DSP as I will call it for short, is complex and intriguing. But is it plausible? I think not. At any rate, it is far from uncontroversial. As many have pointed out, a legal system might still exist, and if it did would still have a purpose or point, in a society of angels. Since the *ex hypothesi* perfect population of such a society will be guided by the *ex hypothesi* perfect laws and policies of their *ex hypothesi* perfect government, coercion by that government will not be needed, and will not be used, to get them to fall into line with law. Nor,

⁹ LE, 47.

¹⁰ LE, 93. The square-bracketed insertion reflects what Dworkin says a few lines later, and is added here to reduce the volume of quotation.

therefore, will law be called upon to regulate government coercion. Yet there will still be co-ordination problems to which angelic law may provide the best solutions (what side of the road to drive angelic vehicles on, what frequencies to allocate to angelic cellphones, etc.). So angelic law may still exist and, if it does, it will still have a purpose – even though there is no coercion by angelic governments for it to ‘guide and constrain’.¹¹

There are several things one can learn from this exotic thought-experiment. The most important lesson is this: That the licensing of government coercion in ordinary human legal systems, even when successful, is a consequence of a deeper failure. As Hart captures the point, the resort to legal coercion is a ‘*pis aller*’, a ‘secondary provision[] for a breakdown in case the primary intended peremptory reasons are not accepted as such.’¹² Whatever other purposes law may have, it clearly has the purpose of providing law-subjects, including the government, with normative guidance; that is to say, of subjecting their conduct to the governance of norms. If only law were fully to succeed in this purpose, if only all law-subjects were to use legal norms as they are supposed to be used, by being guided by them *qua* norms, there would be no need, and no case, for the government to coerce people into conformity with those same norms. So there would be no need for law to regulate government coercion. If that much is true, then DSP, even if it is a distinctively legal purpose, is not a unifying one. It is a purpose of law only on those occasions when law has failed to achieve its more unifying (albeit less distinctive) purpose of providing normative guidance for use by its subjects.

¹¹ Aristotle, *Nicomachean Ethics* 1179b30-1180b28; Hart, *The Concept of Law*, above note 1, 195; Joseph Raz, *Practical Reason and Norms* (London 1975), 159; John Finnis, *Natural Law and Natural Rights* (Oxford 1980), 266-7.

¹² Hart, ‘Commands and Authoritative Legal Reasons’ in his *Essays on Bentham* (Oxford 1982), 254.

II

Although I have just made my own sympathies clear, my interest here is not in developing this critique of DSP.¹³ I am interested, rather, in an aspect of DSP that the critique, as it stands, leaves unchallenged. Possibly law's purpose, even in a society of angels, is not merely to provide its subjects (including the government) with normative guidance. Possibly law's purpose, more specifically, is to provide its subjects with *justified* normative guidance. This view has been defended at length by John Finnis in *Natural Law and Natural Rights*. To Finnis, the 'society of angels' thought-experiment¹⁴ tends to suggest, not that law lacks a unifying-and-distinctive purpose, but that law has a unifying-and-distinctive purpose quite different from DSP. The purpose is that of providing co-ordination of conduct for the common good.¹⁵ This purpose is in two respects more distinctive than that of merely providing normative guidance to law-subjects. In the first place, according to Finnis, law aims to provide normative guidance to law-subjects that works in a distinctive way, namely by co-ordinating their conduct. In the second place, law aims to provide normative guidance that lives up to a certain standard: it aims to serve the common good. This second specification is the one that we are concerned with here. It entails an important feature that Finnis's suggested purpose shares with Dworkin's. For Finnis and Dworkin alike, law aims to guide its subjects

¹³ One way to attempt a rescue of DSP might be to argue, with Kelsen, that there *are* no legal norms except those that regulate the coercive conduct of state officials. In Kelsen's words: 'Law is the primary norm which stipulates the sanction.' See *General Theory of Law and State* (Cambridge, Mass. 1949), 63. This view of Kelsen's has not, however, survived Hart's critique of it in *The Concept of Law*, above note 1, 35-41.

¹⁴ Or 'world of saints', as Finnis prefers: *Natural Law and Natural Rights*, above note 11, 269.

¹⁵ *Ibid.*, e.g. at 334-336.

properly, soundly, upstandingly, well. Law aims to be justified in the guidance that it gives to those whom it aims to guide, such that what they do, when they are guided by law and make no legal mistakes, will itself be justified.

One should be careful not to trivialize this thesis. In all norm-governed pursuits, questions of justification arise that are, so to speak, internal to the pursuit. They are simply questions of whether the norms are being adhered to. In a game of *Monopoly*, for example, I land on 'Chance' and draw the 'Go Directly to Jail' card. The 'banker' refuses to pay me the 'salary' I usually get for passing 'Go'. Is this refusal justified? The answer depends on the rules of *Monopoly*. Barring exceptional circumstances (e.g. we are playing for the last space in the lifeboat, or the 'banker' is a cheat), the act of denying me the 'salary' has no significance outside the game, and there is no relevant extra-ludic standard of assessment. In law, we are sometimes temporarily interested in justification conceived in this purely internal way. On some occasions and for some purposes, we merely want to know whether what we are doing is justified by the legal system's own rules, however quirky and technical. As a landlord of properties in Sweden, for example, one may want to know what deadline Swedish law sets for serving a notice to quit following a breach of lease, because one may want to know what the legal consequences will be of postponing service of the notice until rent negotiations are complete. This is a superficially game-like question. As a lawyer, one may sometimes be tempted to think of it on the model of *Monopoly*. But law, as Finnis rightly emphasizes, is not a game.¹⁶ Everything done by law affects someone, or potentially affects someone, in a morally significant way. Thus a question of legal justification always invites, and never eclipses, a *further* question of justification. Swedish law sets, let us suppose, a 14-day deadline for serving a notice to quit

¹⁶ Ibid, 305.

following breach of a lease. But in one's relations with one's Swedish tenants, should one use this legal deadline rather than some other? This is not a question about what is justified under the legal norm. *Ex hypothesi*, a deadline of 14 days from breach of lease is justified under the legal norm. Rather, it is a further question about whether one is *morally* justified in relying on the legal norm as a justification for one's action. Law, on the view I am associating with Dworkin and Finnis, aims to live up to this standard: to be something that its users are morally justified in using. In Finnis's terms, law can be 'fully understood only by understanding [its] point, that is to say [its] objective,'¹⁷ which is to make a distinctive kind of contribution to 'practical reasonableness' (this expression being substituted only because 'the term "moral" is of somewhat uncertain connotation').¹⁸

No doubt Dworkin would resist this (Finnis-influenced¹⁹) conceptualization of the contrast between law and game-playing. Dworkin treats the moral questions inevitably raised by law as bearing (mainly) on the correct interpretation of legal norms, not (or not mainly) on the propriety of their use once correctly interpreted.²⁰ This is the second component of the 'interpretive attitude' that law calls for as an 'interpretive enterprise'. Law not only 'has a point'; law's content – what the law of any given jurisdiction says on any given question – is also 'sensitive to its point'.²¹ Thus, for Dworkin, what one is morally justified in doing in one's relations with one's Swedish tenants affects (mainly) whether Swedish law should be understood as setting a 14-day deadline in the first place, not (or not mainly) whether

¹⁷ Ibid, 3.

¹⁸ Ibid, 15.

¹⁹ Ibid, e.g. 354–362.

²⁰ LE, 47–8.

²¹ LE, 47.

one is justified in using the legal deadline once Swedish law is so understood. It follows that in the legal domain, according to Dworkin, there is normally no such thing as justification ‘internal to the pursuit’ where this implies leaving the question of moral justification open in determining what the applicable legal norms are.

I will return to this issue later. For the time being, we need only note that Dworkin’s famous view about the determination of legal content (the second component of his ‘interpretive attitude’) does not drive any wedge between him and Finnis on the question of law’s purpose or point (the first component). Finnis and Dworkin alike suggest that law has a justificatory purpose. Moreover for both of them it is a morally justificatory purpose. Theirs is not the easy-to-accept thesis that law is a normative pursuit and hence cannot but provide standards of justification of *some* kind. Theirs is the more substantial and contentious thesis that law aims to provide standards of *moral* justification, and hence to be *morally* justified in the norms it provides. This thesis leaves open whether the aim in question is to be served by interpreting laws morally, or by not following immoral laws, or perhaps sometimes by interpreting laws morally and sometimes by not following immoral laws. This disagreement can be bracketed for now. Our interest for the time being is only in the Finnis-Dworkin ‘plateau’²² of agreement, which seems to extend to the following thesis, if no further:

(α) Law aims to be morally justified.

In formulating (α) I have chosen ‘aims’ rather than ‘has the purpose’ or ‘has the aim’, not only to save words, but also to avoid giving the impression that, for either Finnis or Dworkin, (α) fully captures law’s unifying-and-distinctive purpose. For

²² LE, 93.

both of them (α) captures no more than one (unifying but not distinctive) aspect of law's unifying-and-distinctive purpose.²³

III

Is Dworkin committed to (α)? (α) is entailed by DSP, which is Dworkin's own 'conceptual statement' about law. But recall that DSP is only mooted provisionally by Dworkin, as a working assumption to help us 'organize[] further argument about law's character'. Does (α) represent an equally provisional aspect of Dworkin's thought? Does he align himself with (α) only for the sake of argument? Or would (α) also be entailed by every other suggested unifying-and-distinctive purpose for law that Dworkin would be prepared to entertain as an alternative to DSP?

There is much in *Law's Empire* to suggest that the answer is yes: Dworkin is committed to (α). Chapters four to seven of the book are devoted to exploring the question: Which moral ideal is the proper moral ideal for law (through its practitioners and officials) to aim at? Dworkin famously answers: 'integrity'.²⁴ His defence of this answer is conducted on the footing that, while the choice of integrity as the proper moral ideal to be aimed at is not itself conceptually determined – 'law as integrity' is but one possible 'conception' of law – nevertheless, it is part of the concept of law that law aims at *some* moral ideal. Since it is (in turn) part of the concept of a moral ideal that whatever aims at a moral ideal aims to be, at the very least, morally justified, it seems

²³ This opens up the possibility that thesis (α) is also endorsed by Hart in *The Concept of Law*, above note 1, at 186-8. But Hart keeps his options open on this point, and in the postscript to the second edition of *The Concept of Law*, above note 1, at 248-9, he explicitly disclaims any attachment to (α). Law is not a game, but the difference, for Hart, does not lie in law's aim. It lies, *inter alia*, in law's claim. See section IV below on aims and claims.

²⁴ LE, 244. Hercules, the ideal judge 'follows law as integrity'.

that, for Dworkin, any acceptable conception of law is one that paints law as aiming to be, at the very least, morally justified. So, in these subsequent chapters of *Law's Empire*, (α) seems to be endorsed by Dworkin and not just mooted for the sake of argument.

Yet there are also conspicuous themes in Dworkin's work that seem to militate against his endorsing (α). In the following three sections I will consider three of these themes.

IV

In recent work, Dworkin has expressed scepticism about the personification of law. His scepticism is expressed in the context of a critique of Joseph Raz's work on the nature of law. What can Raz mean, asks Dworkin, when he says (as he often does) that 'law claims legitimate authority'? Dworkin answers:

This type of personification is often used in philosophy as a shorthand way of stating the meaning or content of a class of propositions. A philosopher might say, for example, that morality claims to impose categorical requirements, or that physics claims to reveal the deep structure of the physical universe. He means that no proposition is a true proposition of morality unless it accurately reports categorical (rather than only hypothetical) requirements or that no proposition is a true proposition of physics unless it correctly reports physical structure. If we read Raz's personification in this familiar way, we take him to mean that no proposition of law is true unless it successfully reports an exercise of legitimate authority. But that would imply not that morality cannot be a test for law, as Raz claims, but that it *must* be a test for law because, as he recognizes, no exercise of authority is legitimate 'if the moral or normative conditions for one's directives being authoritative are absent.'

It is difficult to find a sensible alternative reading of Raz's personification. He sometimes suggests that when he says 'law' claims legitimate authority he means that legal officials claim that authority; legal officials do this when they insist that they have a 'right' to impose obligations on citizens and that these citizens 'owe them allegiance' and 'ought to obey the law.' It is one thing to suppose that legal officials

often make such claims; it is quite another to suppose that unless they make such claims, there is necessarily no law. In fact many officials do not. Oliver Wendell Holmes, for example, thought the very idea of moral obligation a confusion. He did not suppose that legal enactments replace the ordinary reasons people have for acting with some overriding obligation-imposing directive, but rather that these enactments add new reasons to ordinary ones by making the cost of acting in certain ways more expensive. Whether a community has law does not depend on how many of its legal officials share Holmes' views. So we cannot make sense of Raz's crucial personification by supposing it to refer to the actual beliefs or attitudes of officials.²⁵

If sound, these criticisms tell against an important thesis that Raz implicitly defends as a rival to (α). This rival thesis is entailed by the thesis that law claims legitimate authority. It says:

(β) Law claims to be morally justified.²⁶

Dworkin's criticisms of Raz on authority tell against (β) because (β) can be true only if law is the kind of thing that can make claims, and in the quoted passage Dworkin denies that law is that kind of thing. But should he deny it?

One may readily agree with Dworkin, as Raz does, that it takes a human being to make a claim. Raz makes tolerably clear that, for these purposes, the relevant human beings are legal officials.²⁷ Legal officials, he argues, are those who make the claim mentioned in (β). Yet at the same time Raz's attribution of the claim to law itself is not elliptical. It is not shorthand for 'legal officials claim that law is morally justified.' That is because legal

²⁵ Dworkin, 'Thirty Years On', *Harvard Law Review* 115 (2002), 1655 at 1666-7.

²⁶ Thesis (β) has also been defended by Robert Alexy under the title of 'law's claim to correctness'. See e.g. Alexy, 'On Necessary Relations between Law and Morality', *Ratio Juris* 2 (1989), 167.

²⁷ *Ethics in the Public Domain* (paperback edition, Oxford 1995), 215-6.

officials, according to Raz, make the claim mentioned in (β) *on law's behalf*. And that in turn is because it is part of the concept of a legal official that, when someone acts as a legal official, she acts on law's behalf. So if (β) is sound, then someone who does not claim moral justification for what she does is not, in doing it, acting as a legal official, for (in failing to make the claim that law necessarily makes) she is no longer acting on law's behalf. That is the most important pay-off of (β) , and it holds only if the claim in (β) is understood (non-elliptically) to be law's own claim, and not merely the claim of some human beings.²⁸ It takes a human being to make a claim but it does not follow that human beings are the only things that make claims. Law makes claims through human beings acting on its behalf.

These remarks about (β) matter for present purposes because they apply, *mutatis mutandis*, to (α) as well. True, law cannot make any claims except through human beings acting on its behalf, i.e. legal officials. But by the same token law cannot have any *aims* except through human beings acting on its behalf. For (α) to be non-elliptically true, there must equally be human beings who, on law's behalf, aim at law's being morally justified, and who are acting on law's behalf (i.e. count as legal officials) only if they aim at law's being morally justified.

Inasmuch as (β) is offered by Raz as a rival to (α) , there must obviously be some objections to (β) that are not objections to (α) . But Dworkin's way of rejecting (β) , in the passage just quoted, would also commit him to rejecting (α) . Consider what it means to make a claim to moral justification. Minimally, it means acting with the aim that one be taken to be morally justified. Legal officials – those acting on behalf of law – make a claim to moral justification only if they aim that law should be taken to be morally justified by those law-subjects to whom it is

²⁸ Cf. Philip Soper, 'Law's Normative Claims' in Robert P. George (ed), *The Autonomy of Law* (Oxford 1996).

addressed. This in turn means that they aim *either* that law be morally justified *or* that it be mistaken for something that is morally justified. It is the second possibility – the possibility of a pretence or masquerade on the part of law and legal officials – that distinguishes (β) from (α). Some things that would not count as law according to (α) – because they do not aim to be morally justified – still count as law according to (β) – because they masquerade as having that aim. Raz is careful to point out that, as compared with law that lives up to the standard enunciated in (α), law that merely masquerades as doing so is a less central case of law.²⁹ Just as the central case or paradigm of anything that has an aim is (*ceteris paribus*) the case in which it succeeds at that aim, so the central case or paradigm of anything that makes a claim is (*ceteris paribus*) the case in which it makes that claim sincerely. So the central case of law, according to Raz's criterion (β), is the case of law that is morally justified. Relative to morally justified law, law that merely aims to be morally justified but does not succeed in that aim is a less central case of law. And relative to law that aims to be morally justified (whether or not it succeeds in that aim), law that merely pretends to have that aim but does not really have it is in turn a less central case of law. It is a highly deviant case of law. Yet the claim that is present in the deviant case is also present in the central case. That is one of the features that, for Raz, brings them all together as cases of law. Although there may be law that does not have the aim mentioned in (α), there is no possible law that does not make the claim mentioned in (β).

If we understand Raz's thesis (β) in this way, then Dworkin's proposed counterexample – Justice Holmes' rule-sceptical attitude to law – serves as a counterexample to (β) only if it also serves as a counterexample to (α). If truth be told, it does not really serve as a counterexample to either (β) or (α). Admittedly,

²⁹ *Ethics in the Public Domain*, above note 26, 270.

in his extrajudicial writings, Holmes peddled the mistaken view that legal rules cannot impose moral obligations on law-subjects but can only give them prudential incentives.³⁰ But were Holmes' arguments and pronouncements from the bench consistent with this view? Didn't he sometimes use legal rules to help justify his own legal rulings, thereby establishing that legal rules *must* be more than mere incentives? And in the process didn't he sometimes treat himself as *bound* to use legal rules in justifying his legal rulings, thereby confirming that at least some legal rules are rules of obligation? And, even when not, didn't he at least insist that his own legal rulings were morally obligatory, never mind why he made them? Or at any rate didn't he insist that his own legal rulings were morally *justified* even if not morally obligatory? Or at the very least didn't he insist on the moral justification of the very ruling he was just in the process of making? It seems to me that, as a legal official, Holmes could not but insist on the moral justification of the very ruling he was just in the process of making. If he spoke from the bench in a way that suggested that he did not insist on this, then it seems to me that he was not speaking on behalf of law – i.e. in his official capacity – when he did so. For better or worse, he was replacing his official position with his personal position. But even if you doubt all this, ask yourself: What, in Holmes' judicial decisions, could possibly count as a denial of the *claim* to moral justification that would not equally count as a denial of the *aim* of moral justification? How could anything in Holmes' judicial decisions possibly serve as a counterexample to (β) without equally serving as a counterexample to (α)? For the only relevant difference between (β) and (α) is that (β) allows for the extra possibility of officials who, speaking on behalf of law, pretend to be acting exactly as they would be acting if only (α) were true.

³⁰ O.W. Holmes, 'The Path of the Law', *Harvard Law Review* 10 (1897), 457 at 461-2.

In invoking Holmes, therefore, Dworkin seems to be distancing himself not only from Raz's thesis that law makes a moral claim, but also from the thesis, apparently so central to *Law's Empire*, that law has a moral aim: that law's distinctive-and-unifying purpose is a morally justificatory purpose.³¹

V

Perhaps more importantly, *Law's Empire* itself gives us reason to doubt whether Dworkin accepts, or could accept, (α). Consider Dworkin's statement of the first assumption made by those who take the 'interpretive attitude' to law. They assume, he says,

that the practice [of law] does not simply exist but has value, that it serves some interest or purpose or enforces some principle – in short that it has some point – that can be stated independently of just describing the rules that make up the practice.³²

There is some equivocation in this remark. To adopt the interpretive attitude, says Dworkin, we need to assume that law *serves* a purpose. Does this mean that law *has* a purpose? Or does it mean that law *achieves* that purpose? The two claims are not, as they stand, incompatible. Many things have a purpose that they also achieve. But the two claims are incompatible as soon as they are understood as 'conceptual statements' about law. That is because purposive agency is agency that leaves open the logical possibility of failure. If it is impossible to classify the actions of a certain agent into the categories 'failure' and 'success' (because failure is conceptually ruled out) then that agent is not a purposive agent. It does not have any purposes. And if a certain

³¹ Contrast LE, 172-175, where Dworkin seems to suggest that law has a moral voice in which officials, acting as officials, cannot but speak.

³² LE, 47.

action cannot be classified as a failure or success (because failure is conceptually ruled out) then that action is not an action with a purpose. And if a certain action cannot be classified as a failure or success in its possession of a certain property (because failure to possess that property is conceptually ruled out) then having that property cannot figure among the purposes of that action. Accordingly, if law is such that whatever it does is morally justified – if its being morally justified is part of what it means for it to count as law – then it cannot at the same time aim at (have among its purposes that of) being morally justified.

In short, thesis (α) cannot possibly be true if the following rival thesis about law is true:

(γ) Law is morally justified.

If Dworkin accepts (γ) then he cannot accept (α).³³ Moreover, he cannot accept any ‘conceptual statement’ for law of which (α) is an implication. So he must also abandon DSP, the unifying-and-distinctive purpose that he provisionally attaches to law in chapter three of *Law’s Empire*. Since by (γ) there is no logical space for law to fail in the moral justification of state coercion – since law’s own moral justification in doing whatever it does is conceptually secure – morally justifying state coercion cannot be an aim or purpose of law. It can of course be an aim or purpose of some people writing about law, such as Dworkin himself. Such law-favourers may aim to morally justify (all) law in order to support the case for (γ). My point is only that law itself (acting through its officials) cannot aim to be morally justified if (γ) is true, whereas law itself (acting through its officials) cannot *but* aim to be morally justified if (α) is true.

³³ Contrast Julie Dickson, *Evaluation and Legal Theory* (Oxford 2001), at 106. Dickson allows Dworkin to endorse both (α) and (γ) together, and seems to see them as natural bedfellows.

Does Dworkin accept (γ), and hence eschew (α)? Some other passages in *Law's Empire* maintain the same equivocation between (γ) and (α) that afflicts Dworkin's statement of the 'interpretive attitude' above. Consider the following remarks on Nazi law in chapter three:

We need not deny that the Nazi system was an example of law, no matter which interpretation we favour of our own law, because there is an available sense in which it plainly was law. But we have no difficulty in understanding someone who does say that Nazi law was not really law, or was law in a degenerate sense, or was less than fully law. For he is not then using 'law' in that sense; he is not making that sort of preinterpretive judgment but a skeptical interpretive judgment that Nazi law lacked features crucial to a flourishing legal systems whose rules and procedures do justify coercion.³⁴

The words 'do justify coercion' at the end of this passage might tempt one to suppose that Dworkin means to commit himself to (γ) rather than (α). By his 'conceptual statement' for law (DSP) he meant that whatever counts as law *does* morally justify coercion, not that it has the purpose of doing so. And yet the preceding sentence decisively rules out this reading of the passage as a whole. Dworkin sees morally justified law only as the central case or paradigm of law. This is incompatible with his endorsing (γ). It is compatible with his endorsing (α) or (β). It is also *conducive* to his endorsing either (α) or (β). For as we already mentioned, both of these proposed theses share the implication (explicitly endorsed by both Raz and Finnis) that morally justified law is the central case of law, and hence that Nazi law is degenerate *qua* law. That Dworkin thinks there is an available sense in which Nazi law 'plainly' was law suggests that, as between (α) and (β), he actually ought to favour Raz's (β). For there is ample evidence to suggest a mere pretence of moral

³⁴ LE, 103-4.

rectitude on the part of many Nazi officials, such that Nazi law made moral claims that were not matched by genuine moral aims. Be that as it may, the passage as a whole certainly militates against the view that Dworkin accepts (γ). Morally justified law only represents law's central case. So 'morally justified law' is not a tautology and 'morally unjustified law' is not an oxymoron. Both kinds of law are conceptual possibilities. So perhaps there is, after all, nothing here to cast doubt on Dworkin's allegiance to (α). What seem to be statements endorsing (γ), and hence denying (α), are on closer inspection statements denying (γ).

VI

Yet the problem of integrating (α) into *Law's Empire* is not quite behind us. There remains the question of how to reconcile Dworkin's commitment to (α) with his well-known rejection of the doctrine known as 'legal positivism'. Consider Dworkin's statement of the second assumption made by those who take the 'interpretive attitude' to law. They assume, he says,

that the requirements of [law] – the behaviour it calls for or judgments it warrants – are not necessarily or exclusively what they have always been taken to be but are instead sensitive to its point, so that the strict rules must be understood or applied or extended or modified or qualified or limited by that point.³⁵

Here we find traces of the same equivocation between (α) and (γ) that ran through Dworkin's statement of the first assumption, quoted above. If (γ) is true then the 'requirements' of law, the 'strict rules', are *already* morally justified and officials need not alter them to make them so. If (α) is true, on the other hand, then there may be 'requirements' or 'strict rules' of law that are

³⁵ LE, 47.

not already morally justified, in which case legal officials, acting on behalf of law, have the (α)-given aim of transforming them into morally justified requirements or rules. The words 'extended or modified or qualified or limited' plainly support the second reading of the passage, and hence tend to confirm Dworkin's allegiance to (α) over (γ). Legal officials have the (α)-given aim of taking morally unjustified legal norms ('strict rules') and changing them (by extension, modification, qualification or limitation) into morally justified legal norms. So there can be morally unjustified legal norms that call for legal officials to change them with the (α)-given aim of making them morally justified. (γ) is false because (α) is true.

The words 'understood or applied', on the other hand, can be read consistently with either (α) or (γ). Understanding and applying legal norms might be operations that legal officials perform upon legal norms with the aim of improving them, with the aim of transforming them into morally justified norms on the occasions when they are not morally justified as they stand. On this reading of 'understood or applied', (γ) remains false, for there can be morally unjustified as well as morally justified legal norms. Yet one may also read the words 'understood or applied' consistently with (γ), and hence inconsistently with (α). No legal norm is morally unjustified, and so no legal official can possibly have the aim of changing a legal norm from a morally unjustified one to a morally justified one. The challenge for legal officials under the heading of 'understanding and applying' the 'strict rules' is to bring out what the law of their legal system³⁶ already says - to understand each legal norm as the morally justified norm that it already is, and to apply it accordingly.

Dworkin's account of how judges should go about understanding and applying the law - namely, by 'constructively

³⁶ From here on I will speak of 'the law' (with a definite article) to refer to the legal norms of a particular legal system.

interpreting' it – is usually read in the second of these ways, as an account according to which the law already means what it should mean (i.e. what it would mean if only it were morally justified) and hence only needs to have its meaning brought out, not altered, by judges. This is what I referred to above as 'Dworkin's famous view about the determination of legal content'. On closer inspection, however, Dworkin's official characterization of 'constructive interpretation' in chapter two of *Law's Empire* leans very strongly in the opposite direction:

Roughly, constructive interpretation is a matter of imposing purpose on an object ... in order to make of it the best possible example of the form or genre to which it is taken to belong. It does not follow, even from that rough account, that an interpreter can make of [the object] anything he would have wanted it to be, that a citizen of courtesy who is enthralled by equality, for example, can in good faith claim that courtesy actually requires the sharing of wealth. For the history and shape of a[n] ... object constrains the available interpretations of it Creative interpretation, on the constructive view, is a matter of interaction between purpose and object.³⁷

This passage has an odd start, when set against other passages in the same chapter. Dworkin suggests that a purpose needs to be *imposed* on an object by a constructive interpreter. If this were true it would compete with the thought that law has a purpose. Perhaps Dworkin only means that the interpreter has to work out what the purpose in question is? Or perhaps Dworkin means that, given that law has among its purposes that of being morally justified, the interpreter still needs to do the work of adjudicating between various different moral ideals for law ('conceptions') to decide which particular laws would be morally justified ones and why? Either way, the word 'impose' seems ill-suited to capture how the interpreter is supposed to relate to his or her object.

³⁷ LE, 52.

That constructive interpreters 'impose' purpose on the object before them seems, then, to be an infelicity in Dworkin's formulation.³⁸ That constructive interpreters thereby 'make [something] of the object before them seems, however, to be an accurate statement of what Dworkin has in mind. There is always an object of interpretation and the aim of the constructive interpreter is to improve it, transform it into a better object of the same kind. In legal contexts, thanks to the truth of (α), that means a *morally* better object, a legal norm that comes closer to conforming to the proper moral ideal for law, whatever that ideal may be. In the process, there must of course be some preservation of some aspects of the norm one started with. If there is nothing at all left of that norm then what one did to it cannot count as interpreting it. But there must also be some improvement. If one did not improve the norm one started with, one's interpretation of it was not constructive.

That seems to be the sense in which, according to Dworkin, constructive interpretation is a matter of 'interaction between purpose and object'. There is some continuity in the object but there is also some improvement, some gravitation towards the ideal that properly pertains to an object of that type. The key Dworkinian contrast seems to be that between constructive interpreters, who aim to give the same object a new and better meaning, and what Raz has called 'conserving' interpreters, who aim to retrieve some meaning that the object already has or has had.³⁹ Both differ from non-interpreting improvers – Dworkin calls them 'pragmatists' – who are simply inclined to replace the object outright with a new and better one.

³⁸ See also Finnis, 'On Reason and Authority in *Law's Empire*', *Law and Philosophy* 6 (1987) 357, at 359–60.

³⁹ Raz, 'Interpretation without Retrieval' in Andrei Marmor (ed), *Law and Interpretation* (Oxford 1996).

If this reading is correct, then ‘understanding’ and ‘applying’ the law, when tackled constructively, are also ways of ‘extending or modifying or qualifying or limiting’ the law. The law is not left as it was by the interpreting judge. This conclusion is crucial to the success of *Law’s Empire* if it is to be read as a defence and explication of (α). Throughout the book, Dworkin uses the situation of judges to illustrate the force of (α). But if judges are to have the aim, on behalf of the law, that law be morally justified there must be possible morally unjustified legal norms for them to have and pursue this aim in respect of – morally unjustified legal norms that they can render morally justified by their improving interpretative interventions.⁴⁰

The most striking implication of this, if true, is that the Dworkin of *Law’s Empire* no longer has any significant axe to grind with writers in the legal positivist tradition.⁴¹ The Dworkin of *Law’s Empire* makes it seem that he still has such an axe to grind by representing legal positivists as advocates for ‘conserving’ interpretations of legal norms. He thereby creates an issue between himself and so-called legal positivism, namely the issue of constructive versus conserving interpretation. But none of the major recent writers commonly thought of as legal

⁴⁰ Compare Nicos Stavropoulos’s claim that Dworkin ‘need not accept that any legal norms or rules are individuated non-interpretively’: ‘Interpretivist Theories of Law’, *Stanford Encyclopaedia of Philosophy*, <http://plato.stanford.edu/entries/law-interpretivist/>. What does Stavropoulos mean? Perhaps all he means is that each new constructive interpreter comes to the norm as already shaped by some previous constructive interpretation of it. This is false (someone has to be the first judge to read the first constitution, the first statute, etc). But even if it were true it would be trivial. Relative to each act of interpretation there would still surely be a pre-interpretive norm, viz. one that was output by a previous interpreter. Dworkin must accept that *these* pre-interpretive norms exist, or else an act of constructive interpretation has norms neither as inputs nor as outputs, and so is in no sense normative.

⁴¹ Unlike the Dworkin of *Taking Rights Seriously* (London 1977).

positivists (Kelsen, Hart, Raz, Coleman) shows any general predilection for conserving interpretations of legal norms.⁴² The thing they all agree on, what unites them as legal positivists, is that the law is made by legal officials, such that if one wants to know what the law says on a given subject in a given jurisdiction one needs to investigate what those officials did or said, not what they ought to have done or said. The law is made up exclusively of norms that have been announced, practiced, invoked, enforced, or otherwise engaged with by human beings acting on law's behalf. We can represent this thesis as:

(δ) In any legal system, the law is made up of norms which are part of the law only because some legal official engaged with them, and such an agent is a legal official only because, by engaging with norms in certain ways, he or she can make them part of the law.⁴³

In chapter one of *Law's Empire* Dworkin promises that he will be arguing against the 'plain fact' view of law, as he calls it, the view that 'what the law is in no way depends on what it should be'.⁴⁴

⁴² Furthermore, Hart and Raz explicitly renounce any such predilection: see Hart, *The Concept of Law*, above note 1, 200-2; Raz, 'Why Interpret?', *Ratio Juris* 9 (1996), 349 at 360-3.

⁴³ For a perhaps more familiar formulation of (δ), see J. Gardner, 'Legal Positivism: 5½ Myths', *American Journal of Jurisprudence* 46 (2001), 199.

⁴⁴ LE, 7. Strictly speaking, the words 'in no way' make this view slightly more restrictive than (δ). Some who endorse (δ), including Hart, understand it to be compatible with there being moral tests of legal validity if (but only if) those moral tests have been engaged with (announced, used etc.) by legal officials: see Hart, *The Concept of Law*, above note 1, 70-71. Elsewhere on the same page Dworkin places a different restriction on the 'plain fact' view. He formulates it as the view that 'the law is only a matter of what legal institutions have decided in the past ... So questions of law can always be answered by looking in the books where the records are kept'. Such a view may have been held by Austin and maybe even Bentham but it is rejected by Kelsen, Hart, Raz and Coleman, all of whom recognize the *using* of a norm, as well as the

This suggests that he will be arguing against thesis (δ). But the subsequent chapters of the book do not fulfil the promise. Instead they argue, consistently with (δ), that judges should improve the law by constructively interpreting it. It is true that, when the law is improved by constructive interpretation, the re-interpreted norms are part of the law because they are (held by the judge to be) morally justified, or as close to morally justified as they can be made. If the parenthetical words 'held by the judge to be' are suppressed in this statement, it sounds like an attack on (δ). It seems to make 'what the law is' depend on 'what it should be'. But the parenthetical words cannot be suppressed. For according to Dworkin's own explicit characterisation of constructive interpretation, it is not a constructively interpreted norm's being morally justified that turns it into law. Rather, it is the 'plain fact' of an official's doing something to a norm (viz. interpreting it constructively) that turns it into law. Remember that constructive interpretation is an 'interaction between purpose and object.' There must be a human being – a legal official – who has the purpose in question. There must also be an object – a legal norm – to which the purpose is applied. The law is made by the interaction of the two, by the official's engaging with the norm as its interpreter, with the aim of yielding up a morally improved legal norm. If that is the picture he has in mind, then Dworkin's war with the legal positivist tradition is over. He has no quarrel with (δ). He would have a quarrel with (δ) only if the purpose of law were self-fulfilling, and needed no agent, no constructive interpreter, to carry it out on law's behalf. In that case, as I already explained above, it would be wrong to think of it as law's purpose, for there would be no logical possibility of failure on the part of the law.

announcing of it, as a possible way of engaging with it so as to make it into law. I am assuming that Dworkin means the 'plain fact' view to be one that could be taken by Kelsen, Hart, Raz and Coleman – in other words, that, in spite of his ambiguities, he means it to correspond to (δ).

Thesis (α), to put it another way, is perfectly compatible with thesis (δ). Indeed, thesis (α) presupposes thesis (δ).⁴⁵ Dworkin himself shows why in his more recent critique of Raz, quoted at length above.⁴⁶ For law to do things there must be human beings who do those things on behalf of law. (α) emphasizes that legal norms are made (and modified) by people, for by (α) legal norms are made (and modified) with a certain aim, viz. that they be morally justified. If there are any legal norms that are not made (or modified) by human beings then they cannot have that or any other aim, so they would count as counterexamples to (α). So if *Law's Empire* is a defence of (α), it should also be read as a defence, albeit a backhanded defence, of thesis (δ), which is the thesis that unites members of the legal positivist tradition.

Of course the converse does not hold. One may be a legal positivist – an (δ)-endorser – who does not endorse (α). Raz is an example. As we saw, he endorses (β) over (α). The difference, recall, is that (β) allows for legal officials who only pretend to aim that the law be morally justified: on law's behalf they make the claim to be morally justified but do not really have the aim. (β) makes conceptual space for such pretence, so that Nazi law is law, and Nazi officials are legal officials, even if many of them are only pretending to aim at moral justification. Of course, while it makes logical space for it, (β) does not make any *moral* space for such pretence. (β) is a thesis about law, not a thesis about the moral duties of legal officials. Morally, as Raz says, judges should aim that the law they make or modify be morally justified.⁴⁷ But

⁴⁵ A point that is accepted and emphasised by Finnis. See *Natural Law and Natural Rights*, above note 11, at 232; also 'The Truth in Legal Positivism' in Robert P. George (ed), *The Autonomy of Law*, above note 28.

⁴⁶ Text at note 25 above.

⁴⁷ Sometimes, on Raz's view, this moral imperative should carry judges beyond interpreting the law to make it morally better. Sometimes they should effect moral improvements to the law in ways that are more radical than mere

the fact that they should have this aim does not entail that, whenever they speak on behalf of the law, they do have this aim. It does not entail that (α) rather than (β) is true, any more than it entails the opposite. It is an independent issue. Nevertheless it is an issue that one confronts only if one endorses (α) or (β) rather than (γ). For if (γ) is true then there is no logical space for judges to act with the aim that the law they make or modify be morally justified. For all the law they engage with is morally justified already, and their only job is to bring this fact out.

VII

Of the three rival theses about law that we encountered, namely:

(α) Law aims to be morally justified;

(β) Law claims to be morally justified;

(γ) Law is morally justified;

the first two are legal-positivist theses.⁴⁸ They presuppose

interpretation would allow. They should sometimes decline to follow the law. See, among many discussions spread across Raz's work, *The Authority of Law* (Oxford 1979), ch 10, *Ethics in the Public Domain*, above note 27, ch 14, and 'Incorporation by Law', *Legal Theory* 10 (2004), 1.

⁴⁸ Robert Alexy (e.g. in 'On Necessary Relations between Law and Morality', above note 26) has devoted much energy to showing that thesis (β) is incompatible with legal positivism. But he reaches this conclusion only because he (unlike Dworkin) holds legal positivists to the thesis

(ϵ) there is no necessary connection between law and morality.

Plainly (β) contradicts (ϵ). For some reasons to use the label 'legal positivism' to designate thesis (δ) rather than thesis (ϵ), see Gardner, 'Legal Positivism: 5½ Myths', above note 43. One reason is that no major writer commonly

(δ) In any legal system, the law is made up of norms which are part of the law only because some legal official engaged with them, and such an agent is a legal official only because, by engaging with norms in certain ways, he or she can make them part of the law.

Of the three, only (γ) parts company with (δ). If law is made by people, then law is vulnerable to moral error, for people are vulnerable to moral error. So if law is incapable of being morally unjustified, as (γ) tells us it is, how can it be made by people? There may be some who think that the value of having norms made by people is such as to justify them morally, no matter how (otherwise) morally abhorrent are the norms that are made. Surely some law, even Nazi law, is at least preferable to chaos? This is, to my mind, a deeply unattractive moral position. But be that as it may, it is certainly not Dworkin's position. Dworkin's position is either that law is morally justified and hence not made by people (i.e. (γ) is true and therefore (δ) is false) or that law aims to be morally justified and hence is made by people who pursue that aim on behalf of the law (i.e. that (α) is true and therefore (δ) is true). *Law's Empire* sometimes leaves one puzzled by suggesting that (α) is true but (δ) is false. This is an impossible conjunction of views. Much of the book suggests that we should hold Dworkin to (α) and accordingly discount his expressed (and widely-advertised) opposition to (δ). That being so, we should be pleased to welcome Dworkin back into the best tradition of thinking about law, which is the legal positivist tradition.

thought of as a legal positivist endorses (ε) without qualification. Most, for instance, accept either (α) or (β) as a qualification to it. Whereas all accept (δ).