LAW'S EMPIRE

RONALD DWORKIN

FONTANA MASTERGUIDES
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outright; instead he relied on controversial sociological evidence to show that racially segregated schools could not be equal, for that reason alone. Nor did he say flatly that the Court was now overruling *Plessy*. He said only that *if* the present decision was inconsistent with *Plessy*, then that earlier decision was being overruled. The most important compromise, for practical purposes, was in the design of the remedy the opinion awarded the plaintiffs. It did not order the schools of the southern states to be desegregated immediately, but only, in a phrase that became an emblem of hypocrisy and delay, "with all deliberate speed."[27]

The decision was very controversial, the process of integration that followed was slow, and significant progress required many more legal, political, and even physical battles. Critics said that segregation, however deplorable as a matter of political morality, is not unconstitutional.[28] They pointed out that the phrase "equal protection" does not in itself decide whether segregation is forbidden or not, that the particular congressmen and state officials who drafted, enacted, and ratified the Fourteenth Amendment were well aware of segregated education and apparently thought their amendment left it perfectly legal, and that the Court's decision in *Plessy* was an important precedent of almost ancient lineage and ought not lightly be overturned. These were arguments about the proper grounds of constitutional law, not arguments of morality or repair: many who made them agreed that segregation was immoral and that the Constitution would be a better document if it had forbidden it. Nor were the arguments of those who agreed with the Court arguments of morality or repair. If the Constitution did not as a matter of law prohibit official racial segregation, then the decision in *Brown* was an illicit constitutional amendment, and few who supported the decision thought they were supporting that. This case, like our other sample cases, was fought over the question of law. Or so it seems from the opinion, and so it seemed to those who fought it.

SEMANTIC THEORIES OF LAW

Propositions and Grounds of Law

Earlier in this chapter I described what I called the plain-fact view of law. This holds that law depends only on matters of plain historical fact, that the only sensible disagreement about law is empirical disagreement about what legal institutions have actually decided in the past, that what I called theoretical disagreement is illusory and better understood as argument not about what law is but about what it should be. The sample cases seem counterexamples to the plain-fact view: the arguments in these cases seem to be about law, not morality or fidelity or repair. We must therefore put this challenge to the plain-fact view: why does it insist that appearance is here an illusion? Some legal philosophers offer a surprising answer. They say that theoretical disagreement about the grounds of law must be a pretense because the very meaning of the word "law" makes law depend on certain specific criteria, and that any lawyer who rejected or challenged those criteria would be speaking self-contradictory nonsense.

We follow shared rules, they say, in using any word: these rules set out criteria that supply the word's meaning. Our rules for using "law" tie law to plain historical fact. It does not follow that all lawyers are aware of these rules in the sense of being able to state them in some crisp and comprehensive form. For we all follow rules given by our common language of which we are not fully aware. We all use the word "cause," for example, in what seems to be roughly the same way—we agree about which physical events have caused others once we all know the pertinent facts—yet most of us have no idea of the criteria we use in making these judgments, or even of the sense in which we are using criteria at all. It falls to philosophy to explicate these for us. This may be a matter of some difficulty, and philosophers may

well disagree. Perhaps no set of criteria for using the word "cause" fits ordinary practice exactly, and the question will then be which set provides the overall best fit or best fits the central cases of causation. A philosopher's account of the concept of causation must not only fit, moreover, but must also be philosophically respectable and attractive in other respects. It must not explain our use of causation in a question-begging way, by using that very concept in its description of how we use it, and it must employ a sensible ontology. We would not accept an account of the concept of causation that appealed to causal gods resident in objects. So, according to the view I am now describing, with the concept of law. We all use the same factual criteria in framing, accepting, and rejecting statements about what the law is, but we are ignorant of what these criteria are. Philosophers of law must elucidate them for us by a sensitive study of how we speak. They may disagree among themselves, but that alone casts no doubt on their common assumption, which is that we do share some set of standards about how "law" is to be used.

Philosophers who insist that lawyers all follow certain linguistic criteria for judging propositions of law, perhaps unawares, have produced theories identifying these criteria. I shall call these theories collectively semantic theories of law, but that name itself requires some elaboration. For a long time philosophers of law packaged their products as definitions of law. John Austin, for example, whose theory I shall shortly describe, said he was explicating the "meaning" of law. When philosophers of language developed more sophisticated theories of meaning, legal philosophers became more wary of definitions and said, instead, that they were describing the "use" of legal concepts, by which they meant, in our vocabulary, the circumstances in which propositions of law are regarded by all competent lawyers as true or as false. This was little more than a change in packaging, I think; in any case I mean to include "use" theories in the group of semantic theories of law, as well as the earlier theories that were more candidly definitional.[29]

Legal Positivism

Semantic theories suppose that lawyers and judges use mainly the same criteria (though these are hidden and unrecognized) in deciding when propositions of law are true or false; they suppose that lawyers actually agree about the grounds of law. These theories disagree about which criteria lawyers do share and which grounds these criteria do stipulate. Law students are taught to classify semantic theories according to the following rough scheme. The semantic theories that have been most influential hold that the shared criteria make the truth of propositions of law turn on certain specified historical events. These positivist theories, as they are called, support the plain-fact view of law, that genuine disagreement about what the law is must be empirical disagreement about the history of legal institutions. Positivist theories differ from one another about which historical facts are crucial, however, and two versions have been particularly important in British jurisprudence.

John Austin, a nineteenth-century English lawyer and lecturer, said that a proposition of law is true within a particular political society if it correctly reports the past command of some person or group occupying the position of sovereign in that society. He defined a sovereign as some person or group whose commands are habitually obeyed and who is not in the habit of obeying anyone else.[30] This theory became the object of intense, and often scholastic, debate. Legal philosophers argued about whether certain obviously true propositions of law—propositions about the number of signatures necessary to make a will legally valid, for example—could really be said to be true in virtue of anyone's *command.* (After all, no one has commanded you or me to make any will at all, let alone to make a valid will.) They

also debated whether any group could be said to be an Austinian sovereign in a democracy, like the United States, in which the people as a whole retain the power to alter the form of government radically by amending the constitution. But though Austin's theory was found defective in various matters of detail, and many repairs and improvements were suggested, his main idea, that law is a matter of historical decisions by people in positions of political power, has never wholly lost its grip on jurisprudence.

The most important and fundamental restatement of that idea is H. L. A. Hart's book, *The Concept of Law,* first published in 1961.[31] Hart rejected Austin's account of legal authority as a brute fact of habitual command and obedience. He said that the true grounds of law lie in the acceptance by the community as a whole of a fundamental master rule (he called this a "rule of recognition") that assigns to particular people or groups the authority to make law. So propositions of law are true not just in virtue of the commands of people who are habitually obeyed, but more fundamentally in virtue of social conventions that represent the community's acceptance of a scheme of rules empowering such people or groups to create valid law. For Austin the proposition that the speed limit in California is 55 is true just because the legislators who enacted that rule happen to be in control there; for Hart it is true because the people of California have accepted, and continue to accept, the scheme of authority deployed in the state and national constitutions. For Austin the proposition that careless drivers are required to compensate mothers who suffer emotional injury at the scene of an accident is true in Britain because people with political power have made the judges their lieutenants and tacitly adopt their commands as their own. For Hart that proposition is true because the rule of recognition accepted by the British people makes judges' declarations law subject to the powers of other officials—legislators—to repeal that law if they wish.

Hart's theory, like Austin's, has generated a good deal of

debate among those who are drawn to its basic idea. What does the "acceptance" of a rule of recognition consist in? Many officials of Nazi Germany obeyed Hitler's commands as law, but only out of fear. Does that mean they accepted a rule of recognition entitling him to make law? If so, then the difference between Hart's theory and Austin's becomes elusive, because there would then be no difference between a group of people accepting a rule of recognition and simply falling into a self-conscious pattern of obedience out of fear. If not, if acceptance requires more than mere obedience, then it seems to follow that there was no law in Nazi Germany, that no propositions of law were true there or in many other places where most people would say there is law, though bad or unpopular law. And then Hart's theory would not, after all, capture how all lawyers use the word "law." Scholars have worried about this and other aspects of Hart's theory, but once again his root idea, that the truth of propositions of law is in some important way dependent upon conventional patterns of recognizing law, has attracted wide support.

Other Semantic Theories

Positivist theories are not unchallenged in the classical literature of jurisprudence; I should mention two other groups of theories generally counted as their rivals. The first is usually called the school of natural law, though the various theories grouped under that title are remarkably different from one another, and the name suits none of them.[32] If we treat these as semantic theories (in Chapter 3 I describe a better way to understand them), they have this in common: they argue that lawyers follow criteria that are not entirely factual, but at least to some extent moral, for deciding which propositions of law are true. The most extreme theory of this kind insists that law and justice are identical, so that no unjust proposition of law can be true. This extreme theory is very implausible as a semantic theory because lawyers often

speak in a way that contradicts it. Many lawyers in both Britain and the United States believe that the progressive income tax is unjust, for example, but none of them doubts that the law of these countries does impose tax at progressive rates. Some less extreme "natural law" theories claim only that morality is sometimes relevant to the truth of propositions of law. They suggest, for instance, that when a statute is open to different interpretations, as in Elmer's case, or when precedents are indecisive, as in Mrs. McLoughlin's case, whichever interpretation is morally superior is the more accurate statement of the law. But even this weaker version of natural law is unpersuasive if we take it to be a semantic theory about how all lawyers use the word "law"; Judge Gray seems to have agreed with Judge Earl that the law would be better if it denied Elmer his inheritance, but he did not agree that the law therefore did deny it to him.

Students are taught that the second rival to positivism is the school of legal realism. Realist theories were developed early in this century, mainly in American law schools, though the movement had branches elsewhere. If we treat them as semantic theories, they argue that the linguistic rules lawyers follow make propositions of law instrumental and predictive. The best version suggests that the exact meaning of a proposition of law—the conditions under which lawyers will take the proposition to be true—depends on context. If a lawyer advises a client that the law permits murderers to inherit, for example, he must be understood as predicting that this is what judges will decide when the matter next comes to court. If a judge says this in the course of his opinion, he is making a different sort of predictive hypothesis, about the general course or "path" the law is most likely to take in the general area of his decision.[33] Some realists expressed these ideas in dramatically skeptical language. They said there is no such thing as law, or that law is only a matter of what the judge had for breakfast. They meant that there can be no such thing as law apart from predictions of these different sorts. But even understood in this way, realism remains deeply implausible as a semantic theory. For it is hardly contradictory—indeed it is common—for lawyers to predict that judges will make a mistake about the law or for judges to state their view of the law and then add that they hope and expect that the law will be changed.

Defending Positivism

I shall concentrate on legal positivism because, as I just said, this is the semantic theory that supports the plain-fact view and the claim that genuine argument about law must be empirical rather than theoretical. If positivism is right, then the appearance of theoretical disagreement about the grounds of law, in Elmer's case and *McLoughlin* and the snail darter case and *Brown,* is in some way misleading. In these cases past legal institutions had not expressly decided the issue either way, so lawyers using the word "law" properly according to positivism would have agreed there was no law to discover. Their disagreement must therefore have been disguised argument about what the law should be. But we can restate that inference as an argument against positivism. For why should lawyers and judges pretend to theoretical disagreement in cases like these? Some positivists have a quick answer: judges pretend to be disagreeing about what the law is because the public believes there is always law and that judges should always follow it. On this view lawyers and judges systematically connive to keep the truth from the people so as not to disillusion them or arouse their ignorant anger.

This quick answer is unpersuasive. It is mysterious why the pretense should be necessary or how it could be successful. If lawyers all agree there is no decisive law in cases like our sample cases, then why has this view not become part of our popular political culture long ago? And if it has not—if most people still think there is always law for judges to follow—why should the profession fear to correct their error in the interests of a more honest judicial practice? In

any case, how can the pretense work? Would it not be easy for the disappointed party to demonstrate that there really was no law according to the grounds everyone knows are the right grounds? And if the pretense is so easily exposed, why bother with the charade? Nor is there any evidence in our sample cases that any of the lawyers or judges actually believed what this defense attributes to them. Many of their arguments would be entirely inappropriate as arguments for either the repair or the improvement of law; they make sense only as arguments about what judges must do in virtue of their responsibility to enforce the law as it is. It seems odd to describe Gray or Burger as bent on reform or improvement, for example, for each conceded that what he took to be the law was open to serious objections of fairness or wisdom. They argued that the statute in question had to be interpreted in a certain way *in spite of* its evident defects so interpreted.

But once the positivist concedes that Gray was trying to state what the law was rather than what it should be, he must also concede that Gray's views about the grounds of law were controversial even within his own court. Earl's rival position must also be understood as a claim about what the law requires—a claim that Gray was wrong—not a disguised maneuver to repair or revise the law. In *McLoughlin* the judges of the Court of Appeal did seem to think that since the precedents were limited to emotional injury at the scene of an accident, there was no law either way on emotional injury away from the scene, and that their task was therefore one of repair, of developing the law in the best way, all things considered. But that was not the view of the House of Lords, and very much not the view of Lord Scarman, who thought he was bound by principles embedded in the precedents. For all we know, Lord Scarman agreed with the judges of the Court of Appeal that the community would be made worse off on the whole by allowing recovery in those circumstances. The various judges who adjudicated Mrs.

McLoughlin's case disagreed about the force and character of precedent as a source of law, and though the disagreement was subtle it was nevertheless a disagreement about what the law was, not about what should be done in the absence of law.

In fact there is no positive evidence of any kind that when lawyers and judges seem to be disagreeing about the law they are really keeping their fingers crossed. There is no argument for that view of the matter except the question-begging argument that if the plain-fact thesis is sound they just must be pretending. There is, however, a more sophisticated defense of positivism, which concedes that lawyers and judges in our sample cases thought they were disagreeing about the law but argues that for a somewhat different reason this self-description should not be taken at face value. This new argument stresses the importance of distinguishing between standard or core uses of the word "law" and borderline or penumbral uses of that word. It claims that lawyers and judges all follow what is mainly the same rule for using "law" and therefore all agree about, for example, the legal speed limit in California and the basic rate of tax in Britain. But because rules for using words are not precise and exact, they permit penumbral or borderline cases in which people speak somewhat differently from one another. So lawyers may use the word "law" differently in marginal cases when some but not all of the grounds specified in the main rule are satisfied. This explains, according to the present argument, why they disagree in hard cases like our sample cases. Each uses a slightly different version of the main rule, and the differences become manifest in these special cases.[34] In this respect, the argument continues, our use of "law" is no different from our use of many other words we find unproblematical. We all agree about the standard meaning of "house," for example. Someone who denies that the detached one-family residences on ordinary suburban streets are houses just does not understand the English language.

Nevertheless there are borderline cases. People do not all follow exactly the same rule; some would say that Buckingham Palace is a house while others would not.

This more sophisticated defense of positivism tells a somewhat different story about our sample cases from the "fingers-crossed" story. According to this new story, Earl and Gray and the other judges and lawyers were in no way pretending or trying to deceive the public. They were disagreeing about the state of the law, but their disagreement was a "merely verbal" one like a disagreement about whether Buckingham Palace is a house. From *our* standpoint as critics, according to this defense, it is better to think of their argument as one about repair, about what the law should be, because we will understand the legal process better if we use "law" only to describe what lies within the core of that concept, if we use it, that is, to cover only propositions of law true according to the central or main rule for using "law" that everyone accepts, like the propositions of the highway code. It would be better if lawyers and judges used "law" that way, just as it would be better if no one argued about the correct classification of Buckingham Palace but instead agreed to use "house" in the same way whenever they could. So positivism, defended in this different way, has a reforming as well as a descriptive character. In any case, the defense protects the plain-fact thesis. It treats the main question in each of our sample cases as a question of repair, even though the judges themselves might not have conceived it that way, and encourages us to evaluate their performance by asking how judges should develop new law when some case cannot be resolved by applying rules about the grounds of law that all lawyers accept.

The new story is in one way like the fingers-crossed story, however: it leaves wholly unexplained why the legal profession should have acted for so long in the way the story claims it has. For sensible people do not quarrel over whether Buckingham Palace is really a house; they understand at once that this is not a genuine issue but only a matter of how one chooses to use a word whose meaning is not fixed at its boundaries. If "law" is really like "house," why should lawyers argue for so long about whether the law really gives the secretary of the interior power to stop an almost finished dam to save a small fish, or whether the law forbids racially segregated schools? How could they think they had arguments for the essentially arbitrary decision to use the word one way rather than another? How could they think that important decisions about the use of state power should turn on a quibble? It does not help to say that lawyers and judges are able to deceive themselves because they are actually arguing about a different issue, the political issue whether the secretary should have that power or whether states should be forbidden to segregate their schools. We have already noticed that many of the arguments judges make to support their controversial claims of law are not appropriate to those directly political issues. So the new defense of positivism is a more radical critique of professional practice than it might at first seem. The crossed-fingers defense shows judges as well-meaning liars; the borderline-case defense shows them as simpletons instead.

The borderline defense is worse than insulting, moreover, because it ignores an important distinction between two kinds of disagreements, the distinction between borderline cases and testing or pivotal cases. People sometimes do speak at cross-purposes in the way the borderline defense describes. They agree about the correct tests for applying some word in what they consider normal cases but use the word somewhat differently in what they all recognize to be marginal cases, like the case of a palace. Sometimes, however, they argue about the appropriateness of some word or description because they disagree about the correct tests for using the word or phrase on *any* occasion. We can see the difference by imagining two arguments among art critics about whether photography should be considered a form or branch of art. They might agree about exactly the ways in which photography is like and unlike activities they all recognize as "standard"

uncontroversial examples of art like painting and sculpture. They might agree that photography is not fully or centrally an art form in the way these other activities are; they might agree, that is, that photography is at most a borderline case of an art. Then they would probably also agree that the decision whether to place photography within or outside that category is finally arbitrary, that it should be taken one way or another for convenience or ease of exposition, but that there is otherwise no genuine issue to debate whether photography is "really" an art. Now consider an entirely different kind of debate. One group argues that (whatever others think) photography is a central example of an art form, that any other view would show a deep misunderstanding of the essential nature of art. The other takes the contrary position that any sound understanding of the character of art shows photography to fall wholly outside it, that photographic techniques are deeply alien to the aims of art. It would be quite wrong in these circumstances to describe the argument as one over where some borderline should be drawn. The argument would be about what art, properly understood, really is; it would reveal that the two groups had very different ideas about why even standard art forms they both recognize—painting and sculpture—can claim that title.

You might think that the second argument I just described is silly, a corruption of scholarship. But whatever you think, arguments of that character do occur,[35] and they are different from arguments of the first kind. It would be a serious misunderstanding to conflate the two or to say that one is only a special case of the other. The "sophisticated" defense of positivism misunderstands judicial practice in just that way. The various judges and lawyers who argued our sample cases did not think they were defending marginal or borderline claims. Their disagreements about legislation and precedent were fundamental; their arguments showed that they disagreed not only about whether Elmer should have his inheritance, but about why any legislative act, even traffic codes and rates of taxation, impose the rights and obligations everyone agrees they do; not only about whether Mrs. McLoughlin should have her damages, but about how and why past judicial decisions change the law of the land. They disagreed about what makes a proposition of law true not just at the margin but in the core as well. Our sample cases were understood by those who argued about them in courtrooms and classrooms and law reviews as pivotal cases testing fundamental principles, not as borderline cases calling for some more or less arbitrary line to be drawn.

THE REAL ARGUMENT FOR SEMANTIC THEORIES

If legal argument is mainly or even partly about pivotal cases, then lawyers cannot all be using the same factual criteria for deciding when propositions of law are true and false. Their arguments would be mainly or partly about which criteria they should use. So the project of the semantic theories, the project of digging out shared rules from a careful study of what lawyers say and do, would be doomed to fail. The waiting challenge has now matured. Why are positivists so sure that legal argument is not what it seems to be? Why are they so sure, appearances to the contrary, that lawyers follow common rules for using "law"? It cannot be experience that convinces them of this, for experience teaches the contrary. They say judicial and legal practice is not what it seems. But then why not? The symptoms are classic and my diagnosis familiar. The philosophers of semantic theory suffer from some block. But what block is it?

Notice the following argument. If two lawyers are actually following *different* rules in using the word "law," using different factual criteria to decide when a proposition of law is true or false, then each must mean something different from the other when he says what the law is. Earl and Gray must mean different things when they claim or deny that the law permits murderers to inherit: Earl means that his grounds for law are or are not satisfied, and Gray has in mind his own

grounds, not Earl's. So the two judges are not really disagreeing about anything when one denies and the other asserts this proposition. They are only talking past one another. Their arguments are pointless in the most trivial and irritating way, like an argument about banks when one person has in mind savings banks and the other riverbanks. Worse still, even when lawyers appear to agree about what the law is, their agreement turns out to be fake as well, as if the two people I just imagined thought they agreed that there are many banks in North America.

These bizarre conclusions must be wrong. Law is a flourishing practice, and though it may well be flawed, even fundamentally, it is not a grotesque joke. It means something to say that judges should enforce rather than ignore the law, that citizens should obey it except in rare cases, that officials are bound by its rule. It seems obtuse to deny all this just because we sometimes disagree about what the law actually is. So our legal philosophers try to save what they can. They grasp at straws: they say that judges in hard cases are only pretending to disagree about what the law is, or that hard cases are only borderline disputes at the margin of what is clear and shared. They think they must otherwise settle into some form of nihilism about law. The logic that wreaks this havoc is the logic just described, the argument that unless lawyers and judges share factual criteria about the grounds of law there can be no significant thought or debate about what the law is. We have no choice but to confront that argument. It is a philosophical argument, so the next stage of our project must be philosophical as well.

TWO

INTERPRETIVE CONCEPTS

THE SEMANTIC STING

I shall call the argument I have just described, which has caused such great mischief in legal philosophy, the semantic sting. People are its prey who hold a certain picture of what disagreement is like and when it is possible. They think we can argue sensibly with one another if, but only if, we all accept and follow the same criteria for deciding when our claims are sound, even if we cannot state exactly, as a philosopher might hope to do, what these criteria are. You and I can sensibly discuss how many books I have on my shelf, for example, only if we both agree, at least roughly, about what a book is. We can disagree over borderline cases: I may call something a slim book that you would call a pamphlet. But we cannot disagree over what I called pivotal cases. If you do not count my copy of *Moby-Dick* as a book because in your view novels are not books, any disagreement is bound to be senseless. If this simple picture of when genuine disagreement is possible exhausts all possibilities, it must apply to legal concepts, including the concept of law. Then the following dilemma takes hold. Either, in spite of first appearances, lawyers actually all do accept roughly the same criteria for deciding when a claim about the law is true or there can be no genuine agreement or disagreement about law at all, but only the idiocy of people thinking they disagree because they attach different meanings to the same sound. The second leg of this dilemma seems absurd. So legal philosophers embrace the first and try to identify the hidden ground rules that *must* be there, embedded, though