

Language, Law, and Authority: The Social Roots of Political Obligation

Abstract:

My dissertation develops a novel account of public reason as an intrinsic ground for the value of democracy and the rule of law. I begin by exploring the way that law practices are necessarily limited by their medium of expression in natural language. Next I argue that the aim legal system is to guide action by giving reasons to those subject to it. Given this aim and the problem of legal indeterminacy, I contend that the proper goal of interpretation is to recover the meaning that rational, reasonably well-informed subject of the law would assign to that law practice. Next, I develop a conception of public reason based on group agency to explicate the idea of a rational, reasonably well-informed interpreter. I conclude by arguing that the necessary publicity needed to overcome both the problem of legal indeterminacy and the critique of public reason accounts delegitimizes institutions of judicial supremacy.

Background:

In 1993 the U.S. Supreme Court heard the appeal of John Angus Smith. Smith had been arrested after arranging to exchange a modified MAC-10 machine pistol and silencer for two ounces of cocaine. Among other offenses, Smith was charged with “using” a firearm “during and in relation to a drug trafficking crime” which violated a statute that mandated additional jail time. Smith’s appeal argued that the additional jail time was unwarranted because he had not “used” the firearm as a firearm, but rather as a medium of exchange. The crux of the matter is whether or not the word ‘uses’ in the statute applies to cases where the firearm is used as a medium of exchange, rather than as a weapon. Smith’s attorney contended that it did not—and this was no insignificant matter. If the Court held that Smith’s use of the weapon as a medium of exchange was contained within the meaning of the statute it would add 30 years of additional jail time.

One of the interesting things about this case is that intuitions are often divided as to its proper resolution in a way that defies expected political ideologies and allegiances. That is, it is not the case that the conservatives see it one way and the liberal justices another. Rather, the case seems to truly revolve for each about what the word ‘use’ means in the

statute.

It has been a commonplace of jurisprudential thought that the law will be full of these gaps at least since H.L.A. Hart's classic discussion in *The Concept of Law*. Hart (1997) argued that legal terms refer to concepts that have both a settled "core" of meaning and a "penumbra" in which there was no settled meaning. To use Hart's example, consider the term 'vehicle' in a rule that reads 'No vehicle shall be allowed in the park.' Private automobiles would seem to fall within the core of the term 'vehicle' as used in this simple rule. That is just to say that it is hard to imagine on what grounds one might offer an interpretation of the rule that did not prohibit private automobiles in the park.

When a fact of a case falls within the penumbra of a term used in a rule it is tempting to say that there simply is no fact of the matter as to whether or not the law permits or prohibits the actions under question. Call this phenomenon legal indeterminacy, where a legal rule neither permits nor prohibits a certain action because there is no legal fact which can justify the decision to permit or prohibit the act in question. For instance, in our case we might think that there is no fact of the matter about whether the rule under question permits or prohibits bicycles in the park. This puts judges in an awkward position, since they generally *must* decide on the case. What are they to do, if the act at issue is neither permitted nor prohibited by the law? Hart argued that the combination of the indeterminacy generated by this vagueness of legal concepts combined with the necessity of a decision meant that judges must simply *have* the discretion to fill in these gaps in the law. That is, in such cases since there is no legal fact prior to the judge's decision as to whether or not the act is permissible or prohibited it must be the decision itself which creates or constitutes the legal fact that justifies the decision.

However, judges rarely if ever see themselves as creating law—or at least they don't admit it. Taking another look at *Smith*, we might be tempted to think that because of the vagueness of the word 'uses' in the statute there is simply no fact about what the law requires in the case prior to the ruling of the Court. But the Court itself doesn't seem to see itself as acting this way! To the contrary, both majority and dissent offer sophisticated arguments not just for or against Smith's claim, but purport to do so on the grounds that the statute under question—i.e., the statute imposing additional jail time—somehow settles the legal question in virtue of what it means. This pattern of arguing about what the law requires is typical of judicial practice, which tends to frame its decisions in terms of discovering the law rather than creating it. Given this feature of legal practice we should prefer an account that refrains from painting most judges as either liars or delusional in so many of their decisions. Thus, I argue that we need an account that can stay true to legal practice while avoiding the anti-democratic implications of Hart's view of judicial discretion.

Chapter Summaries:

Chapter 1

Ronald Dworkin offers a critique of Hart's argument about judicial discretion that holds some promise. Dworkin argues that judges are more akin to umpires in baseball than the (sometimes) legislators of Hart's description. Just as the baseball umpire has the authority to determine whether or not any pitch is a strike or a ball, a judge has the discretion (and the duty) to decide cases. However, just like the umpire who can call a strike wrong by missing the fact that the ball has not passed over the plate, there is a right and a wrong way for a judge to decide each hard case. To clarify, the judge isn't wrong about the resolution of the case, just as the umpire isn't wrong that the pitch *counts* as a strike, but both might be wrong

about the fact of the matter. According to Dworkin (1978, 1986), judges are bound to interpret the law in the way that best justifies the coercive nature of the legal system given the various legal facts about what various actors in the legal system have done in deciding previous cases, legislating other laws, etc. Thus, on Dworkin's view, what seems like indeterminacy at the local level of particular laws actually is not when one considers the entire legal system. While several different interpretations might "fit" the legal facts of the case, such as the rule permitting bikes in the park and the one prohibiting bikes in the park, only one of the two rules will both fit all other legal facts and *best* justify the coercive nature of the legal system as a whole. It is as if our impression of gaps in the law is an artifact of too narrow a focus on the particulars of the rule under question.

Without delving into the practical difficulties of the epistemic task this presents for legal institutions there are more immediate objections that spring to mind—i.e., Dworkin's theory relies on an idea of normativity that might be questionable. Is there really *always* a single interpretation that *best* justifies the legal system? Why could there not be two interpretations of some law that not only fit the legal facts but also equally justify the legal system? If we assume, as seems reasonable, that legal systems promote a range of values some of which are mutually exclusive then the door is wide open to object to Dworkin's theory. It is at least possible that there will be two interpretations of some law where each promotes a value that excludes the other. Provided the values are of equal weight, then this is enough to raise the worry that both interpretations equally, and exclusively of one another, justify the legal system.

For example, let us assume that both the majority and the dissent in *Smith* establish that either rule *fits* the legal facts reasonably well, so that the question then becomes which

interpretation best justifies the legal system. One might plausibly think that an affirmative answer to the question of whether or not ‘use’ includes employing a firearm as a medium of exchange might promote the value of public safety, while a negative answer might promote the value of liberty (or even fairness if it matters that ambiguities in criminal statutes be resolved in favor of the accused—i.e., if the so-called “rule of lenity” is an application of some general moral principle of fairness). Let us also presume that at least in some cases the values of public safety and the values of liberty and fairness are very important, but mutually exclusive of one another. This is the initial conclusion of the dissertation, that legal indeterminacy is a real danger, and a danger that we want to avoid in a democracy, given that if Hart is right then judges have no choice but to legislate to fill in the gaps of the law.

Chapter 2

My contention is that resolving the difficulty of legal indeterminacy requires taking a stand on the question of what the primary purpose of a legal system is. I will argue that in a modern, democratic state the purpose of the legal system is to provide social coordination and planning by guiding the actions of citizens. There is strong support for this view in the work of H.L.A. Hart. Joseph Raz (1986, 1999) and Scott Shapiro (2011) hold influential versions of this view, as well. The primary contenders are the Dworkinian view that the purpose of legal systems is to justify coercion, and a more general view that argues that purpose of legal systems are, at least primarily, to secure social and distributive justice—a view that seems broadly attributable to John Rawls (2005) and many whom he influenced, but also natural law theorists like John Finnis (2011). My view adopts a notion of political obligation and legal normativity that draws on the work of Margaret Gilbert (2006) on joint commitments—the social relations that underpin collective actions and group

responsibilities. I will argue that Gilbert's account suffers from a problem that parallels the legal problem, insofar as the precise terms of joint commitments, especially in large multicultural societies, are open to reasonable dispute. If so, then the purpose of a legal system is best understood as providing a forum for the enumerations, contestation, and resolution of disputes about the exact nature of these commitments. This is the second major conclusion of the dissertation: modern, democratic legal systems are best understood as systems for guiding the action of citizens by explicating and adjudicating disputes of the content of the joint commitment that gives rise to fellow citizens common political and legal obligations.¹

Chapter 3

The question then becomes: How is a legal system supposed to serve this explicative and adjudicative function given the phenomenon of legal indeterminacy that is exemplified in the imagined park ordinance or cases like *Smith*? My answer is that judges must interpret the law as a rational, reasonably well-informed interpreter would interpret the law. That is, judges must decide cases according to what a hypothetical interpreter would have taken the law to require. This view bears some resemblance to the public meaning views of legal theorists like Keith Whittington (2004) and Larry Solum (2006, 2008), and popularized by the "New Originalists" such as Justices Antonin Scalia and Samuel Alito. However, I argue that a public meaning view as articulated by these theorists remains mired in a naïve view of linguistic meaning that allows too much room for judicial legislation under the guise of common-sense judging, and slogans like 'plain meaning' and 'original meaning.' Instead, I propose that we understand public meaning as itself subject to justificatory constraints. That

¹ I will also attempt to explicate the nature and stringency of these obligations, which I take to be normative obligations of a distinctive kind that may be defeated by other reasons and obligations.

is, I argue that the interpretations judges assign to statutes should be constrained by a principle of public reason that requires interpretations to be justifiable to all suitably qualified points of view. Here I distinguish myself from originalists by arguing that statutory meaning is not settled by socio-linguistic facts at the moment of its enactment, but through a process that is thoroughly normative and subject to constraints and obligations imposed by the nature of legislation as an attempt to explicate the content of our shared political commitments. The third major conclusion of the dissertation is that this set of constraints justifies subjecting justification in the interpretive process to strong requirements of public acceptability.

Chapter 4

Such requirements of public reason are often sparingly explicated and have been subjected to serious critique in the literature. One strand of critique sees the principles as unfairly excluding some reasons that should be allowed into political discussion. A second strand argues that such a notion has an unduly narrow view of the politics as a transactional process of reason-giving and reason-taking, and an unfairly individualistic slant. I attempt to meet these critiques primarily by drawing primarily on the work of Carol Gould (1988, 2004, 2014) but also several other feminist social ontologists such as Diana Meyers (2000) and Natalie Stoljar (2013) who argue for a more relational understanding of individuals. By combining such an understanding of individuals as individuals-in-relations, and broadening the notion of reason to include the importance of feelings of attachment, solidarity, care, and civic friendship I argue that the revised notion of public reason avoids both critiques. This presents a novel blend of traditional liberalism and engagement with a rich literature on feminist ethics and ontology, which has been a strong opponent of liberal views in recent years. I end the chapter by comparing my theory to the three other prevalent theories of

public reason, those of David Estlund (2008), Gerald Gaus (2012), and Jonathan Quong (2011). I will show that my more relational and social version fares better against objections of over-inclusiveness and exclusivity that beset these theorists.

Chapter 5

The final chapter assesses the implication of the forgoing for actual democratic institutions. I claim that judicial review is always a detriment to the democratic credentials of an institutional system and so requires special justification if it is included in a system. The point of a legal system is to guide action by explicating and adjudicating our common commitments. Yet, law's necessary expression in the medium of natural language presents the problem of legal indeterminacy, which threatens a legal system's ability to fulfill this purpose. Since the proper remedy for this situation is requirement of public reason we are left with the question of what institution should be left with the final word on what the law means. I contend that the judiciary is the wrong institution, at least as judiciaries are commonly instituted.

Taking the United States as a test case, I argue that we should be wary of a system that gives the final say in normal politics of explicating and adjudicating the public's commitment to one another to an elite group of unelected and unaccountable experts. That is, courts are well suited to determining what the law is and whether or not it applies when these matters can be meaningfully answered in a correct or incorrect way. However, in hard cases we need to make a collective choice about how the law is best understood. Under those circumstances the very features of expertise and insularity that make a powerful court so suitable to decide impartially when the law is clear make it a poor choice for carrying out the very public, transparent, and political task of determining the meaning of the polity's political commitments. Instead, I argue that democracy requires that the institution that fulfill the role of final arbiter be less geared

toward expert evaluation of the legal doctrines, and more toward the relevant, thoroughly political task of understanding how it is that we should understand our common, political bonds.

Timeline:

I have worked out the following schedule with my advisor, Carol Gould, to complete the dissertation. By February 28th I will submit the initial draft of the first two chapters—both of which are nearly complete at this point. These first two chapters are based off of my second qualifying paper and a paper I presented at a conference in October of 2013. By May 30th I will submit the initial draft of the third and fourth chapter. The third chapter is in part based off a different term paper I presented to a workshop also in October of 2013 and also a paper on obligations I presented at a conference in July of 2013. Over this summer I will complete the fifth chapter, and revise the first two in response to comments, turning them all in on the first day of fall term 2016. Then I will revise the third and fourth chapters over the course of that term. I will finalize the revisions by mid-March of 2016 in order to defend in late April.

Methodology:

My dissertation methodology is primarily library research. I have the argument well worked out, and much of it is based off of either term papers or papers I have presented at conferences (see above). Additionally, I am submitting the first chapter on legal indeterminacy to conference on legal theory. I am also applying to a conference in Milan this summer to discuss Margaret Gilbert's work, for which I will submit much of chapter 2. I also plan to submit chapter 4, on public reason and social ontology, to an annual conference on social philosophy at which I have presented before. I am confident that with this rigorous schedule of drafting, revision, and these conference presentations (for outside feedback) I will complete the project next spring.

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