R. DWORKIN

LAW'S EMPIRE

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FOR BETSY

. PREFACE .

We live in and by the law. It makes us what we are: citizens and employees and doctors and spouses and people who own things. It is sword, shield, and menace: we insist on our wage, or refuse to pay our rent, or are forced to forfeit penalties, or are closed up in jail, all in the name of what our abstract and ethereal sovereign, the law, has decreed. And we *argue* about what it has decreed, even when the books that are supposed to record its commands and directions are silent; we act then as if law had muttered its doom, too low to be heard distinctly. We are subjects of law's empire, liegemen to its methods and ideals, bound in spirit while we debate what we must therefore do.

What sense does this make? How can the law command when the law books are silent or unclear or ambiguous? This book sets out in full-length form an answer I have been developing piecemeal, in fits and starts, for several years: that legal reasoning is an exercise in constructive interpretation, that our law consists in the best justification of our legal practices as a whole, that it consists in the narrative story that makes of these practices the best they can be. The distinctive structure and constraints of legal argument emerge, on this view, only when we identify and distinguish the diverse and often competitive dimensions of political value, the different strands woven together in the complex judgment that one interpretation makes law's story better on the whole, all things considered, than any other can. This book refines and expands and illustrates that conception of law. It

to be hunted by reason and imagination. Some critics have thought I meant that in these cases one answer could be *proved* right to the satisfaction of everyone, even though I insisted from the start that this is not what I meant, that the question whether we can have reason to think an answer right is different from the question whether it can be demonstrated to be right. In this book I argue that the critics fail to understand what the controversy about right answers is really about—what it must be about if the skeptical thesis, that there are no right answers, is to count as any argument against the theory of law I defend. I claim the controversy is really about morality, not metaphysics, and the no-right-answer thesis, understood as a moral claim, is deeply unpersuasive in morality as well as in law.

I have not tried generally to compare my views with those of other legal and political philosophers, either classical or contemporary, or to point out how far I have been influenced by or have drawn from their work. Nor is this book a survey of recent ideas in jurisprudence. I do discuss at length several fashionable views in legal theory, including "soft" legal positivism, the economic analysis of law, the critical legal studies movement, and the "passive" and "framers' intention" theories of American constitutional law. I discuss these, however, because their claims fall across the argument I am making, and I entirely neglect many legal philosophers whose work is of equal or greater importance.

Frank Kermode, Sheldon Leader, Roy McLees, and John Oakley each read a draft of a substantial part of the book and offered extensive comments. Their help was invaluable: each saved me from serious mistakes, contributed important examples, saw issues that had eluded me, and made me rethink certain arguments. Jeremy Waldron read and improved Chapter 6, and Tom Grey did that for Chapter 2. Most of the notes, though not the long textual ones, were prepared by William Ewald, William Riesman, and, especially, Roy McLees; any value the book has as a source

. CONTENTS .

ONE

WHAT IS LAW?

WHY IT MATTERS

It matters how judges decide cases. It matters most to people unlucky or litigious or wicked or saintly enough to find themselves in court. Learned Hand, who was one of America's best and most famous judges, said he feared a lawsuit more than death or taxes. Criminal cases are the most frightening of all, and they are also the most fascinating to the public. But civil suits, in which one person asks compensation or protection from another for some past or threatened harm, are sometimes more consequential than all but the most momentous criminal trials. The difference between dignity and ruin may turn on a single argument that might not have struck another judge so forcefully, or even the same judge on another day. People often stand to gain or lose more by one judge's nod than they could by any general act of Congress or Parliament.

Lawsuits matter in another way that cannot be measured in money or even liberty. There is inevitably a moral dimension to an action at law, and so a standing risk of a distinct form of public injustice. A judge must decide not just who shall have what, but who has behaved well, who has met the responsibilities of citizenship, and who by design or greed or insensitivity has ignored his own responsibilities to others or exaggerated theirs to him. If this judgment is unfair, then the community has inflicted a moral injury on one of its members because it has stamped him in some degree or dimension an outlaw. The injury is gravest when an innocent person is convicted of a crime, but it is substantial enough

when a plaintiff with a sound claim is turned away from court or a defendant leaves with an undeserved stigma.

These are the direct effects of a lawsuit on the parties and their dependents. In Britain and America, among other places, judicial decisions affect a great many other people as well, because the law often becomes what judges say it is. The decisions of the United States Supreme Court, for example, are famously important in this way. That Court has the power to overrule even the most deliberate and popular decisions of other departments of government if it believes they are contrary to the Constitution, and it therefore has the last word on whether and how the states may execute murderers or prohibit abortions or require prayers in the public schools, on whether Congress can draft soldiers to fight a war or force a president to make public the secrets of his office. When the Court decided in 1954 that no state had the right to segregate public schools by race, it took the nation into a social revolution more profound than any other political institution has, or could have, begun.[1]

The Supreme Court is the most dramatic witness for judicial power, but the decisions of other courts are often of great general importance as well. Here are two examples, chosen almost at random, from English legal history. In the nineteenth century English judges declared that a factory worker could not sue his employer for compensation if he was injured through the carelessness of another employee.[2] They said that a worker "assumes the risk" that his "fellow servants" might be careless, and anyway that the worker knows more than the employer about which other workers are careless and perhaps has more influence over them. This rule (which seemed less silly when Darwinian images of capitalism were more popular) much influenced the law of compensation for industrial accidents until it was finally abandoned.[3] In 1975 the House of Lords, the highest court in Britain, laid down rules stipulating how long a Cabinet officer must wait after leaving office to publish descriptions of confidential Cabinet meetings.[4] That decision fixed the

official records that are available to journalists and contemporary historians criticizing a government, and so it affected how government behaves.

DISAGREEMENT ABOUT LAW

Since it matters in these different ways how judges decide cases, it also matters what they think the law is, and when they disagree about this, it matters what kind of disagreement they are having. Is there any mystery about that? Yes, but we need some distinctions to see what it is. Lawsuits always raise, at least in principle, three different kinds of issues: issues of fact, issues of law, and the twinned issues of political morality and fidelity. First, what happened? Did the man at the lathe really drop a wrench on his fellow worker's foot? Second, what is the pertinent law? Does the law allow an injured worker damages from his employer for that sort of injury? Third, if the law denies compensation, is that unjust? If so, should judges ignore the law and grant compensation anyway?

The first of these issues, the issue of fact, seems straightforward enough. If judges disagree over the actual, historical events in controversy, we know what they are disagreeing about and what kind of evidence would put the issue to rest if it were available. The third issue, of morality and fidelity, is very different but also familiar. People often disagree about moral right and wrong, and moral disagreement raises no special problems when it breaks out in court. But what about the second issue, the issue of law? Lawyers and judges seem to disagree very often about the law governing a case; they seem to disagree even about the right tests to use. One judge, proposing one set of tests, says the law favors the school district or the employer, and another, proposing a different set, that it favors the schoolchildren or the employee. If this is really a third, distinct kind of argument, different both from arguments over historical fact and from moral ar-

guments, what kind of argument is it? What is the disagreement about?

Let us call "propositions of law" all the various statements and claims people make about what the law allows or prohibits or entitles them to have. Propositions of law can be very general—"the law forbids states to deny anyone equal protection within the meaning of the Fourteenth Amendment"—or much less general—"the law does not provide compensation for fellow-servant injuries"—or very concrete—"the law requires Acme Corporation to compensate John Smith for the injury he suffered in its employ last February." Lawyers and judges and ordinary people generally assume that some propositions of law, at least, can be true or false.[5] But no one thinks they report the declarations of some ghostly figure: they are not about what Law whispered to the planets. Lawyers, it is true, talk about what the law "says" or whether the law is "silent" about some issue or other. But these are just figures of speech.

Everyone thinks that propositions of law are true or false (or neither) in virtue of other, more familiar kinds of propositions on which these propositions of law are (as we might put it) parasitic. These more familiar propositions furnish what I shall call the "grounds" of law. The proposition that no one may drive over 55 miles an hour in California is true, most people think, because a majority of that state's legislators said "aye" or raised their hands when a text to that effect lay on their desks. It could not be true if nothing of that sort had ever happened; it could not then be true just in virtue of what some ghostly figure had said or what was found on transcendental tablets in the sky.

Now we can distinguish two ways in which lawyers and judges might disagree about the truth of a proposition of law. They might agree about the grounds of law—about when the truth or falsity of other, more familiar propositions makes a particular proposition of law true or false—but disagree about whether those grounds are in fact satisfied in a particular case. Lawyers and judges might agree, for exam-

ple, that the speed limit is 55 in California if the official California statute book contains a law to that effect, but disagree about whether that is the speed limit because they disagree about whether, in fact, the book does contain such a law. We might call this an empirical disagreement about law. Or they might disagree about the grounds of law, about which other kinds of propositions, when true, make a particular proposition of law true. They might agree, in the empirical way, about what the statute books and past judicial decisions have to say about compensation for fellow-servant injuries, but disagree about what the law of compensation actually is because they disagree about whether statute books and judicial decisions exhaust the pertinent grounds of law. We might call that a "theoretical" disagreement about the law.

Empirical disagreement about law is hardly mysterious. People can disagree about what words are in the statute books in the same way they disagree about any other matter of fact. But theoretical disagreement in law, disagreement about law's grounds, is more problematic. Later in this chapter we shall see that lawyers and judges do disagree theoretically. They disagree about what the law really is, on the question of racial segregation or industrial accidents, for example, even when they agree about what statutes have been enacted and what legal officials have said and thought in the past. What kind of disagreement is this? How would we ourselves judge who has the better of the argument?

The general public seems mainly unaware of that problem; indeed it seems mainly unaware of theoretical disagreement about law. The public is much more occupied with the issue of fidelity. Politicians and editorial writers and ordinary citizens argue, sometimes with great passion, about whether judges in the great cases that draw public attention "discover" the law they announce or "invent" it and whether "inventing" law is statecraft or tyranny. But the issue of fidelity is almost never a live one in Anglo-American courts; our judges rarely consider whether they should follow

the law once they have settled what it really is, and the public debate is actually an example, though a heavily disguised one, of theoretical disagreement about law.

In a trivial sense judges unquestionably "make new law" every time they decide an important case. They announce a rule or principle or qualification or elaboration—that segregation is unconstitutional or that workmen cannot recover for fellow-servant injuries, for example—that has never been officially declared before. But they generally offer these "new" statements of law as improved reports of what the law, properly understood, already is. They claim, in other words, that the new statement is required by a correct perception of the true grounds of law even though this has not been recognized previously, or has even been denied. So the public debate about whether judges "discover" or "invent" law is really about whether and when that ambitious claim is true. If someone says the judges discovered the illegality of school segregation, he believes segregation was in fact illegal before the decision that said it was, even though no court had said so before. If he says they invented that piece of law, he means segregation was not illegal before, that the judges changed the law in their decision. This debate would be clear enough—and could easily be settled, at least case by case—if everyone agreed about what law is, if there were no theoretical disagreement about the grounds of law. Then it would be easy to check whether the law before the Supreme Court's decision was indeed what that decision said it was. But since lawyers and judges do disagree in the theoretical way, the debate about whether judges make or find law is part of that disagreement, though it contributes nothing to resolving it because the real issue never rises to the surface.

THE PLAIN-FACT VIEW

Incredibly, our jurisprudence has no plausible theory of theoretical disagreement in law. Legal philosophers are of

course aware that theoretical disagreement is problematic, that it is not immediately clear what kind of disagreement it is. But most of them have settled on what we shall soon see is an evasion rather than an answer. They say that theoretical disagreement is an illusion, that lawyers and judges all actually agree about the grounds of law. I shall call this the "plain fact" view of the grounds of law; here is a preliminary statement of its main claims. The law is only a matter of what legal institutions, like legislatures and city councils and courts, have decided in the past. If some body of that sort has decided that workmen can recover compensation for injuries by fellow workmen, then that is the law. If it has decided the other way, then that is the law. So questions of law can always be answered by looking in the books where the records of institutional decisions are kept. Of course it takes special training to know where to look and how to understand the arcane vocabulary in which the decisions are written. The layman does not have this training or vocabulary, but lawyers do, and it therefore cannot be controversial among them whether the law allows compensation for fellow-servant injuries, for example, unless some of them have made an empirical mistake about what actually was decided in the past. "Law exists as a plain fact, in other words, and what the law is in no way depends on what it should be. Why then do lawyers and judges sometimes appear to be having a theoretical disagreement about the law? Because when they appear to be disagreeing in the theoretical way about what the law is, they are really disagreeing about what it should be. Their disagreement is really over issues of morality and fidelity, not law."

The popularity of this view among legal theorists helps explain why laymen, when they think about courts, are more concerned with fidelity to law than with what law is. If judges divide in some great case, and their disagreement cannot be over any question of law because law is a matter of plain fact easily settled among knowledgeable lawyers, one side must be disobeying or ignoring the law, and this must

be the side supporting a decision that is novel in the trivial sense. So the question of fidelity is the question that demands public discussion and the attention of the watchful citizen. The most popular opinion, in Britain and the United States, insists that judges should always, in every decision, follow the law rather than try to improve upon it. They may not like the law they find—it may require them to evict a widow on Christmas eve in a snowstorm—but they must enforce it nevertheless. Unfortunately, according to this popular opinion, some judges do not accept that wise constraint; covertly or even nakedly, they bend the law to their own purposes or politics. These are the bad judges, the usurpers, destroyers of democracy.

That is the most popular answer to the question of fidelity, but it is not the only one. Some people take the contrary view, that judges should try to improve the law whenever they can, that they should always be political in the way the first answer deplores. The bad judge, on the minority view, is the rigid "mechanical" judge who enforces the law for its own sake with no care for the misery or injustice or inefficiency that follows. The good judge prefers justice to law.

Both versions of the layman's view, the "conservative" and the "progressive," draw on the academic thesis that law is a matter of plain fact, but in certain ways the academic thesis is more sophisticated. Most laymen assume that there is law in the books decisive of every issue that might come before a judge. The academic version of the plain-fact view denies this. The law may be silent on the issue in play, it insists, because no past institutional decision speaks to it either way. Perhaps no competent institution has ever decided either that workmen can recover for fellow-servant injuries or that they cannot. Or the law may be silent because the pertinent institutional decision stipulated only vague guidelines by declaring, for example, that a landlord must give a widow a "reasonable" time to pay her rent. In these circumstances, according to the academic version, no way