

LAW AS A SECULAR ENTERPRISE

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Introduction

This essay provides a long answer to a short question: do we interpret the law as if God wrote it? It will be argued that we do not. More precisely, it will be argued that key features of legal interpretation are best understood without reference to religious assumptions. The contrary viewpoint is most forcefully articulated by Steven D. Smith in his insightful article “Law as a Religious enterprise”.¹ Smith’s article will be this essay’s target for attack. Smith identifies three shared features of scriptural and legal interpretation and argues that, in the law, these features seem “silly, superstitious or mindless” unless interpreters, either consciously or subconsciously, presuppose divine authorship of the law.² This essay will follow a three part structure organised around these shared features of legal and scriptural interpretation. Part one will examine why both scriptural and legal interpretation see texts “as repositories of hidden or esoteric meanings.”³ Using Ronald Dworkin’s interpretive theory, this feature of legal interpretation will be explained without reference to religious assumptions. The second part of this essay will discuss why both scriptural and legal interpretation treat texts as authoritative for our own conduct and decisions.⁴ It will be argued that we treat the law as authoritative because of secular liberal ideals and secular constitutional practises, not because of religious assumptions. Part three will examine why both scriptural and legal interpretation treat seemingly disparate and diverse texts as forming a

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¹ Smith, Steven D., “Law as a Religious Enterprise: Legal Interpretation and Scriptural Interpretation” in Richard O’Dair and Andrew Lewis (eds) *Law and Religion* (Oxford: Oxford University Press, 2001) 83-9 (Law as a Religious Enterprise).

² *Ibid.*

³ *Ibid.*, 84.

⁴ *Ibid.*

unified, harmonious whole.⁵ Smith argues that interpreting the law like this – as if it were the work of a single author – is best explained by the religious assumption of divine authorship. However, this essay will show that the appearance of divine authorship is the unavoidable result of the two previous, secular, interpretive practises.

A. Why do legal texts have hidden meanings?

In both scriptural and legal interpretation, texts are seen as having a hidden or esoteric meaning. Smith defines a 'hidden meaning' as a meaning "not obvious upon an ordinary or casual reading".⁶ In hermeneutics, meanings of "Christological significance" can be found beyond the literal meaning of the text.⁷ Likewise, in the law, specially trained interpreters can perceive meanings that an untrained interpreter would be unlikely to perceive.⁸

Smith argues that understanding the law as a religious enterprise can explain why esoteric legal interpretations are respected while the esoteric use of language generally is seen as a 'dodge'.⁹ If we unconsciously see the law "in some sense" as the expression of "divine semantic intention" then hidden meanings are "to be expected".¹⁰ Mortals are not able to fully comprehend the divine. Thus, hidden meanings in the law are respected because they are expected.¹¹

An alternative secular explanation is possible using Dworkin's interpretive theory. In essence, words or text can be understood in a non-literal way if this "makes the best sense of" the words in their broader context.¹² Thus, hidden meanings we accept can be explained by virtue of their interpretive "fit".¹³ Correct meanings in the law cohere with the surrounding body of legal rules, principles and

⁵ *Ibid.*

⁶ *Ibid.*, 88.

⁷ *Ibid.*, 87.

⁸ *Ibid.*

⁹ Smith, *Law as a Religious Enterprise*, 95.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Dworkin Ronald, *Laws Empire*. Cambridge, Massachusetts: Belknap Press, 1986 (*Laws Empire*).

¹³ Smith, Steven D. "Law without Mind" in *Michigan Law Review*, Volume 88, Number 1, 1989-1990, 104, 109 (*Law without Mind*).

practises.¹⁴ Further, the correct interpretation of law will be compatible with “current values and the best available political and moral theory”.¹⁵ Dworkin’s method recognises that the meaning of text in its full context might be quite different to the ‘literal’ meaning of the same text viewed in a vacuum. Context changes the meaning of text. So, to those untrained in recognising the *full* context, it could seem as if a trained interpreter has given the text a ‘hidden’ meaning.

Smith does not think that this secular explanation threatens his thesis. Smith’s position is that religious assumptions provide the best explanation of hidden meanings in the law even when Dworkin’s theory is taken into account. This is because, according to Smith, hidden interpretations produced by Dworkin’s “sophisticated project of interpretation” are functionally similar to creative lies that distort language.¹⁶ Further, we have no reason to respect hidden interpretations simply because they are creative – hidden interpretations are creative (or at least non-literal) by definition. To bolster his position, Smith uses an article by Robert Nagel which notes the similarities between Dworkin’s jurisprudence and Ex-President Clinton’s embellishments in regards to the Lewinsky scandal.¹⁷ Nagel notes that both Dworkin’s theory and Clinton’s embellishments use high levels of abstraction to assign a counterintuitive meaning to words.¹⁸ For example, in the law flag burning is interpreted as “speech” and in Clinton’s embellishments oral sex was not “sexual relations”.¹⁹ Also, both Dworkin and Clinton creatively use language.²⁰ This creative use of language arises in response to obstacles that are preventing the liar’s or lawyer’s progress.²¹ Despite these similarities, Clinton’s rationalised embellishments led to an “incredulous public reaction” while, conversely, skilled legal interpreters are respected and admired.²² Smith thinks that this respect for hidden meanings in the law flows from underlying religious assumptions.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Smith, Law as a Religious Enterprise, 90.

¹⁷ *Ibid.*

¹⁸ Nagel, Robert F., “Lies and Law”, *Harvard Journal of Law and Public Policy*, Volume 22 1998-1999, 605, 607 (Lies and Law).

¹⁹ *Ibid.*, 608, 609.

²⁰ *Ibid.*, 608.

²¹ *Ibid.*, 611.

²² *Ibid.*, 608, 612.

Smith's argument is mistaken. Dworkin's interpretations fundamentally differ from creative lies, and this difference explains why hidden meanings in the law are respected. Under Dworkin's theory correct interpretations follow a restrictive logical structure. Lies do not. Non-literal meanings that lawyers respect and admire can be explained because of their institutional coherence. There are two main steps in Dworkin's interpretive process which restrict the outcomes that can be considered 'correct': pre-interpretation and interpretation.²³

Pre-interpretation recognises that people can only intelligibly agree or disagree about the application of law when they share some assumptions and practices.²⁴ Dworkin's point is that there cannot be argument about a concept if the participants in the argument are mistaken about what they are arguing over. To illustrate, if two chefs are going to sensibly argue about whether the flesh or the rind of an orange is better, they first need to agree upon whether they are discussing baking or fruit salads. This level of pre-interpretive agreement is needed not only for the subject matter of the discussion, but also for the interpretive method that the interpreters will use to make the best sense of the subject matter.²⁵ For example, in adjudication, two opposing advocates would need a degree of pre-interpretive agreement about the general area of law in question (the subject matter) *and* the general methodology which will produce a correct answer. They cannot have a sensible argument if one advocate's methodology is legal reasoning from precedent while the other advocate is planning to read the entrails of a sacrificial animal for the answer. In many instances pre-interpretation will not require explicit argument; indeed, Dworkin acknowledges that this stage of the interpretive process is often assumed.²⁶ Two lawyers, for example, will probably agree on the subject matter at issue and the types of argument that can be used to analyse the subject matter.

²³ Dworkin, *Laws Empire*, 65, 66. There is also a third stage called 'Post-interpretation' (discussed at page 66 of *Laws Empire*) which essentially applies the correct interpretation to the relevant facts. A detailed discussion of this interpretive phase is not necessary for the purposes of this essay.

²⁴ Dworkin, Ronald. *Justice in Robes* (Cambridge, Mass: Belknap Press, 2006) 9.

²⁵ *Ibid*, 10.

²⁶ *Ibid*, 12.

This pre-interpretive phase is the first step to ensuring that while meanings in text might be hidden they will not be surprising to an informed interpreter. In contrast, hidden meanings that we see as 'distortions of language' are often the result of different perceptions at the pre-interpretive stage. For example, the American public assumed Clinton would give an everyday explanation of the Lewinsky affair.²⁷ Clinton's technical use of the words 'sexual relations' did not cohere with this assumption. In consequence people felt surprised or tricked by his use of language.²⁸ Because of different assumptions at the pre-interpretive stage Clinton was not seen as giving sensible explanations for his position and the 'hidden' meaning he gave the term "sexual relations" was seen as a 'distortion'.²⁹

Dworkin's second interpretive stage has two interrelated strands.³⁰ According to Dworkin, correct interpretations must have both legal 'fit' and moral worth.³¹ Legal 'fit' is the idea that an interpretation must be consistent with the surrounding legal context.³² To illustrate, the metaphor of a chain novel with multiple authors is helpful.³³ While each subsequent author has some freedom to develop the novel, they are constrained by what has already been written. For example, each author would need to have regard to things like previous plot developments and the names of the characters if the novel is to make sense.³⁴ Likewise, in the law, developments must fit with the past. Legal interpretations must coherently fit within their relevant legal context; the surrounding body of statutes and precedents.

Dworkin's claim that correct interpretations must have moral worth is more controversial. This claim requires Dworkin to show that the law has a moral element. He provides several arguments to this end. First,

²⁷ Nagel, *Lies and Law*, 605.

²⁸ *Ibid.*, 605, 609.

²⁹ *Ibid.*, 609.

³⁰ In 'Justice in Robes' Dworkin breaks the interpretive stage into the 'Jurisprudential' and the 'Doctrinal' stage at pages 12 and 13. The Jurisprudential stage deals with legal fit while the doctrinal stage deals with wider moral fit. In this essay, it is easiest to deal with both these stages together.

³¹ Dworkin, *Justice in Robes*, 14, 15.

³² Guest, Steven., *Ronald Dworkin*. Edinburgh: Edinburgh University Press, 1992, 49 (Guest).

³³ *Ibid.*

³⁴ *Ibid.*, 50.

Dworkin argues that the coercive power of the State must ultimately rest upon moral justifications.³⁵ Other potential justifications for the State's coercive power obviously exist but, according to Dworkin, they will not be the best justifications.³⁶ For example, it might be argued that our legal system ultimately rests upon the pragmatic justification of 'majority rule'. However, the idea of 'majority rule' would not draw a distinction between an egalitarian legal system and a legal system that held a minority group as slaves. Because we think of the law as a system of justice, not injustice, 'majority rule' is not the best ultimate justification of our legal system. Dworkin says that the law has a moral dimension for a second set of reasons. Namely, there are moral standards, or principles, in the law.³⁷ Principles exist because of their substance. In comparison rules are observed because of their source or "pedigree".³⁸ Dworkin justifies his assertion that 'principles exist' because this makes the best sense of legal arguments, practises and judgements.³⁹ When we argue about hard cases in the law we act as if principles exist.⁴⁰ Because the law has a moral dimension the best legal interpretations will do more than 'fit' with the surrounding body of statutes and cases; they will also have moral worth.

Dworkin does not think that talking about moral worth is pointless. His idea is that a right moral answer is the product of everyday argumentation. Reasons are given, and the moral position is unhelpful and misleading. First, there is no logical requirement that a right answer needs proof. For example, a peasant in the Middle Ages could be right in thinking that the earth was round even if she could not prove that this is the case. Further, the very proposition that proof is needed for something to be true is not true under its own standard – it cannot be proved. This argument is purely defensive. It is protects Dworkin's idea that a best justified answer can be right even though it cannot be objectively proved to be right. Dworkin's ultimate point is that forgoing moral argument because of "objective truth" concerns is

³⁵ *Ibid.*, 33.

³⁶ *Ibid.*

³⁷ Dworkin, Ronald., *Taking Rights Seriously*. London: Duckworth, 1977, 40 (Taking Rights Seriously).

³⁸ *Ibid.*, 17, 26.

³⁹ *Ibid.*, 45.

⁴⁰ A 'hard case' in the law is simply a case where the outcome is not immediately obvious, but is the product of legal argument.

unproductive. The reality is that we do argue about moral issues. Further, we give reasons for our moral convictions. If we think rational argument can help us reach the right conclusions in everything from politics to law to predicting who will win the rugby, why reject the worth of rational argument in the moral realm? As put by Dworkin, when one is confronted with a moral argument:

it will not be wrong to reply, “but that is only your opinion.” However, you must ask yourself whether, after reflection, it is your opinion as well.⁴¹

The cumulative effect of these moral and legal requirements of interpretation is that legal interpreters are restricted when they interpret texts. Dworkinian interpretation produces ‘hidden’ meanings of text that are consistent with both the law and our moral convictions. This contextual and ethical consistency explains, without religious assumptions, why we respect hidden meanings in the law while we see unrestricted displays of linguistic creativity as a communicative ‘dodge’. Hidden meanings in the law are interpretations that ‘fit’ with the principles, practises and ethics that surround the question. In contrast, an embellishment or lie will cut against an informed perception of reality. Note that this difference between lies and interpretations is only discernable when the context surrounding the question is known. This is why lawyers can derive meanings from legal texts that would not be evident to laymen; lawyers have a well informed understanding of the surrounding legal context.

Smith’s article challenged us to account for the difference between “sophisticated” interpretations and lies which distort language.⁴² His argument was that an unconscious religious assumption can best account for this difference (namely that we see legal texts as “in some sense” the product of divine authorship, so hidden meanings are “expected”). Upon reflection, and with Dworkin’s interpretive theory in mind, we can provide a better secular explanation. Sophisticated interpretations differ from lies *because of their sophistication*. Lies are a creative free-for-all. In contrast, correct legal interpretations are restricted in their creation and have coherence with the surrounding law and our moral convictions. This difference explains why we respect

⁴¹ Dworkin, *Laws Empire*, 86

⁴² Smith, *Law as a Religious Enterprise*, 90.

interpretations of the law but not embellishments of language even though both invoke the 'hidden' meaning of text.

A few final points can be made about Smith's argument that religious assumptions best explain why some hidden meanings are accepted while others are not seen as credible. Smith asks why hidden meanings are accepted in legal and religious texts when they are not accepted in ordinary language.⁴³ However, this observation is mistaken. What Smith has seen as a distinction between legal and religious interpretation on the one hand, and ordinary use of language on the other, is actually a distinction between coherent interpretations and manipulations of language. In ordinary language, just as in the law, the meaning of a word in its full linguistic, ethical and social context might be different to the literal meaning of the word if viewed in a vacuum. To those considering the word in isolation, a contextual meaning would appear to be a 'hidden' meaning. To borrow an example from Stanley Fish, imagine a notice in a plane lavatory which says "do not put waste down the toilet".⁴⁴ Here, we obviously recognise that waste does not include excrement. In contrast, when looking at a hose connection on the side of a campervan labelled "waste outlet" we would clearly read waste to mean "human excrement". The hidden meaning of 'waste' is accepted in both these instances because it coheres with the broader context. Interpretations that are accepted in law also cohere with the broader context in this way.

Having given a secular explanation for why certain 'hidden' meanings in language are accepted it is pertinent to ask Smith the converse question: to what extent do religious assumptions actually explain hidden meanings in law and scripture?

Smith's argument is that because humans will never be able to fully comprehend the divine, we expect to find hidden meanings in religious and legal texts. However, our very conception of God supplies the answer to Smith's argument. God is omnipotent, omniscient and omnibenevolent.⁴⁵ A benevolent God would want to clearly communicate

⁴³ *Ibid.*

⁴⁴ Fish, Stanley., *Doing what comes Naturally: Change, Rhetoric and the Practise of Theory in Literary and Legal Studies*. Durham, North Carolina: Duke University Press, 1989, 302 (Doing What Comes Naturally.)

⁴⁵ McCann, Hugh J., "Divine Providence", *The Stanford Encyclopedia of Philosophy* (Fall 2006

with humanity.⁴⁶ Further, an omnipotent God would, by definition, have the power to clearly communicate with humanity. Thus, without further explanation by Smith, ‘religious assumptions’ poorly explain why we accept hidden meanings in scripture and the law. Our religious assumptions cut against the existence of hidden meanings in scripture.

In sum, ‘religious assumptions’ seem to provide a poor explanation of why hidden meanings are accepted in the law. Further, the acceptance of hidden meanings in legal texts can be convincingly explained using Dworkin’s interpretive theory. Namely, hidden meanings that cohere with their broader context are accepted as correct. In comparison, distortions of language which do not have any broader contextual coherence are treated with scorn in both the law and ordinary language.

B. Why do we treat legal texts as authoritative?

The second similarity Smith notes between legal and scriptural interpretation is that both methods treat texts as authoritative for our conduct and decisions.⁴⁷ By this Smith means that both legal and scriptural texts are seen as authoritative on the basis of their own intrinsic authority. We obey scripture because it is scripture and we obey the law “because it is the law”. Smith notes that this is a striking contrast to the “forward looking, pragmatic costs-and-benefits decision making that we employ in many areas of life.”⁴⁸ He argues that it is hard to understand why we would treat legal texts as intrinsically authoritative.⁴⁹ However, this would not be hard to understand if legal texts, like scriptural texts, were supposed to express the will of God.⁵⁰

Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/fall2006/entries/providence-divine/> Last accessed 28 May 2008.

⁴⁶ God’s word is meant to provide a code for proper religious and secular conduct. (Kuntz, Paul Grimley, *The 10 Commandments in History: Mosaic Paradigms for a Well-Ordered Society*, (Grand Rapids, Mich: Eerdmans, 2004) Ch 1). If people are to follow God’s instructions without conflict, his or her instructions would need to be clear. A benevolent God would not want unnecessary conflict and would therefore ensure all his communications with mankind could be clearly understood.

⁴⁷ Smith, *Law as a Religious Enterprise*, 90.

⁴⁸ *Ibid*, 91.

⁴⁹ *Ibid*.

⁵⁰ *Ibid*, 95.

Smith is overstating the problem. It is not difficult to explain why we treat the law as authoritative even if a pragmatic costs-and-benefits analysis would yield a more 'rational' result in individual cases. We respect the law as authoritative as part of the Lockean social contract.⁵¹ In exchange for protection, individuals allow the curtailment of some freedoms by the state.⁵² We prefer the governance of the law to a state of nature where life is "nasty, brutish, and short".⁵³ Further, we respect the law as authoritative because we trust the constitutional structure which creates, interprets and applies the law. Society feels comfortable being governed by a state operating under the rule of law, whose coercive power is checked by the separation of powers and political accountability.⁵⁴

Further, because the law is a body of generalised rules and principles there will be instances where a legal outcome differs from what a pragmatic costs-and-benefits analysis would dictate.⁵⁵ The reason we treat the law as authoritative, even in this circumstance, is because we value the principle of legal certainty.⁵⁶ Legal certainty, by way of predictable law, is a control on the exercise of state power.⁵⁷ Even if rules are not always just, we can plan our activities successfully under rules provided they are consistently interpreted and applied.⁵⁸ As put by John Smillie, this predictability of legal outcomes "encourages future planning and co-operative activity".⁵⁹ Thus, a key reason for treating the law as authoritative is precisely because it is *not* pragmatic.

⁵¹ Locke, John., *The Second Treatise of Government*, (New York; Bobbs Merrill) (First Published 1690) 76, 77, 78.

⁵² *Ibid.*

⁵³ Hobbes, Thomas., *Leviathan* (New Jersey, Prentice Hall, 1958) (Originally published in 1651).

⁵⁴ Blackstone, W., *Commentaries on the Laws of England*. (Reprint of 1st ed, London, Dawsas of Pall Mall, 1966) Volume 1. 142.

⁵⁵ Schauer, Frederick., *Playing by the Rules: A Philosophical Examination of Rule-Based Decision Making in Law and in Life*. New York: Oxford University Press, 1991, 17 (Playing by the Rules).

⁵⁶ Craig, P. P., "Substantive Legitimate Expectations in Domestic and Community Law" *Cambridge Law Journal*, July 1996, 289, 299.

⁵⁷ Stinchcombe, Arthur L., "Certainty of the Law: Reasons, Situation-Types, Analogy and Equilibrium. *The Journal of Political Philosophy*: Volume 7, Number 3, 1999, 209.

⁵⁸ Schauer, *Playing by the Rules*, 138.

⁵⁹ Smillie J., 'Formalism, fairness and efficiency: civil adjudication in New Zealand' [1996] *NZ Law Review* 254, 257.

This raises a *prima facie* objection. On the one hand, it has been argued that correct interpretations in the law will only be discernable to those with a full knowledge of the surrounding legal context. This precludes all but specialised legal interpreters from knowing what the law is. On the other hand, it has been argued that Smith has erred by not taking into account the principle of legal certainty. For the principle of legal certainty to have any worth it must be possible for the majority of the people to find out the majority of the law the majority of the time. If people do not know the law they cannot plan future conduct around it.

This charge of self-contradiction does not stand. Nowhere does Smith assert that *all* legal text has hidden meaning.⁶⁰ Rather, Smith's point is that there are tricky problems of interpretation which are solved by reference to 'hidden' meanings.⁶¹ Dworkin's interpretive theory explains why some 'hidden' interpretations are respected as providing the answer in hard cases.

The point is that the vast majority of legal text will not be hard cases requiring interpretation. Most cases before the courts are not argued on a legal basis; the law is applied to the facts (which often are in dispute) with little argument as to the substance of the law. This is consistent with Smith's observations, Dworkin's theory and the principle of certainty in the law. Because the majority of the law is unambiguous the majority of the time, the general public can embrace legal certainty as a worthwhile goal. The principle of legal certainty, combined with our constitutional principles and the Lockean idea of a social contract explains, in a completely secular manner, why the law is treated as authoritative.

The final similarity between legal and scriptural interpretation identified by Smith is that both types of interpretation treat seemingly disparate and diverse texts as forming a unified and harmonious whole.⁶² Smith notes that this assumption is extraordinary.⁶³ Despite statutes made by different legislatures with different aims and intentions and despite decisions made by different judges, in different centuries, with different temperaments and training, we view the law as constituting and

⁶⁰ Smith, *Law as a Religious Enterprise*, 83.

⁶¹ *Ibid.*, 89.

⁶² *Ibid.*, 84.

⁶³ *Ibid.*, 93.

reflecting a unified, coherent whole.⁶⁴ The law, like the Bible, Qur'an or Torah, is seen as the work of a single author.

However, there is nothing mysterious about this aspect of the law. It can be explained by summarising the conclusions of the previous parts of this essay. Under the Dworkinian interpretive method, the correct interpretation of hard cases will be consistent with the surrounding legal rules and principles. This drive for consistency and coherence is further buttressed by the fact that we treat the law as authoritative. Then, because the law is seen as authoritative, we attempt to give full effect to it. This means we try to read inconsistent texts in a consistent manner; we give the law a coherent and consistent meaning even if pragmatic considerations would require a different result. This is because we value the principle of legal certainty. In sum, our secular practices of interpretation aim for the law to represent a consistent, coherent whole. Smith sees our approach to interpretation as presupposing divine authorship of the law.⁶⁵ He has got it backwards. The appearance of divine authorship in the law is merely a symptom of our wholly secular approach to interpretation.

Conclusion

It has been argued that we do not interpret the law as if God wrote it. Interpretive practises in the law make sense without reference to religious assumptions. This thesis was advanced in three parts. These parts were organised as an attack on the main pillars of Smith's article "Law as a Religious Enterprise". Part one set out Smith's position that underlying religious assumptions best explain the acceptance of hidden meanings in legal texts. This position was wrong, as hidden meanings in legal texts are accepted due to their coherence with the surrounding body of law and our moral convictions. This idea, that context can alter literal meanings, holds true in ordinary language as well as in the law. Part two of this essay explained the law's "inherent" authority without reference to religion. We treat the law as authoritative because rule by law is an attractive alternative to a Hobbesian state of nature. Further, the secular principle of legal certainty explains why we continue to treat the law as authoritative even though a pragmatic cost-and-benefits

⁶⁴ *Ibid*, 93.

⁶⁵ *Ibid*, 98.

analysis might yield more rational results in individual cases. Smith's observation that the law presupposes a single divine author was countered in the final part of this essay. Because correct legal practise demands coherence and consistency in the law, a symptom of our secular practices is that the law appears to be the work of a single author.