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Legal Realism, Legal Interpretivism, Holmes and Nietzsche

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Abstract
Two new legal philosophies took shape in the twentieth century, legal realism and legal interpretivism. Legal realists are skeptical of law and the legal reasoning done in courts. Ronald Dworkin's philosophy, legal interpretivism, views legal reasoning as part of the coherent narrative that justifies the role of law in society. The realist movement is often traced to the philosophy of Oliver Wendell Holmes, Jr., whose thinking bears similarities to that of Friedrich Nietzsche. Taking Jerome Frank's philosophy as the epitome of legal realism, I argue that Holmes and Nietzsche would prefer Dworkin's legal interpretivism rather than Frank's legal realism. This project illuminates the differences between Dworkin and Frank, as well as showing a realist lineage in Dworkin. This ultimately makes interpretivism a more palatable philosophy to Holmes and Nietzsche, who, when given a sympathetic exegesis, have more subtle, nuanced views of law.

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Legal Realism, Legal Interpretivism, Holmes and Nietzsche

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John Koselke

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The report of the investigation undertaken as a
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Abstract

Two new legal philosophies took shape in the twentieth century, legal realism and legal interpretivism. Legal realists are skeptical of law and the legal reasoning done in courts. Ronald Dworkin's philosophy, legal interpretivism, views legal reasoning as part of the coherent narrative that justifies the role of law in society. The realist movement is often traced to the philosophy of Oliver Wendell Holmes, Jr., whose thinking bears similarities to that of Friedrich Nietzsche. Taking Jerome Frank's philosophy as the epitome of legal realism, I argue that Holmes and Nietzsche would prefer Dworkin's legal interpretivism rather than Frank's legal realism. This project illuminates the differences between Dworkin and Frank, as well as showing a realist lineage in Dworkin. This ultimately makes interpretivism a more palatable philosophy to Holmes and Nietzsche, who, when given a sympathetic exegesis, have more subtle, nuanced views of law.

First among equals dedicated in this thesis is my pet bird Davy, as well as my pet birds Kimmy and Aristotle. Second in the equal sense is Professor Chad McCracken, Professor Janet McCracken, Professor Daw-Nay R. Evans Jr., and Professor Dan LeMahieu.

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Chapter 1: Introduction

This is a work in philosophy of law, principally that basic philosophical question of what is law. No one is denying that most people can use the word law, and whatever concept it may refer to, seamlessly and fruitfully in day-to-day conversation. However the philosopher has a nagging itch to know what is really meant, what ideas are really going on, beneath the surface, of the idea of law. This nagging itch is often spoken of as a beautiful desire for truth, after all philosophy is attic Greek for love of wisdom. However for many philosophers it is an affliction, a need for useless knowledge beyond common sense that annoys and puts them at odds with their peers and contemporaries.

The general question dealt with in this work, that is, the question of what is law, may seem hopelessly boring. My aim is not to bore anyone to tears. To make a work of legal philosophy more interesting and less abstract I will follow in the footsteps of the legal philosophers Jerome Frank and Ronald Dworkin by integrating a real legal issue into this work. What will follow are lengthy quotes, but providing these quotes will ensure a clear communication of the issue. Consider the situation of Weldon Angelos as reported by Jacob Sullum, a writer at *Forbes*.

> Nine years ago [2004], Weldon Angelos, a 24-year old rap music entrepreneur from Salt Lake city, was sentenced to 55 years in federal prison for three small-time marijuana sales . . . U. S. District Judge Paul Cassell, who imposed what may well amount to a life sentence on Angelos, called it 'unjust, cruel, and even irrational' but noted that his hands were tied by the mandatory minimums Congress had prescribed for people who engage in drug trafficking while possessing a gun . . . he never brandished a gun, let alone fired one, and no one but Angelos and his family suffered as a result of the marijuana sales, which involved a total of a pound a half (Sullum 1-2).

More interesting is what is said and quoted by Sullum in summarizing a letter written to President Obama to commute the sentence.

> Angelos would have been treated less severely if he had shot the police informant posing as a customer instead of selling him pot twice more. The sentence was so egregious, the letter notes, that in 2006 "a group of 145 individuals—including former U.S. Attorneys General, retired U.S. Circuit Court Judges, retired U.S. District Court judges, a former Director of the FBI, former U.S. Attorneys, and other former high-ranking U.S. Justice Department officials—submitted a brief amici curiae in support of Mr. Angelos's case (Sullum 4).

There is no particular reason for choosing this legal question or issue, it has not been carefully selected to make a specific point. Rather it serves as an example of the importance of law and legal questions. What is the law in this situation? With so many, including the judge, thinking this sentence too harsh it raises the question whether or not the law really can have such a harsh position. What does it mean for the law as a standalone, independent influence on lives of people if, for example, the President does commute Angelos' sentence? Regardless of one's particular position, law is important in the lives of people. In some cases to some people the law's position may be so frustrating that perhaps we would doubt there being law in this situation at all. To some that think this the law has a higher value, and a law is actually not really law if it transgresses this value. When the law seems so unjust, it can be natural to then ask, what is the law? Is the true law really contained in the statutes with its supposedly clearly written out minimum sentences? Are these questions just hopeless dreams? Whatever the status of these questions and their answers, a general philosophy of what is law can furnish a framework for answering them.

There are numerous philosophical answers to the question of what is law. In the twentieth century, amongst other developments in legal thinking, two new major

philosophies emerged that offered an answer to this question, and these two philosophies are the subject of this work. The first was legal realism. The second was Ronald Dworkin's philosophy of legal interpretivism. I will eventually explain ways that Frank's legal realism and Dworkin's legal interpretivism might address the law concerning Weldon Angelos' situation. Before that though, to make reading smooth, I will present a very quick gloss and summary of the two major philosophies and various thinkers prominent in this work.

Legal realism views law as only being the decisions of judges, and the predictions thereof. To bring this closer to common sense, they would say there is no law until the judge makes his ruling, and someone is forced to pay a fine, or go to jail. That is, law proper is intimately connected with particular legal decisions and their material consequences. The heyday of legal realism was in the 1920s and 1930s. Jerome Frank had several law jobs, he was first a lawyer in Chicago and New York, then a research associate at Yale Law School, then a lawyer in FDR's various New Deal programs, then head of the SEC and eventually a judge on the 2nd Court of Appeals. I take Jerome Frank's legal realist philosophy outlined in his 1930 book *Law and the Modern Mind* to be the epitome of legal realism, and I take it as a coherent, standalone work to be given a sympathetic exegesis and reconstruction in regards to the question of what is law. I mean 'coherent' in the sense that Frank's other writings, and possible changing positions overtime, will not influence my understanding it bar some references to the later preface to *Law and the Modern Mind.* In that preface, and shortly after publishing the book, Frank retreated from many of his positions (xx). The philosophy I deal with is not the later Frank, but the philosophy of Frank as the relatively unknown lawyer who just published the book *Law and the Modern Mind*. This work treated as a coherent

philosophy of law provides a very fruitful tree or pole to juxtapose with Dworkin's interpretivism. Frank in that work is skeptical of law and legal reasoning, while Dworkin is not at all. I do not necessarily disagree with those who think Frank's philosophy and legal realism as a whole should not be seen as having a general theory of law, but it is clear enough that he offered a definition and a philosophy in 1930 when he wrote *Law and the Modern Mind*.

Ronald Dworkin's legal interpretivism is the view that the law is first and foremost an interpretive concept. The claim is that the law is the best interpretation of past political decisions, and the various moral principles of the legal community personified that best justifies current political practices, rights and the use of force. Ronald Dworkin was at first a law clerk, then a lawyer in New York City, and then became a law professor. Some of the law schools and universities he taught at include Yale Law School, Oxford University, New York University and University College London. Dworkin's philosophy began developing in the 1960s and in my eyes reached its clearest and most coherent exposition in his 1986 book *Law's Empire*. I also treat *Law's Empire* as a coherent, standalone work to be given a sympathetic exegesis and reconstruction in regards to the question of what is law.

As a side note, throughout this work I may use phrases like 'law proper', or 'what law truly is'. What I mean by this is what is law according to the legal philosophy in question. This is to distinguish it from the more colloquial usage, which I inevitably have to dip into to make my writing smoother.

The legal realist movement is often seen in having its origins in the writings of Oliver Wendell Holmes Jr., who is often regarded as the spiritual father and inspiration of the legal realist movement. Holmes fought in the civil war, was a lawyer, a scholar on

law, and eventually became a Supreme Court Justice. Interestingly, several scholars have pointed out that Holmes' thinking bears many similarities to the thinking of the nineteenth century German philosopher Friedrich Wilhelm Nietzsche (Leiter 1). Nietzsche had his beginnings as a philology professor, and in his later life wrote many philosophical works and he is famed for his arguments against Christian morality. Nietzsche has also been compared as having similarities in thought to the legal realists as well (Diener 1).

In this work, I argue that contrary to first assumptions, Holmes and Nietzsche would be more likely to agree with Ronald Dworkin's legal interpretivist philosophy outlined in *Law's Empire* than the matured and full blown legal realist philosophy outlined in Jerome Frank's *Law and the Modern Mind*. For Holmes' position, I only consider his 1897 article *The Path of the Law* and his writings in his book *The Common Law*. Nietzsche, not having given a political philosophy let alone a philosophy of law needs to be looked at more abstractly and indirectly to discern what positions in 20th century legal philosophy Nietzsche would like. I consider his writings on morality of custom, history, as well as the broader themes of his work. Some may dispute that Nietzsche should be involved in this, as it cannot be definitively said what Nietzsche's position on two major 20th century Anglo-American legal philosophies would be, and in all likelihood it would not interest him directly. Despite this, bearing the comparisons made to Holmes, and how he would superficially appear to have a home with the legal realists, trying to construct Nietzsche's position may be speculative, but is a fruitful endeavor.

However before I get to the nuts and bolts of this fruitful endeavor, I think the words of the legal philosopher Karl N. Llewellyn will help set the tone, to act as some

sugar to help the medicine go down, and to remind us of the relaxed sense of leisure one can always take when perusing philosophy. After rigorous discussions of case law, Llewellyn says ". . . we can sit back more at our ease, give fancy freer rein, and loaf a little in such pastures of the law as the old nag will take us to. There is no end of pastures: logic, and legal history, . . . statutes; the judge in politics, legal research . . . let us pick out a few of these, and stuff our pipes, touch a match, puff, and watch the pictures in the smoke" (Llewellyn 73). With Llewellyn's leisure in mind, let us begin.

Chapter 2: Jerome Frank's Legal Realism

What is the law to Jerome Frank? Frank's first answer is this "a complete definition would be impossible and even a working definition would exhaust the patience of the reader" (Frank 46). Despite Frank seeming to avoid the question, he does give a roundabout answer, and in examining his other statements I will attempt to present a Frankish vision of legal realism. Frank continues that we should consider what "the law means to the average man of our times when he consults his lawyer" (46). That is to say, Frank, in a sense, is purposely giving us an incomplete definition of the law, and the part he is giving it is from an experiential perspective of 'the average man.' He then presents the legal battle between the Jones' Blue & Gray Taxi Company and the Purple Taxi Company, whereby when the hard question is asked by the commoner to his lawyer, his lawyer can offer at first what is essentially only a prediction of how the courts will rule on the question (47). The lawsuit goes through several levels of the appellate court, with decisions changing so that at different times in the life of the lawsuit the answer to whether or not the contract is legal changes (48-49). So, varying throughout the life of the lawsuit something is legal, then not legal, and so forth, and this only ends at the Supreme Court (48). At this highest level another prediction is cast, but this time is more based on the perceived character of the judges than any remarks of law or past precedents (48-49). At first the predictions are about what precedents the lawyer thinks may be followed, and the higher one goes in the court, the more it becomes the question of what precedent behavior of a judge in following legal precedents, will be followed. Meaning, as the question is put to a higher authority a lawyer in counseling his client is less reliant on the law in the traditional sense of statues as precedents than he is in personality. As Frank

puts it "Now what was 'the law' for the Joneses, who owned the Blue & Gray Company, and the Williamses, who owned the Purple Company? The answer will depend on the date of the question" (49).

From this experiential perspective and answer, Frank presents a more substantial view of the law. The law to "any particular lay person . . . is a decision of a court with respect to those facts so far as that decision affects that particular person. Until a court has passed on those facts no law on that subject is yet in existence" (50). Before that has happened, the law is only predictions (50). Frank continues "law, then, as to any given situation is either (a) actual law, *i.e.*, a specific past decision, as to that situation, or (b) probable law, *i.e.*, a guess as to a specific future decision" (50-51). It is odd that Frank says this is what the law is for 'the average man,' as I doubt any average person would ever give this answer. Even if his or her lawyer gave him or her this answer, I doubt he or she would take it, although Frank does acknowledge that this view is "not at all . . . how lawyers customarily define the law" (51). This conception of law is better seen as Frank's enlightened perception of the law for 'the average man.' It is also, his clearest answer on what the law is.

In one sense, this is an empirical take on the law. Go look and see the law happening in the real world. Consider the perspective of a real person wanting an answer to a question about what the law is in a particular instance, and analyze what the law really is from that person's limited perspective. When we examine this particular instance, the Blue & Gray Company incident, we find that the law is not very clear. The stronger our legal microscopes the fuzzier the picture becomes. The picture changes from time to time. If we imagine ourselves as Mr. Jones the scientist, asking the question, what is the law on the Blue & Gray Taxi Company contract, and every hour of everyday we

ask and record the answer, initially there is no answer, and then from time to time the answer changes until it finally stabilizes. The answer is not the collective tally of observations, the collective tally of how many hours the contract was legal or not, it is always the last immediate observation, meaning, the most recent answer from the highest appellate body. When determining the answer to hard particular legal questions and situations, the answer is far from some a priori formula, but a heap of predictions that depend more and more on predictions of character and less and less on statutes.

Existential and Psychological Character

There is something else in this approach, Frank takes up a hard case, and a hard case with lots of money at stake. That is to say, Frank's observation of law out in the real world is one where people are financially and emotionally invested in the answer. Does the answer provide a relief to the intense feelings relating to the legal questions in the lawsuit? The answer to the legal question given in court relieves the feelings in so far as the final answer is the official end of the conflict and one can go to bed at night knowing the lawsuit is over, but how does Frank's view of the law, with the focus on a judge's personality, make us feel about the answer as in something with reasons? "If two more judges on that bench [the Supreme Court] had agreed with Justice Holmes, Brandeis and Stone, the law and the rights of the parties would have been of a directly opposite kind" (50). In Frank's view, the ultimate reason and cause for the particular answer given comes down to the collection of individuals answering it. The question of what the law is then comes down not seemingly to cosmic order and justice, but to the mere political circumstances of the current appointed judges. In this sense, the answer is an emotional

letdown to the grand and broad question of what is the law on the legality of the contract. In this sense, there is an existential character to Frank's answer to the question.

The bulk of Jerome Frank's project is a project of destruction. Frank is trying to tear down myths about the law, and it is in this negative project that the existential twist of Frank's philosophy is more clearly seen. Frank succinctly puts it that "the basic legal myth that law is, or can be made, unwavering, fixed and settled" (21). This myth exists because people desire it, and it is a desire birthed in fears. "Man, we might conceivably say, driven by fear of the vagueness, the chanciness of life, has need of rest. Finding life distracting unsettling, fatiguing, he tries to run away from unknown hazards" (211). This is what leads people to religious worship, and the same sentiments are carried over into conceptions of the law (211). Even more significant to Frank's views is his belief that the desire for legal certainty has its origins in childish ways of thinking. "The infant strives to retain something like pre-birth serenity . . . these factors manifest themselves in a childish appetite for complete peace, comfort, protection from the dangers of the unknown. The child, 'unrealistically,' craves a steadfast world which will be steady and controllable" (20). This craving is satiated in the false belief in an "incomparable, omnipotent, infallible father" (20). For many there is still an "infantile longing to find a father-substitute in the law" (192). In this light we see Frank having a tragic view of the law. In the law people put their hopes for order, stability, exactness, and right decisions, but it fails its task, and we blind ourselves to its failure because of our childish dispositions.

Pragmatism and Skepticism

There is also a pragmatic element to Frank's position, and this is more clearly revealed by developing a critique of Frank's work. One could protest Frank and try to

turn the tables on him by saying "Frank, isn't it you who want the law to be an infallible father authority? While you can stomach a conception of law that changes fast, your position, that law is the decision of the courts and predictions thereof, makes law infallible! Think about it, in your position, Frank, when the Supreme Court rules on a case, we absolutely know the law for that case. It is really those who champion conceptions of law that have a metaphysical dimension, where we have to discover the law, and courts may not correctly discover it, those are the adult perspectives on law. An advocate of that view may say in some instances that society may be lost, not following its own laws, and unable to discern what its laws even are. Now that view invites skepticism, because how do we know if a decision of a court was law or not? It is that conception of law that invites despair that society could be hopelessly ruled by an imposter law." One response from Frank could be echoing a sentiment of John Chapman Gray, that any conception of law that says the courts do not follow law is absurd (131). It is not out of childish thought patterns that judicial decisions are law but a desire to have some rational grounding in a conception of law. The skepticism in Frank's work is furthered revealed in this as well, a skeptic often takes a high standard of truth, and in this case law needing to have certainty, Frank takes the highest standard of certainty and so the only thing that meets this skeptical requirement for law is a judge's decision.

Another response to this critique would be to point out that it is premised on a very robust notion of law as a kind of father or God. God may not answer our prayers, but to a believer, believing God is there, surely that is a comfort, and the same applies with this conception of law. For the legal "faithful" law is actually there to discover and for Frank that is not so, "whenever a judge decides a case he is making law" (136). In considering that we see legal realism slide into something like legal skepticism,

skepticism that law is at all possible. Law, in failing its divine mandate to have rules that could ever be applied to the relevant facts, is forced to exist only in the past decision of judges. By placing the only true origin of law proper in a judge's decisions we are coincidentally putting law's only existence at its most pragmatic point. Judges decide cases, thus ending conflicts, a judge's decision gets society moving properly again as far as the litigants are concerned, and it is an end to their legal problems, whether or not they may like the outcome or sanctions. Frank's view of law is less about ordering society than about solving problems and conflicts. To Frank, judges make law, and coincidentally then all created law ends a conflict and thus all law for Frank has a necessary connection to practical affairs. Frank's perspective on law is pragmatic as well. Frank, taking the position of the lawyer telling the law to practically-minded laymen, is giving the truth in law only in so far as it has practical benefits. That is to say it is a pragmatist's view of truth because the truthful statements of law are tied to what is practical.

Justice and Illusions

Frank's pragmatic conception of law is what fuels a lot of Frank's criticisms, and one of his main targets is the doctrine of precedents. Anything that interferes with law resolving disputes is hindering us and needs to be done away with. It is important to note that this practical notion of law is not devoid of flowery, beautiful ideals. Frank does believe that the law should bring about justice. This is evidenced when Frank criticizes judges for relying on precedents and making a bad decision for the particular circumstances that would create a good precedent rule (165). Frank terms this "'injustice according to law"' (165). Frank's position is in some ways based on the position of John

Chipman Gray, on which he sees Holmes' philosophy as an advancement of (133 – 134). The unique contribution in Gray's thought is that there is a division between law and sources of law (131). Gray held that courts in decisions are making rules, and everything else, like legislative documents, are just sources of law (131). Frank rejects that judge's make rules, in part because Frank rejects precedents on the grounds that they can never truly be known. "The rules a judge announces when publishing his decision are, therefore, intelligible only if one can relive the judge's unique experience while he was trying the case – which, of course, cannot be done" (161). The skepticism of this is deep. Frank is asking, what is it like to be a judge? The answer, we cannot possibly know.

There are two issues that make even identifying what exactly is a binding rule in a precedent problematic. With identifying the rule, Frank claims "There are the two following effective methods employed by the courts for "distinguishing" (*i.e.* evading or sterilizing) a rule laid down in an earlier case . . ." (159). Frank continues "(1) the rule is limited to the 'precise questions' involved in the earlier case" (159). In other words, the judge claims that the precedent does not apply to the current case because the precedent case was too narrow. The second means of evading a rule is that "it is often asserted that the 'authoritative' part of a decision is not what was decided or the rule on which the court based its decision but something (lying back of the decision and the rule) called the 'ratio decideni' – the 'right principle upon which the case was decided'" (159). This is saying that even when a clear rule is sketched out, the judge has to determine what the real principle behind that principle and decision was. Just as a judge interprets a statute and reports that interpretation in a decision, a later judge can dispute that interpretation by finding another layer of meaningful principles behind the earlier decision.

Precedents are also problematic because of their need to be applied to particular facts, and since the relevant facts of a case can be changed, it renders the binds of precedents weak.

> What are the 'relevant facts' in any case? One judge may say they are facts a, b and c. It may well be that most other judges would agree that there could be but one proper decision *if* they agree that a, b and c were the relevant facts. But suppose another judge holds that the evidence also discloses fact d and that fact d is 'relevant' On that basis he may reach a different decision, which most other judges would concede to be correct *if* they agree that a, b, c and d were the relevant facts (145).

Thus, even with a seemingly clear precedent rule, the application requires a judgment of facts that is another area of disagreement. This is why Frank regards precedents 'illusory'. The gray area of what facts are relevant will hinder a coherent picture of the law, and the choosing of relevant facts is another area for intentional judicial subterfuge or other unconscious, motivating forces, such as the childish thought pathways that Frank argues against. As Frank later succinctly puts it "The 'facts,' it must never be overlooked, are not objective. They are what the judge thinks they are" (xxx). This further confounds any assertion that precedents can have any unifying application.

While many of these critiques are aimed at precedent in particular, they are valid for all legal rules because a precedent is just a type of legal rule or a source for creating a legal rule. This brings up the notion for Frank that we can only have particular knowledge. ". . . [What] judges have failed to see is that, *in a sense, all legal rules, principles, precepts, concepts, standards – all generalized statements of law – are fictions"* (179). After all, a rule in a precedent is a generalized statement, but because of the various ways judges can understand those precedents, and apply them, their truth as general propositions is illusory. They are at best words that signify a bundle of particular

means of deciding cases, and many of those particular means of deciding cases can yield different results. Another fruit of this is that, seeing as they are bundles of sometimes contradicting particular means of solving legal problems, no one future decision flows from any of these 'general' statements of law. "However, in a profound sense the unique circumstances of almost any case make it an 'unprovided case' where no well-established rule 'authoritatively' compels a given result" (162). This statement can be read as against the syllogistic view of law, the view that all a judge needs to do to get his or her decision is to syllogistically reason it out of the laws and precedents that come before. To Frank, no judge's decision is compelled by the law in the same way we are compelled by reason to say, that 1 + 1 = 2. This means, once again, that the law cannot act as a unified, guiding authority in life.

Even when things appear clear, the justice of the situation should be favored as noted above. There is no point in keeping a bad precedent. Frank also has a broader view of sources of law, noting that another scholar points out that judges are influenced by and often explicitly employ the reasoning given by scholars (160). This means "that *anyone can make a legal rule or principle*" (160). In this light, Frank would view much of legal philosophy as really just arguing about what are necessary sources of law, or what sources of law inherently trump other sources of law, but for Frank none of this is of any importance. The hierarchy, categorization, or the respect demanded by any source of law is pointless; all that matters is the law itself, that the decision is good and fitting for the circumstance before the judge. If a source of law would lead to a bad decision, that source of law should be discounted no matter how venerable it is. The whole notion of dressing up statutes or past decisions, or anything else, or the belief in one meaning for a legal rule is just a regression into mysticism, word magic, or 'word consciousness', and

looking for a father authority. Frank is about destroying old historical forms that are keeping us bound and limiting the law from what it can be.

However, what is it that law can be? If we recall, law is only predictions of decisions, and present decisions, and this implies that the more general account and description of law that we are used to in day to day affairs is lost in Frank's conception. One critique to be levelled at Frank is that his conception of law is incoherent with our everyday notions of what the law is. If the law is only the decisions of judges, then what are legislators doing? It would be absurd to say that the legislature voting on a bill and the President signing it is not law. Frank is willing to pay this price in his concept of law and would say those that say otherwise just want a comfortable conception of law fitting for a child, and would then have to concede that some of what our judges, the authority on the meaning of the law, do is a deviation from the meaning of the law. This view could render the judges as bad shepherds leading lambs to an uncertain demise. Although Frank does not see it this way, the judge is then freed to make good decisions based on good policy, trying to formulate some perfect principle that will be a great timeless rule will result in imperfect decisions on cases, which to repeat is what Frank considers "'injustice according to law"' (165). The worship of general rules can render us slaves to tyrannical principles, and is a childish denial of all the ways that judges can and do avoid or impose precedents.

There is another important issue of the supposed genealogy of Frank's work. While Frank agrees with the work of Gray, he also agrees with Justice Holmes, who he also sees as agreeing and advancing upon the same thought of Gray (133). Frank cites agreement and continuity with a lengthy passage from Holmes' article *The Path of the Law*. He adds a later quote by Holmes that echoes some of the exegetical treatment I give

to Frank. "'A generalization is empty so far as it is general. Its value depends on the number of particulars which it calls up to the speaker and the hearer"' (134). General ideas are nothing but convenient word markers for a plethora of particular situations. Holmes will get his own treatment later in this work, but for now, bringing up Frank's imagined tutelage under Holmes suffices. After drawing on the work of Gray on sources of law, and on Holmes, Frank says that

> among those sources [of law] are not only statutes, precedents, customs and the like, but the rules which other courts have announced when deciding cases. Those rules are no more law than statutes are law. For, after all, rules are merely words and those words can get into action only through decisions; it is for the courts in deciding any case to say what the rules mean, whether those rules are embodied in a statute or in the opinion of some other court. The shape in which rules are imposed on the community is those rules as translated into concrete decisions. Your bad man doesn't care what the rules may be if the decisions are in his favor (135).

This is a lengthy quote, but I found Frank's words themselves best describe his relation to Holmes. Words, rules, are meaningless, and lifeless unless we care how they directly play out in the affairs of people, and that means in the courts. I see in the above passage Frank giving his exegesis and agreement with Holmes' famous statement from *The Common Law* that "the life of the law has not been logic: it has been experience" (Holmes 3). Mechanistic reasoning is not the law rather its gritty, imperfect application to situations that arise in courtrooms.

The Last Hand Thesis

As has been said much before, one of the main tenets of Frank's legal realism is that law is only judicial decisions, and predictions thereof, but there is another general

tenet to Frank's realism that can be drawn out, something I will call the last hand thesis. While Frank's book kicks off with his general thesis of legal realism and the nature of law, near the end of the book he has what amounts to more, crushing positions. He gives the account of how Frederick the Great, and Napoleon, tried to make a complete codification of law that would guarantee legal predictability and certainty (200-201). In the case of Frederick the Great, more rules had to be issued to clear up issues with the first set, and even though the judges were not supposed to use precedent or interpret, it quickly became the practice, the legal reality on the ground (200). Eventually the dream was dropped, and "judges were explicitly given the right to 'interpret' the law 'so as to give effect to changes in the general condition of things'" (200). There are several other historical examples of efforts to make a legal system that did not require something like a judiciary, but they all failed. Frank says they are trying to revive "the old dream of legal finality and exactitude. Once this dream took the form of a belief in a list of rules directly God-derived. Belief in a man-made code, which shall be exhaustive and final, is essentially the same dream in another form" (203). The passage above gives what is Frank's account of very pure natural law theories as well, that they are just dreamy fiction because such an exhaustive code whether written by a king or dictated by God is surely to collapse.

What happens when the dream code unravels? Frank continues saying that "situations are bound to occur which the legislature never contemplated when enacting the statutes. Then the incompleteness of the code calls for judicial law-making" (204). What Frank is saying is that no law, no set of rules, will ever be exhaustive or self-applying, something like a judiciary will always exist, and this will always be the place of the true law proper. I call this the 'last hand thesis', because it essentially says the only

law that exists, and is there, is the last hand of the legal institution that touches that law. It is only when a legal pronouncement or decision is rendered that cannot or manifestly will not be turned over in that system that there is law. As said before about law being just the decisions of judges. Frederick's or Napoleon's code was not law, because other hands of something acting as a judiciary were going to touch and make amendments to that code. As Frank states earlier in his book "particular judgments of particular controversies are only vaguely predictable" (58). A complete code would make things perfectly predictable, and Frank claims that is an unrealistic, childish dream (58). I draw from this most historically oriented chapter in Frank's work his commitment to something along the lines of the 'last hand thesis', and it does fall out of the only law being the judge's decision. It just gives Frank's realism some wider historical and universal claim, that a system may not have a judiciary like ours, but a system of rules will need some decision makers to apply and make amendments to those rules, and it is this latter system, whatever it be called, that is the last hand to touch the law and is the origin of law proper.

With all of this considered, what would Jerome Frank's legal realism have to say about Weldon Angelos' situation and the law? Frank, tying legal knowledge to material consequences could regard the law, for the time being, as the judge's decision, and that means the law proper does sanction a 55-year prison sentence in this situation. If anything, the judge in Angelos' case, thinking the law unjust, is doing exactly the sort of thing Frank wants us to not do, make a bad or unjust decision based on some privileged, hierarchical understanding of sources of law. In this case, this judge viewed statutes as too authoritative, and lacked the creative insight to see another means to achieve a more just end.

On the other hand, Frank could regard the law as being able to be changed. The President, with the power to commute or pardon a sentence, is in this case the last institutional hand who can change material consequences. Regardless of the decisions and reasoning of the judge, regardless even if the President's commutation confirms the original decision of the judge as correct, the President, in removing the material consequences, is effectively removing the law proper. That is to say, a judge's decision, his or her legal reasoning, is not a part of the law proper, only the hard empirical facts, like punishments, are ordinarily seen as part of the real law.

What is the take away from Jerome Frank's legal realism philosophy? It is perhaps best regarded as legal skepticism. As he reiterates his central point later in his work "to repeat, law is what has happened or what will happen in concrete cases. Past decisions are experimental guides to prognostications of future decisions" (297). Frank furnishes his legal realist philosophy by marrying the pragmatists' valuation of truth to a skeptic's standard for certainty. Frank's targets of criticism are those who view law as coherent and legal reasoning as a path to providing definitive legal answers, because Frank sees much of legal thinking as an outpost of childish and old mystical thinking. It may be.

Chapter 3: H. L. A. Hart & Lon Fuller, Legal Positivism and Natural Law

Before I move on to Dworkin's philosophy, I will discuss a thinker not at the forefront of this work, but necessary for later discussions and for truly appreciating Dworkin's work, and this is H. L. A. Hart. Hart is widely considered to be the most influential legal philosopher of the 20th century. It is unlikely that Dworkin's philosophy would exist as we know it without Hart's philosophy, as in many ways Dworkin was responding directly to Hart's philosophy. In what follows, I will give a quick summary of Hart's legal positivist philosophy as set out in *The Concept of Law*. To better appreciate Dworkin and Hart, I will also present some of the views of one of Hart's early opponents, Lon Fuller and his natural law philosophy.

Hart's Concept of Law

What is law for H. L. A. Hart? Ultimately the most important aspect to Hart is that it is a union of primary and secondary rules (Hart 81). Primary rules deal with designating duties and obligations, such as a duty to not speed over 30, or an obligation to pay certain taxes and so forth (80). A secondary rule is a rule that modifies and introduces as well as removes such primary rules, and an example of a secondary rule is a rule governing how a legislator votes on an act or the rules of contract law, as contracts impose duties and obligations on the parties in the contract (80). Also for Hart there is some rule of recognition, some means by which legal officials can figure out what is a law, and what is not (94).

Most important for our discussion is the idea that with a legal system rises an internal and external point of view of the law (88). That is, people in a legal system will

regard the law as a reason for doing or not doing certain activities (90). If you ask someone in our legal order, why do you stop at a stop sign, one would ordinarily respond, it is the law to do so. The law is invoked as a reason, its normative element, for doing something. This is also an example of the sort of conceptual analysis that dominates the method and thinking of Hart in investigating law. The external view is merely empirical, an outsider perspective, of just seeing people stopping at stop signs, and nothing more, without knowing the internal reason of the mind of someone in a legal system (89). Hart also thinks a legal system to be efficacious must have a minimum content of natural law (193), but that ultimately law as we know it is separable from morality (185-186). Hart is less concerned about the implications of judicial decision making as it affects law, and this is a difference in focus between his and the philosophy of Frank and Dworkin.

Hart's philosophy has a universal claim at truth as well as Frank's, that is, Hart does not think his account of law is only true for the concept of law of his time and his perspective.

> No doubt as a matter of history this step from the pre-legal to the legal maybe accomplished in distinguishable stages, of which the first is the mere reduction to writing of hitherto unwritten rules. This is not itself the crucial step, though it is a very important one: what is crucial is the acknowledgement of reference to the writing or inscription as *authoritative*, i. e. as the *proper* way of disposing of doubts as to the existence of the rule (95).

What Hart is saying is, that implicitly for a secondary rule to work there must be a rule of recognition that determines what rules are even in the legal system. Hart uses this idea of the rule of recognition above as part of describing the movement from a pre-legal to a legal community. There is a pervasive issue for Hart that there are many things in primitive societies that look like legal systems, but fall short and are just pre-legal systems. While Hart does not have any huge account of the development of a legal

system, he does make some claims, such as the ones above, and this does reveal that his philosophy of law is true for all peoples and all time. If some tribe thinks it has law, and it may look like they have law, but they lack the key points of Hart's philosophy such as primary and secondary rules, then they do not have law. This is similar to the 'last hand' thesis of Frank, giving Frank's philosophy a universal pull. This point will become important later in discussing Dworkin's philosophy, which is only partially universal in its claims to truth, and it will be very important in discussing Nietzsche.

To state again, the most important take aways from Hart are that Dworkin is a response to Hart, the notion of internal and external perspectives of the law, and the universal character of Hart's claims.

Fuller on Failed Law

It is not a focus of this project, but for the sake of balance and a fuller understanding of the legal philosophy landscape I will give an example of a natural law philosophy, and I take Lon Fuller, an old challenger to Hart, as an excellent example of such positions. Lon Fuller sets out his own guidelines for when a law fails, it represents the morality of the law as being integral to what law ultimately is. Fuller talks about King Rex who tries to make law but ultimately fails.

> The first and most obvious lies in a failure to achieve rules at all so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient

> his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration. . . They [the citizens of this fictitious kingdom] were not faithful to his law, for he never made any (16).

A more recent natural law position is Fuller's, where there is no law that fails to meet some basic moral criteria of anything that wants the title of law. This will be an example of natural law, simply so some such position is represented. What should be noted is there is a universal aspect to this. Fuller is using an imagined legal community, and this evidently means his claims about these internal, moral fixtures are necessary for any efficacious legal system that is indeed a legal system. Here we see morality and law having a very strong overlap, that is more external and universal, so that an amoral community may have a system vaguely resembling law, but if it lacks these elements then it is just a crude simulation of law. For Hart, there is a minimum content of natural law, Fuller has the same thing, but this minimum bar is far, far higher and more demanding and perhaps even more central than the notion of a rule is for the law. What good is a rule in a legal system if these eight principles are not fulfilled? For Fuller, that is a meaningful insight into the nature of what the law is.

Frank on Hart and Fuller

It is interesting to consider what Frank would have to say about Hart and Fuller. Although Frank wrote before them, he did criticize the positions of Professor Beale of Harvard Law School. According to Frank, Beale denies that court decisions can be a part of the law proper (Frank 53). This is because in Beale's view law is made "of general principles and rules. For these rules and principles can be made stable, continuous and predictable" (58). The reason this is so is because law is about guiding society, and for

law to effectively guide society it must have those characteristics and judicial decisions must be strongly predictable (57-59). Beale can be seen as holding the rules and institutions focus of Hart, and the moral principles of Fuller, and Frank regards such positions as childish denials of what happens in the courts whereby "the Federal courts and state courts attach different consequences to identical facts occurring in the same place," and Frank thinks it absurd to say courts err or do not follow the law, while Beale asserts they can make mistakes (58).

Chapter 4: Ronald Dworkin's Legal Interpretivism

Theoretical Disputes and Interpretation

What is law to Ronald Dworkin? Dworkin's clearest answer to that question is his conception of "law as integrity" (225). Dworkin continues that "propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice" (225). It gets problematic when one considers that Dworkin's idea of integrity is true for law only so far in fitting Anglo-American legal practices (176). Integral to Dworkin's broader conception of law is the view that the concept of law is in some sense an interpretive concept (45).

A question that first concerns Dworkin in *Law's Empire* is having a legal philosophy that can account for what he calls theoretical disagreements in the law (5). Dworkin begins by bringing up the notion of "'propositions of law,' [they are] all the various statements and claims people make about what the law allows or prohibits or entitles them to have" (4). There is then the question of how do we know when a 'proposition of law' is "true or false"? (4). Dworkin gives an example of "the proposition that no one may drive over 55 miles an hour in California is true, most people think, because a majority of a state's legislators [voted yes to that]" (4). This is to say that to know if that 'proposition of law' is true is a relatively easy question of looking up what the law says.

Dworkin then brings up the more difficult question of theoretical disagreements in the law, namely questions of say "whether statute books and judicial decisions exhaust the pertinent grounds of law" (5). What I really read Dworkin as saying here, despite not

using this language is, in hard legal cases that come before judges, it seems that all the ordinary laws, or sources of law, to use Frank's language, do not provide an easy answer. There is legitimate disagreement on the truth or falsity of propositions of law in hard cases. How can we account for this? What are its implications for legal knowledge, and the question of what is law? These are all the same concerns and anxieties of a legal realist like Frank. Frank saw these hard cases, or 'theoretical disagreement[s]' as undermining any coherent idea of law, and any idea of there being right answers, an issue that will be dealt with later. Hart accepted the indeterminacy that the legal realists argued for with his talk about the "open texture of law," that there is no best way or interpretation of the law, parts of it are just open (Hart 124). A major difference between Frank and Hart is that Hart did not think indeterminacy of some sort posed a threat to the concept of law that he makes using conceptual analysis. Dworkin, is sensitive to the concern of Frank, but believes his philosophy of legal interpretivism can provide answers, and he does so with the notion of interpretation.

I find the notion of interpretation to be central to Dworkin's philosophy, and rightly so as his philosophy bears the name interpretivism. I will give the notion of interpretation its own exegetical treatment to answer the question of what is Dworkin's concept of interpretation. Dworkin has this statement about interpretation. "I mean that an interpretation is by nature the report of a purpose; it proposes a way of seeing what is interpreted – a social practice or tradition as much as a text or painting – as if this were the product of a decision to pursue one set of themes or visions or purposes, one 'point,' rather than another" (Dworkin 58-59). What this means is that when dealing with law, law is regarded as having a meaning, a purpose, or a point, and that law "in its best light" is viewed as illuminated by "that meaning" (47). Dworkin notes that interpretation is not

just reporting how others taking part in a social practice describe the practice. A person, as an individual his or herself, must make an effort to interpret the meaning of a practice (63). This essentially means that there is no neutral method of interpretation that is merely descriptive, one must be engaged in a practice oneself and find it meaningful before one can interpret it (64).

Dworkin identifies three of what he calls the 'stages of interpretation' (65-66). The first is the "'preinterpretive' stage in which the rules and standards taken to provide the tentative content of the practice are identified" (65-66), meaning that some basic level of recognizing what it is that will be interpreted is found, that there is some consensus about what constitutes the practice or object of interpretation in question. It is finding "the raw data of his [the interpreter's] interpretation" (67). The second is fully interpretive and is where "the interpreter settles on some general justification for the main elements of the practice identified at the preinterpretive stage" (66). This justification does not have to specifically justify "every aspect or feature of the standing practice," but it cannot deviate too far that the interpreter is essentially "inventing a new [practice.]" (66). A legal example would be justifying the practice of using prisons as part of punishment. One does not have to justify every particular aspect of our prisons, or the way they work. A conception of the justification of prisons need not justify the exact particular way food or nutrition is handled in prisons currently. The last stage is the "postinterpretive or reforming stage, at which he [the interpreter] adjusts his sense of what the practice 'really' requires so as better to serve the justification he accepts at the interpretive stage" (66). To put Dworkin's stages of interpretation in other words, first there is recognizing the practice in question, and the second stage is questioning its value at all. In terms of law, I see issues of fidelity of law happening at the second stage, if one

does not see any worthwhile value or point, or sees no case for justifying the law or practice one may abandon it and ignore it entirely. The final stage is what we see judge's doing who are not ignoring a law, they all see different points, different reasons why the law even exists in the first place, and so in light of this the judges try to better understand what the law really says. If someone thinks a practice is justified on grounds that clearly do not line up with the practice in question, then it is not actually interpretation, just masked destruction of the practice.

Dworkin walks through an example of his notion of interpretation, and because it will be a valuable tool for clarity I will reproduce it with analysis here. Dworkin's example is fictitious. There is a community where

> its members follow a set of rules, which they call 'rules of courtesy,' on a certain range of social occasions. They say, 'Courtesy requires that peasants take off their hats to nobility' . . . For a time this practice has the character of taboo: the rules are just there and are neither questioned nor varied. But then, perhaps slowly, all this changes. Everyone develops a complex 'interpretive' attitude toward the rules of courtesy (47).

This entails the rules of courtesy going through the stages of interpretation, which means seeing it as if it had a purpose and, more importantly, seeing that

> the behavior it [the rules of courtesy] calls for or judgments it warrants – are not necessarily or exclusively what they have always been taken to be but are instead sensitive to its point, so that the strict rules must be understood or applied or extended or modified or qualified or limited by that point (47).

There will be much to say about Dworkin's example of rules of courtesy when I get to Nietzsche, but for now I will point out that this example clearly illustrates the important element of change in an interpretive activity. The object of interpretation is seen as liable to change to certain degrees.

A point for philosophy that Dworkin draws from this is that any theory that tries to give a conceptual account of the rules of courtesy cannot be merely linguistic or even wholly neutral to the practice (68). That is, it will be no use to give linguistic criteria for the correct categorization of practices under the phrase 'rules of courtesy'. Dworkin gives the example of a philosopher, asked to account for what exactly are rules of courtesy, given the fact that other societies have rules of courtesy, but ones that are very different in practice, and that the rules of courtesy of the society in question have changed over time, would have no answer (69). The claim is made that no semantic, linguistic account of rules of courtesy will be adequate for describing the continuity of the rules of courtesy and their changes in this society, or how they relate to others. "There is no feature that any stage or instance of the practice just must have, in virtue of the meaning of the word 'courtesy'" (70). A more fruitful account of the rules of courtesy might be in a theory that says it relates to the community's concept of respect, and that the particular rules that prevail in practices (such as taking a hat off to a noble) are conceptions of that concept of respect (71). This account based in the idea of respect might get deeper than the mere practice, but may not be timeless, as there may be challengers which just signify changes in the way respect is viewed in that society (71-72).

There is another element that constrains interpretation, the concept of a paradigm (72). Paradigms are really any ideas or instances of law or legal reasoning, such that any proposition of law that denies the paradigm of the day would be discarded as absurd (72). This is not a mysterious concept, it merely highlights the observation that in any legal debate there will be some walls the cross of which lead to absurdity. For instance, person who does not regard speed limits as law at all would be breaking a paradigm. Of course, paradigms could be more controversial and less long lasting. Dworkin gives the example

in his society of courtesy where men standing up when women enter a room is at first seen as an exemplar case of courtesy in action, and perhaps later that same action would be regarded as disrespectful and not courteous (72).

These ideas all have an effect on legal argumentation and the thinking of legal philosophers. In the example of describing the rules of courtesy as being a matter of respect, one can "understand law better if we could find a similar abstract description of the point of law most legal theorists accept so that their arguments take place on the plateau it furnishes" (93). That is to say that because of the point finding element of interpretation, law can be better illuminated by theorizing about what really underlies what is going on in law, of advancing the point of the law.

On the topic of immoral and bad legal systems Dworkin says "if useful theories of law are not semantic theories of this kind, however, but are instead interpretive of a particular stage of a historically developing practice, then the problem of immoral legal systems has a different character. Interpretive theories are by their nature addressed to a particular legal culture, generally the culture to which their authors belong. Unless these theories are deeply skeptical, they will treat that legal system as a flourishing example of law, one that calls for and rewards the interpretive attitude" (102). This relates to the question of whether immoral systems of law are law at all.

Dworkin uses the example of a proposition about Nazi law as "not really law, or was law in a degenerate sense, or was less than fully law. For he [the person making the proposition] is not then using 'law' In that sense; he is not making that sort of preinterpretive judgment but a skeptical interpretive judgment that Nazi law lacked features crucial to flourishing legal systems whose rules and procedures do justify

coercion. His judgment is now a special kind of political judgment for which his language, if the context makes this clear, is entirely appropriate" (104).

Politics in Law

"Law's character" also has its connection with government and politics (93). Just as Frank brings pragmatism into his legal philosophy, Dworkin brings politics into his legal philosophy seeing it as an essential feature of law. How does politics get involved? On one hand, it is a somewhat common sense assumption. Almost all of politics is legal, politicians make and carry out laws, it seems then only natural to see politics, political philosophy, and political morality as naturally flowing into legal philosophy.

One related element of politics being related to law for Dworkin is Dworkin's robust notion of the legal community personified. Dworkin says that "Governments have goals: they aim to make the nations they govern prosperous or powerful or religious or eminent; they also aim to remain in power. They use the collective force they monopolize to these and other ends" (93). This is speaking as if political entities were individuals, and Dworkin takes this sort of talking quite seriously. This is an interesting statement on Dworkin's part, because he speaks of government as if it is a person. This is relatively common in our ordinary language, we say the law says, or that Russia's attitude towards y is x. Someone could say this is just a convenience of language and to look any deeper in this language will only uncover illusory conclusions, but more can be drawn out from this. Dworkin further claims in regards to this relation of politics and law that "a full political theory of law, then, includes at least two main parts: it speaks both to the *grounds* of law – circumstances in which particular propositions of law should be taken

to be sound or true – and to the force of law – the relative power of any true proposition of law to justify coercion" (110).

Words of about government's having fixed aims and interests assume the government is a coherent, singular entity to be talked of as such, and the notion of power or force is of course not far from this, because such a coherence and stability requires and results from a certain level of power or force. To Dworkin law has a connection to this power in that "law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing form past political decisions about when collective force is justified" (93). The power and force that a government can command itself is regulated and directed by law, and a part of law then is 'past political decisions.' This may sound a bit abstract, but what Dworkin is describing and talking about is quite common. The power of the state backs the decisions judges make in the United States. If someone is found guilty of a crime and is sentenced to jail, this is seen as justifying, as a reason, for the state employing its power and resources to ensure that the guilty person complies with this decision. Thus we see Dworkin echoing this sentiment that "arguments of legal theory are best understood as arguments about how far and in what way past political decisions provide a necessary condition for the use of public coercion" (96). In this light Dworkin's claims could strike a reader as being relatively uncontroversial, but for someone like Frank or Hart it is not in their conception of law. They may agree with it, but they do not think of it as part of the essential character of law and they do not put it at the forefront of their philosophy.

The idea of past political decisions relates to the idea of history's relation to law. I find one of Dworkin's clearest descriptions of history's relation to law occurs in the

passage, quoted earlier, in a section discussing another important question, whether or not immoral legal systems have law or not. The passage I will bring up is also important because it serves as a very clear summary of Dworkin's philosophy as well. The discussion of this passage will yield many different comments that will be taken up in more detail later. To restate,

> if useful theories of law are not semantic theories of this kind, however, but are instead interpretive of a particular stage of a historically developing practice, then the problem of immoral legal systems has a different character. Interpretive theories are by their nature addressed to a particular legal culture, generally the culture to which their authors belong. Unless these theories are deeply skeptical, they will treat that legal system as a flourishing example of law, one that calls for and rewards the interpretive attitude (102).

I will now walk through the points of this passage. First off, on the initial question that brought up this passage, the question of law's relation to history. Recall that interpretive theories exist when current practices are accepted as being meaningful, having a point, and then justifying it with all the law and political decisions that have come before. Seeing as the current law will likely differ from the old, as it will serve different points, it will likely have different justification. Thus interpretive views of law are dealing with "a particular stage of a historically developing practice" (102). Seeing as the theories draw from what comes before, there is naturally a deep and necessary connection to interpreting political and legal history.

The next question is, interpreting the political and legal history of what? Usually it is one's own legal culture and community, and even then it is only for a "particular stage" in history (102). This again hammers in an important part of Dworkin's philosophy that is too easily neglected, legal philosophy is primarily something situated

in one's own time, and one's own culture, that is to say that it is not aiming at universal truths. The truths found in legal philosophy are really only going to be applicable to the particular legal tradition in question. This all relates to law being an interpretive concept, which necessarily means it is related to finding current practices meaningful and then justifying them with regards to the past.

What about Dworkin's comment about there being 'useful' theories of law? Recall that Dworkin sees a theory like Hart's as preinterpretive, and based on the semantics of the word 'law'. Thus for Dworkin, Hart's theory is not very useful, as it is just trying to define the word 'law' in a way that makes sense for all users of it. Here is a simplistic way of reconstructing Dworkin's point. Someone might say that some immoral law is not law at all. Dworkin sees the legal positivist as essentially saying that this statement proves itself wrong. It begins by talking about an immoral law, that is to say, a law that has been described as immoral, and then makes the claim it is not law. Dworkin views the positivist as just saying that before you cast the judgment on the law as being not law, it was already recognized as law, and thus it still has to be law. It cannot be not law if you first state that it is an immoral law. One needs to go no further than that in understanding the concept of law.

What happens when someone does not find a practice meaningful or justifiable? This is when we get what Dworkin refers to as a skeptic in the passage above. Dworkin's example of the issue of whether or not immoral law is really law is Nazi law (104). He supposes that there is a "judge Siegfried" in some wicked legal system (105). Then Dworkin asks that

> we must now put ourselves in Siegfried's shoes; if we despise the system in which he adjudicates, our interpretation for him might well be a fully skeptical one.

> We might decide that the interpretive attitude is wholly inappropriate there, that the practice, in the shape it has reached, can never provide any justification at all, even a weak one, for state coercion. Then we will think that in every case Siegfried should simply ignore legislation and precedent altogether, if he can get away with it, or otherwise do the best he can to limit injustice through whatever means are available to him (105).

Dworkin's example shows that someone saying that the Nazis had no law at all is right only in the sense that this statement is being made from the speaker's own legal tradition that differs greatly from the Nazi's political practices, so that there is nothing in the speaker's practices that could justify the immoral acts. What this is all saying is if someone does not find current practices meaningful or worth justifying, then it follows they will have a deeply skeptical view of that legal tradition, and not see any coherent narrative or good reasons that justify one decision or another.

I think a more apt way of understanding this is with the language of Hart and his internal and external perspectives. The skeptic, disapproving of the legal system, takes a perspective on the law dominated by the external view. The internal perspective is most clearly seen when people give the law alone as a reason for some action or forbearance. A skeptic in Dworkin's sense, one who does not find current practices justifiable by past political decisions, that is, one who does not see law in the interpretive sense but only in the post-interpretive sense, of course will have a very weak internal sense of the law. They, disapproving of the law, are unlikely to give the law as a reason for doing anything. If anything they just see the law as an impediment to right action. The skeptic, the one who does not like the legal community he resides in, will likely view the law externally only, as external perspectives are rooted in the empirical, in seeing people at stop signs and also in seeing the material consequences from a judge whose decisions are backed by the power of the state.

Personifications and Principles

In what more specific way does history bridge the gap to current political practices? It does so by principles (227). In Dworkin's theory, what is really justifying law, what is really animating and central to law are principles, both moral and political principles Whose principles are these? They are the personified legal community's principles. This is where the focus shifts in Dworkin's philosophy. Broadly construed, I see Dworkin's legal interpretivism having two parts, the universal and the particular, the base level of law and its specific branches. At the base is law as an interpretive concept. This involves the pre-interpretive stage, and the interpretive stage of finding some practices meaningful, and the interpretive stage justifying them with regard to politics and history, and the most important part that I am bringing up now, the principles that reside in law. These statements generally are true for law.

In a sense this is not a very strong claim, it is like saying that law is the coherent narrative of past decisions in this legal community that justify our active commitment, like the usage of force, to doing or not doing things. However this statement alone is not very help or illuminating. The second part is what animates law, the principles, the specific narrative that justifies the present practices in a particular legal community. Why is there the constant theme of justifying current law? Because if enough people found the law ridiculous or useless, there would be great changes, upheavals, perhaps even revolutions or civil wars. If we have a coherent, working, generally efficacious and not broken legal system it is uncontroversial to assert those within it find it meaningful. They have reasons for doing things, that is, they have justified their practices.

So Dworkin, quite early in his book, turns his eye towards coming up with principles that describe our current practice, and then in adequately describing it, provide

logical grounds for justifying it. In Dworkin's view, this is the idea of political and legal integrity, which I will broadly refer to as "law as integrity," a phrase that Dworkin uses (227). Before I dive into the details of integrity, it is necessary to say more on the notion of personification.

Dworkin accepts a robust view of the legal community personified. Dworkin's idea of integrity "supposes that the community as a whole can be committed to principles of fairness or justice or procedural due process in some way analogous to the ways particular people can be committed to convictions or ideals or projects" (167). To some this claim seems odd, but we should keep in mind that it is actually not a strange assertion, because "we personify groups in ordinary conversation" (168). It is common to say that the United States thinks that, or the Republicans or Democrats think a certain way, as I have pointed out earlier in the discussion of politics relation to law.

It is a common part of ordinary speech, but Dworkin takes this more seriously in regard to the legal community personified for the purposes of his philosophy. This position of integrity "assumes that the community can adopt and express and be faithful or unfaithful to principles of its own, distinct from those of any of its officials or citizens as individuals" (172). That is to say, this personification must be treated as it is real, as if it is a true statement that the community holds certain principles. Dworkin would not agree with, nor is it the basis of his philosophy, that the principles of the community are some sort of aggregate of individual positions. The community is like its own person, with a relationship to the individual members, but ultimately holding its own positions. Almost every individual may hold a certain view or principle, but the legal community may not, for any number of reasons. Part of this is because the legal community is an issue of active commitment. We may all hold a certain moral principle, but if the

application of that principle in the legal community is economically impossible, it is likely not going to be a part of the principles of the community, because if it was then the community would always be acting unfaithfully because it would be impossible to be true to its principles. This is the reason why the legal community personified has its own position that may not be shared by any individuals, but it is a working personification that is practical.

At times Dworkin couches his claims about personification with statements about it being particular to law as integrity. Despite this, I view the legal community personified as one of the broader claims of Dworkin's philosophy. Where there is a coherent legal system, there is a legal community, and we can fruitfully speak of it in a personified way. This is because the principles that animate the law may not be held by any individual person, but are just drawn from the collective practices of the community as a whole. As Dworkin later illuminatingly says about his notion of personification is that: ". . . we want to treat ourselves as an association of principle, as a community governed by a single and coherent vision of justice and fairness and procedural due process in the right relation" (404). There will be more to said about justice, fairness, and procedural due process later, but the point is a legal system needs to have some sense of there being a personified legal community that has its own coherent set of principles.

I will now discuss Dworkin's idea of political integrity. Dworkin sees there being "two principles of political integrity" (176). The first is "a legislative principle, which asks lawmakers to try to make the total set of laws morally coherent" (176). If this seems a strong claim, ask, does anyone ask that lawmakers make morally incoherent laws? It is interesting, because the value of coherence is in some sense neutral. It just asks that values and laws make sense morally as a whole, but what exactly is this morality is left

open, it is only asked that the laws paint a coherent picture, that the legal system's laws fit together. The second principle of political integrity is similar. "An adjudicative principle which instructs that the law be seen as coherent in that way, so far as possible" (176). Basically the same, only, to borrow the words I describe Frank with, the last hand, such as the judge applying the law to facts, should continue and maintain this coherence. Again, I think it is an uncontroversial statement that we ask, and expect this, and largely that this is what our legislators and judges do. Now different legislators have different, oftentimes competing judgments that can lead to passing legislation that do seem incoherent, but in the large picture we ask for coherency and the majority aim for it. That is to say, at least for our practice this holds up. If anything, the sense of lack of coherence is the case of Weldon Angelos is what fuels the requests for pardon; it does not seem morally coherent that someone would likely receive a lighter sentence by shooting a government agent or leading some drug ring than for selling drugs to said agent two more times. The intuitive sense of many people is that the law is reflecting incoherent values, on one hand we would say we value life so much that we see shooting and killing as far more condemnable than selling illegal drugs, but on the other, this case in fact played out, Angelos received a near-death sentence (life in prison) for merely selling illegal drugs.

Interestingly, while Dworkin appears to claim that the value of coherence in political integrity is only applicable to our legal culture, I will argue the twin coherences of political integrity are general claims about the nature of law. Dworkin says ". . . I argue that the legislative principle is so much part of our political practice that no competent interpretation of that practice can ignore it. We measure that claim on two dimensions now familiar. We ask whether the assumption that integrity is a distinct ideal of politics, fits our politics, and then whether it honors our politics" (167). Dworkin's

words seem clear enough, that the principle of political integrity, to ask and see our law's as being morally coherent is only looked at in terms of our practice. Dworkin does not preclude it as being true for others, but does not claim it to have a more universal character, as he does law as an interpretive concept. In a sense, I find this odd, because the basic idea of political integrity is coherence, and this seems a relatively uncontroversial tenet to be a part of law. It seems law would be largely coherent, treated as coherent, and interpreted by judges as being coherent in any generally efficacious legal system. Not only that, but Dworkin's interpretive concept brings up the idea of meaning, or points, or purposes, and with this come principles found in history to justify it. Principles seem to imply a substantial degree of coherence. If you cannot draw some principle out of the narrative one makes of history that bridges it to the present, could it be coherent? It seems as if coherence is necessary to have any principles at all.

Should I regard the statements about coherence as being particular claims by Dworkin, or more general? This issue is also there, although less so, for his talk about the personified legal community. He sometimes couches it in terms of being only a part of law as integrity, and law as integrity with its personifications as just a part of the Anglo-American legal tradition. Despite this, I see the claims about personification, and principles as residing in the more general, universal claims about law. This is because, as I said earlier, Dworkin's interpretive concept of finding law meaningful, as having a point, then justifying it with regards to history, seems impossible if we deny it the idea of a personified legal community with its own coherent principles. Looking at past political decisions involves making some narrative history of the legal community, that tells a story, but it seems we have no story at all if there is just incoherent principles, and incoherent current practices. Therefore, I regard Dworkin as making the claim that as part

of the interpretive concept that is law, in some sense the legal community is personified, this legal community has principles that are coherent, and the current legislator and judicial element, or last hand, tries to maintain coherence. Really, these claims all overlap to some extent. If there was no coherent scheme of values, in what sense could we talk about a legal community in any meaningful sense? If there was incoherence, it seems we would rather describe there being several, competing legal communities. What I am saying is, Dworkin's description of law as an interpretive concept is a general statement about law that views law as the best interpretation of past political decisions, and the principles of the legal community personified that justifies current political practices and the use of force.

The level of specificity, the particularity of Dworkin's philosophy the Anglo-American legal community, involves filling in the formula outlined above. Most important is filling in what are the political and moral principles of the legal community personified that animate the law. Rules are passed by legislators, and applied to facts in courts, but what really animates the law, what really brings it to life and allows us to know specific decisions is the moral and politic principles that guide our reading and application of said rules. Now, I am not saying that Dworkin views rules and courts as integral to law. This is part of the confusion. Law as we know it today, and seemingly around the world, involves legislators passing general rules, and a system like courts that apply it in situations of dispute. Dworkin seems to couch his claims about integrity and coherence in legislation and adjudication as being only true for our culture precisely because Dworkin is hesitant to say that rules and courts are a part of the concept of law. The claims of political integrity assume a legislator passing primary rules, it assumes a court system. Does Dworkin's law as an interpretive concept demand or proscribe such

things in order for law to exist? It does not, but it does not deny that a competent conceptual analysis, or pre-interpretive claim about law may be inaccurate for our legal system, or for perhaps the majority of legal systems.

Dworkin kicks off his discussion of the interpretive concept of law with a community governed by custom, as if implying that a system with custom that is interpreted could suffice as law, although not in a way we know because we are not part of such a legal culture or may not know of any. Implicit in this is Dworkin's having the concern that Hart's claims about the concept of law are really only applicable to modern legal systems, and are the result of a modern prejudice towards really knowing the law. So the only thing Dworkin clearly asserts as universal is law as an interpretive concept, and this at least has the appearance of being inoffensive enough to grant many sort of political systems throughout history the lofty title of law. Certainly nothing in the interpretive concept of law precludes a complicated and thoughtful system of custom as counting as law.

Now a better account of why Dworkin talks about political integrity's twin legislative and adjudicative coherence principles is that they are only descriptions of our legal practice. A system of custom treated with the interpretive attitude may be law without anything we could regard as a legislator, or a court system, or perhaps it has one but not the other. Thus, since the claims of legislative and adjudicative coherence require a legislative body and court-like body, and not everything Dworkin would regard as law could have this, he would necessarily feel compelled to couch those claims as descriptive.

Why then, did Dworkin not clearly specify that the value of coherence in law, its principles, and the legal community personified are all up front, next to, and within the concept of law as an interpretive concept? I think it is because Dworkin's initial concern

is to only give a philosophy that applies to his own legal culture, and one that can supply deeper claims of knowledge about this legal system than Hart's.

As a side note, I am not the only one who finds it difficult to figure out precisely what Dworkin is claiming at times. H.LA. Hart says something similar in his response to Dworkin, and it was largely a response to *Law's Empire*. To best understand Hart's words consider that while Dworkin's philosophy is characterized as interpretive and with a degree of evaluation in determining in the law, Hart sees his philosophy as descriptive. Hart said "I find it hard to follow Dworkin's precise reasons for rejecting descriptive legal theory or 'jurisprudence' as he often calls it" (Hart 242). I myself say I had found it hard to follow what is entailed in Dworkin's general theories of law and what is not. On another note, Hart agrees with my characterization of principles being a part of Dworkin's general claims about law being interpretive, that you interpret the legal community to find principles that fit the law (240-241). Keep in mind that Dworkin does consider his philosophy descriptive, at least up to a point. The distinction between what is a general claim about law and what is a particular claim about law in Dworkin's legal community will be important when considering how Nietzsche could receive Dworkin's philosophy.

Aside from the broad claims of coherence in legislation and adjudication, what is seen more particularly in the claim of political integrity in adjudication? "The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness" (225). In regard to the part about legal rights and duties, I do agree with Dworkin's characterization of them as being a description of our practices as opposed to a general

claim about law. I do not want to assert that everything that should be regarded as a legal system for Dworkin's legal interpretivism gives legal rights. To me, legal rights, especially their prominence, seem a product of the enlightenment, or more broadly liberal democracies, and even modernity more broadly construed. Perhaps Dworkin would think all sorts of ancient communities had legal rights in the sense that he defines them, whether not they labeled them as such. Or perhaps he thinks what ancients would regard as legal rights bear a similar name but represent a fundamentally different concept than what Dworkin preaches. Regardless, the specificity is not integral to my aims. It seems uncontroversial enough to accept Dworkin's talk about integrity applying to only our current, modern practices for legal rights and duties.

I also regard Dworkin's earlier claim about integrity being descriptive to current practices as applying to the 'justice and fairness' part as well. The comments made above about legal rights are applicable here as well. Although it does seem strange to say any legal system would aim for injustice, or unfairness, perhaps a people could go by without any coherent conception of justice or fairness. I say only perhaps, because I am not sure, and this is its own question, not to mention what justice or fairness is or the extent to which they are different. I regard these in the area of particular claims, but that does not preclude them being true claims for other legal communities if by chance it does describe them.

The other terms in the passage about judge's treating things coherently, as if the legal community was a person creating all of these laws, I regard as part of the general claims as I argued for above, and as I referenced, Hart does as well. So to make that an entirely general statement, replace 'legal rights and duties,' and 'justice and fairness' with whatever principles can form a coherent narrative of past political decisions. Maybe

another legal culture has justice and fairness similar to our own, perhaps a radically different view of justice. Perhaps they have their own principles relating to their religion, or whatever. My point is that I think coherence and personification are part of more general claims, while Dworkin's claims bout legal rights, justice, and fairness, and whenever he brings up procedural due process, are just descriptions of modern legal virtues seen in our current practices.

I will consider another more particular statement by Dworkin. "According to law as integrity propositions law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice" (225). This is a particular claim, but more generally for law as an interpretive concept some revisions could yield a general statement. By leaving the statement as just talking about principles in general, without specifying those being legal rights or fairness, I render it as a general statement. Much of the later parts of *Law's Empire* are about Dworkin's ideal judge Hercules, and how he would decide specific cases. It is in introducing Hercules that Dworkin says "we must not suppose that his [Hercules'] answers to the various questions he encounters *define* law as integrity as a general conception of law" (239). Dworkin is again warning us that at this point in his philosophy, it is work only applicable to the Anglo-American legal community.

What entails Dworkin's principles of justice, fairness and procedural due process, his "three component virtues"? (404). I will provide Dworkin's short definitions as follows. "Justice, we said, is a matter of the right outcome of the political system." (404). This can be seen as the right ends, the right results. This is in a sense, similar to the usage of 'justice' by Frank. Frank implicitly uses 'justice' to describe a case with a good

outcome for the litigants, regardless of how the case will affect case precedent or other principles, it is only a focus on the ends. “Fairness is a matter of the right structure for that system, the structure that distributes influence over political decisions in the right way” (404). This is not too unintuitive. Consider that we consider it fair that each person gets one vote for electing our President, for us this is the right distribution of political power because it matches our notion of fairness and equality. “Procedural due process is a matter of the right procedures for enforcing rules and regulations the system has produced” (404-405), the idea that law should be used with some set of procedures. If justice and fairness seemed so vague that perhaps they were applicable to everything we would want to regard as a legal system, procedural due process seems a relatively modern virtue. We can imagine some medieval legal order that has no sense of procedural due process besides a king’s sense of justice. Even in that case we could say there is a sense of procedural due process, just one far different from our own because it values some noble king’s word over everyone else’s. Despite these principles seeming vague, I think it is best to accept Dworkin’s earlier claim that these virtues of political integrity are best seen as only applicable to our legal practice. Perhaps a larger study would find most legal systems have them, but Dworkin is not interested in arguing for that claim.

A lot has been said in this past section. To summarize, I argued that contrary to Dworkin’s specific word usage, we should regard a vision of the legal community personified, and this legal community possessing its own distinct principles that animate law, as part of Dworkin’s general claim about law being interpretive. This renders Dworkin’s claim about law as being the following general formula. The law is the best interpretation of past political decisions and the principles of the legal community personified that justifies current political practices and the usage of force. Part of

interpreting the principles of the legal community involves seeing them as coherent, otherwise the sense of there being a singular legal community is weakened. For our own Anglo-American legal community, Dworkin argues that our principles are broadly construed as law as integrity, which involves a coherent sense of justice, fairness, and procedural due process. They must be looked at coherent, because, these virtues are in tension, but a good judge balances and interprets them in the best way that is still coherent (404).

Narrative in Law

Dworkin is concerned with judicial decision making as is Frank. While Frank sees it as undermining any coherent vision of law because of Frank's perception of the vastness of judicial discretion, Dworkin has a more limited view. The notion of interpretation is far tamer than Frank's vision of judges who can always find what they want in sources of law. One way that Dworkin illuminatingly talks about judicial decisions, which is applicable to his vision of law as a whole, is his idea of law and judicial decision making as being like a chain novel.

A chain novel is where an author writes a chapter for a book, and a different author writes the next chapter and so on (229). For the legal chain novel, Dworkin says "the novelists are expected to take their responsibilities of continuity more seriously; they aim jointly to create, so far as they can, a single unified novel that is the best it can be" (229). We see the echoes of the law being the best interpretation in this metaphor of the chain novel. "He [the novelist] must try to make this [the chain novel] the best novel it can be, construed as the work of a single author rather than, as is the fact, the product of

many different hands" (229). This is the literary metaphor echo of the legal community personified, just as the novel is treated as having one fictional author.

Although the authors aim at the best, they are not total slaves to the chapters that come before. "That does not mean his interpretation must fit every bit of the text. It is not disqualified simply because he claims that some lines or tropes are accidental, or even that some events of plot are mistakes because they work against the literary ambitions the interpretation states. But the interpretation he takes up must nevertheless flow throughout the text" (230). The novelist may not even be able to achieve his or her task because it is flawed, as any interpretation is if it lacks "general explanatory power," or leaves unexplained some major structural aspect of the text" (230). When this fails, the author will merely have to make the interpretation that captures what he or she can, "conceding that it [his interpretation and chapter] is not wholly successful" (230). I include many of these passages, as they show that the chain novel is not a totally dreamy, flawless affair.

Dworkin considers the above metaphor applicable for our law. Most people are born into or live in some legal community, with their own legal tradition and culture. There are all sorts of laws, and seemingly principles that bring their application to life, that were designed or first applied by legislators and judges ages past, perhaps at the whims of the populace from ages past. What do we do with this? We sit on the ruins of our past legal history. Dworkin's chain novel is nuanced; the people view continuity with the laws that came before, and shape the principles accepting what justifies their life, so that the present meets the past. The current generation in turn is writing a chapter with some changes that is given to the next generation to work from. Implicit in my language above is looking at law as a historical narrative as well. I have commented before about

the relation between history and law for Dworkin's legal interpretivism, and I will do so with a little more depth now.

While Dworkin couches his words about history's relation to law as being only true for law as integrity, I once again think it is best regarded that history's relevance to law is seen as part of Dworkin's more general claims. "History matters in law as integrity . . . Integrity does not require consistency in principle over all historical stages of a community's law; it does not require that judges try to understand the law they enforce as continuous in principle with the abandoned law of a previous century or even a previous generation" (227). If we consider Dworkin's earlier words about interpretive concepts not being "unstudied deference to a runic order" then these statements seem to be just an elaboration of incorporating history into law (47). Our current political practices may differ so greatly from some past practices, that we will in essence abandon older principles imbedded in the law and rules. Dworkin also puts it as that "law as integrity, then, begins in the present and pursues the past only so far as and in the way its contemporary focus dictates. It does not aim to recapture, even for present law, the ideals or practical purposes of the politicians who first created it" (227). To Dworkin, our practices do not exist to create a justification of past political decisions so that our current life is seen as absolutely coherent with the principles, beliefs and decisions of those in the past. Rather, it works the other way around. History serves the present, in so far as it was what came before and provides fertile ground for further justifying and understanding the political practices the legal community still engages in.

Dworkin says that law ". . . aims rather to justify what they [the citizens of the past] did . . . in an overall story worth telling now, a story with a complex claim: that present practice can be organized by and justified in principles sufficiently attractive to

provide an honorable future" (227-228). What Dworkin is saying is that all we need to do is to tell a good story, that can both incorporate our past, as well as not make it impossible for those that come after to have a future that can tell a good historical narrative as well. "It insists that the law – the rights and duties that flow from past collective decisions and for that reason license or require coercion – contains not only the narrow explicit content of these decisions but also, more broadly, the scheme of principles necessary to justify them. History matters because that scheme of principle must justify the standing as well as the content of these past decisions." It is not the most mind numbing details, and every little political decision that makes up this interpretive narrative, but rather principles that can explain the aims of the past, that will provide some continuity to the future. These principles justify past and current practices because these principles are the reasons for the sake of which we engage in these practices. The practices have values, and the value of the practice is described in its principle.

What we see here is that law has a hugely narrative component for Dworkin. He uses the metaphor of law as a chain-novel, and the metaphor can be taken very seriously. It is not just a playful way to see law, but much closer to what is actually going on. We are essentially making a narrative of the past, telling a story of the past, with values and principles, that can serve our present practices.

Right Answers and Immaterial Efficacy

So far I have outlined how Dworkin's legal interpretivism should be understood. Law is at first an interpretive concept, we find it meaningful, and seek to justify it by telling a narrative of our past animated by principles that justify the present. The values that guide the narrative, that guide the law, are sensitive to each person's own legal

community, so this is why having universal accounts of law is difficult without being lifeless schemes of rules, because the principles that animate the law, and the external shell of rules we often find in modern systems, can vary significantly from community to community. So to better understand law, it is better seen as intimately related to history, politics, and the community's moral values.

There is one odd issue worth dealing with, it has been alluded to, but not addressed specifically. What is entailed in saying that law is the best interpretation? What does it mean that law is the best story of past politics and principles that justifies current practices and the use of force? 'Best' is a singular qualifier; there is only one best of something, and so there is only one best interpretation. When a judge is facing a case, and he or she is dealing with a theoretical disagreement about the law, about what the law is, the legal interpretivist says law is the best interpretation; what the legal interpretivist is also claiming, howver, is that there is a one, singular, right answer to this legal question, and this is known as the 'right answer' thesis.

How do we know if we have the best interpretation? How does a judge know? Could a judge get the best interpretation? Could any judge? If our legal community is animated by justice and fairness, is it not true that they sometimes seem at odds? How will we ever know the best interpretation that reconciles the different demands of our principles? History and practices change, would this not mean there is a slowly, ever changing best interpretation of things then? This is one of the main criticisms of Dworkin's philosophy. That the best interpretation with its demand for right answers, renders law absurd. Since no one will know the right answer, no one really knows the law, but this is ridiculous. It makes Dworkin's philosophy seem like Plato, that all we know is mere shadowy approximations of the true law, and labor under ignorance. The

latter chapters of *Law's Empire* are in some sense devoted to this criticism. In these chapters Dworkin's ideal judge, Hercules, whose only superhuman ability is that he can consider all cases, but he does not have superhuman intelligence; this judge; with unlimited time; would find the best interpretations. While this is interesting, I will draw out what I think Dworkin more or less is asserting when he is defending the right answer thesis with Hercules' judging, I will also defend the right answer thesis with my own ideas.

There are several ways of addressing this criticism. The first is to point out that Dworkin is not looking for a philosopher, let alone a skeptical philosopher's standards for truth. There is a legal realist heritage in Dworkin, and this is seen in his focus on cases, and the pragmatism of legal realists is an influence. We should look at Dworkin's right answers as being practical. Dworkin does not think it impossible to find them, and thinks we do so far more easily than we think, or we at least get something so close that we can just regard it as the best. It does not take superhuman reason, or intuition, but ordinary levels of both. To Dworkin it is possible to find the interpretation that fits our practice. Of course not every judge or person will get the right answer, as we are flawed, but it is not impossible either.

Most people could admit that some court decisions are better than others. As the case of Angelos illustrates, sometimes people may think a judge did reach a bad decision and so they request pardons, or take the case to an appellate level. Few would hold that all court cases are equal, even Frank prizes cases that are what he thinks just more than unjust ones. Just in this admittance, one is on the way to the best interpretation, however. Suppose we only know two ways to answer a court case; most people will regard one as

better than the other. This means that in the limited range of possible interpretations we consider, are all likely to see one as the best, and regard that as the law.

Someone could say that since there are infinitely many different interpretations, and processes, thinking through all of these is impossible. Recall that Dworkin already sees us approaching history, not aiming at every detail, but in broad schemes, seeing it with principles. With the interpretive attitude we approach things with a point, and anything not related to the purpose of something is white noise to be disregarded. The point is, no one is going to, nor needs to, consider infinite varieties. We more or less can regard the pool of possible answers as being a smaller pool of interpretations, that are all the same in so far as how they are meaningful, but may differ in absolutely meaningless details.

This relates to a point seen throughout Dworkin's philosophy; it is not some sort of a priori, rationalistic, idealist, Platonic or even Kantian sort of thing. Dworkin describes legal thinking like writing a messy chain novel the best we can, and as making narrative stories of our history, and as only true for our own culture because it is not a philosophy that gets us universal, transcendent truths. It is not the philosopher's truth or right answers, but merely the right answers in a fairly practical, interpretive endeavor of law. Few things are as human like as telling stories. Dworkin's view on law has more in common with art than it does with mathematics. People approach Dworkin, seeing that he utterly rejects the skepticism of the legal realists, and assume he rejects their practical, down to earth bent, but he does not. Part of Dworkin's legal heritage is, as he says, combining the pragmatism of the legal skeptics with the conventionalism of the formalists. Anyone who reads Dworkin's philosophy as being a dry, exact, mathematical,

rationalistic, or a sobering analytic approach to philosophy is not reading him correctly; Dworkin says law is like a chain-novel for a reason.

There are right answers in law in part because we treat law as such. When we care about a legal case, we are invested as if there are certainly wrong answers, and even if we think there are several right answers, we would regard some as better than others, thus there is a best. We would also regard some right answers as essentially the same. What I am getting at is suggesting to read the right answer thesis as far more descriptive about the way we interact with law, and less of a claim about how if we were super intelligent beings we could always decide cases in ways true to the values of our community.

For some, the right answer thesis will seem too bizarre to be acceptable. While Dworkin's legal interpretivism accepts the right answer thesis, I do think the wider banner of legal interpretivism can go without it. They would just regard the law as our *attempt* at the best interpretation of past political decisions and the principles of the legal community personified that justifies current political practices and the use of force. Dworkin may not like this, but in the bigger picture, given the practical bent one should take when understanding right answers, legal interpretivism can exist in some form without it.

Another way of understanding Dworkin's 'right answer' thesis, related to the claim that we should look at it as practical and utterly ordinary in that we act like there are best answers, is what I call the immaterial efficacy argument. Some would say that the best answer, leaving us at times ignorant of what the law really is, means we will never truly know the law, and having legal ignorance at the forefront of your definition of law is wrong. I would regard that if you want a legal philosophy that is descriptive, it

should account for ignorance, as in a sense working ignorance, an ignorance that still lets one live day to day. This is essential for any efficacious legal system.

No one knows all of the law. So when we live day to day, we have to mentally reconstruct the law. If everyone was asked to write down everything they think is the law, almost everyone will write down some things that are not the law, however we define law. Perhaps some things will be written down that would not be held up in a judge's decision, perhaps some have no relevance to law, perhaps some are based on just awful and off-the-mark interpretations. Regardless how you look at it, it is reasonable to assert that people would reproduce "laws" on their list of laws that are not really law. They will surely omit a considerable amount of things. No one could reproduce their whole body of law. Perhaps many of us will have little written down. We will probably begin writing down many things that we also think of as morally reprehensible, such as that it is illegal to kill someone. What I am getting at, is all the law we know, our mental construction of law that we have in deciding situations will be filled with principles, and will likely have specific rules that are just products of principles we intuitively sense as part of our legal practice. We might write down some specific tax laws, but we are also likely to write down laws as in things that could get us punished in courts for doing otherwise, that are pure products of what we intuitively regard as our legal community's sense of fairness.

What I am saying is, we all have our own version of the law in our head, that is a shadow, an approximation, of what we would regard as the complete, total, absolute entirety of laws in our legal system. Most of us can navigate the legal landscape as well, although ignorance is a fixture of this, as we do not know all the law, and we will have mental constructions of laws that are not laws. That is, our inner law-finding machine will have false positives, things we think that are law but are really not law. Everyone's

mental conception of law will be slightly different than everyone else's. What are we doing when we mentally reproduce the law? We indubitably approach it with an interpretive attitude, in accepting the law as having a point, in choosing not to flee this legal system (assuming we have a choice), we believe in some basic element of fidelity to the law. Our own personal understandings of the law are going to be inevitably patched together with our sense of moral principles, whether very broad ones like fairness, or more specific ones. So our somewhat ignorant, mental reconstruction of the law guides us.

What if there is a legal system that has laws too vast for everyone to know like ours, but noone's mental representation of the law can guide them practically? They either get put to jail, or incur fines, or otherwise cannot do what they want because of their ignorance of the law. Such a system would likely break down, it will unlikely be efficacious. The point is, if people cannot follow the law, then the legal system is bound to breakdown, and to follow the law if the law is too vast we must have a working reconstruction of the law. Thus, if we want an efficacious, working legal system that has a lot of laws like ours where it is impossible to know all the laws, people must be able to get by with their ignorant reconstruction. What this is getting at is, if we accept what has been said so far, that a necessary feature of an efficacious, working, real, legal system is a working level of ignorance. What I call 'immaterial efficacy' or 'mental efficacy'. There is talk of law needing a necessary material efficacy. If there are no physical courts, or legislators, or means of enforcing things, or any other hard, material component of a working legal system, the system will collapse. Yet there must be a mental efficacy, too; that is mentally people accept the law and can engage with it practically.

What I am trying to show in this argument is that for a legal system there is a necessary component of immaterial efficacy, that includes ignorance; is to show that there is immaterial efficacy even if we cannot know the right answers, even though in our legal system almost none of us know any good answers to hard cases at law, even though we likely do not know many specific laws, or what would be a good answer in court. The point is, a day-to-day ignorance of the law is such a part of any competent description of our legal system that not knowing the best interpretation should be no destroying objection to Dworkin's legal interpretivism. Most of us can get by with a principle-laden mental reconstruction of the law, and we treat law as it is important with better and even best answers, and Dworkin seeing these thus has principles and right answers in his idea of law. What I am trying to show is that the right answer thesis does not have to be this head in the clouds, crazy, controversial assertion, but it is much closer to the reality of law working in the real world.

I will now consider what Ronald Dworkin's legal interpretivism would say on the case of Weldon Angelos. I have commented a little on intepretivism's take on it, but no direct answer. Recall that Frank would view the law as wherever the material consequences are falling, so that the law is the judge's decision, or the President's decision to pardon if the President would do so. Dworkin's legal interpretivism, it is not so clear. This is an illuminating point to make, but really, there is nothing you can just point to and without a doubt say is law. Law being the best interpretation of principles and history that justifies the present is not as clear, nor certain as saying a judge's decision, or a system of rules. What this reveals is, while Frank criticized other conceptions of law as being childish addiction to certainty, Frank's own just placed law at a point of guaranteed certainty; the material consequences flowing from a judge's

decision. Dworkin in a sense, takes up Frank's challenge, and gives us the most uncertain definition of law, and perhaps if certainty is the mark of the child's law, then the formalist is a child, Frank's legal realism is a teenager's philosophy, and Dworkin's interpretivism is the most adult philosophy in this sense.

I am not comfortable strongly stating what the Dworkinian interpretivist take on Angelos' case would be, although one thing is certain, legal interpretivism privileges the individual's take in so far as it could have the right answer while the judge is wrong. Compared to legal realism, legal interpretivism can regard a judge's decision as possibly a mistake; it privileges principles as well. Legal interpretivism gives better ground than legal realism for saying the law for Angelos should not be the strict minimum sentences, because doing so could be seen as violating our sense of adjudicative integrity and coherence, that actually our sense of justice, and fairness, means that the law on Angelos' sentence is not what it literally reads as. I am not saying this is exactly what a legal interpretivist would say, but they could say, it provides grounds for it, because it tries to explain that sense many get in cases like Angelos, were we doubt the law is what it might appear to be, because our sense of law is guided by our sense of our community's moral principles, and on these principles being coherent. Legal interpretivism could give grounds, an argument, for not following the supposedly clear words of a statute, but it could also supply the same decision the judge reached. Frank could say the judge was just not creative enough with his sources of law, Dworkin could say the judge could have fidelity to the law and not have imposed the supposedly clearly written minimums. Either way, I do not definitively know what Dworkin's take on the case would be, or what a legal interpretivist would say, but legal interpretivism has the best grounds for reaching a decision not obvious in written rules because it privileges principles.

One final point to make is that Dworkin's philosophy, his whole project, has an epistemic focus to it. It begins with the question of how we know the law, and from the notion of interpretation he builds his theory. If you want to know the law for Dworkin, the internal perspective will provide the freshest ground. Law, being a historical narrative, being laden with community-specific principles, the best way to mentally navigate it is to be an insider, that accepts the legal system as generally meaningful and serious. One must approach the law from the internal perspective of the legal community to have the interpretive attitude, let alone to have any chance of finding the best interpretation. Dworkin sees that answers in hard cases, that law in the day-to-day way we approach it, that law treated as meaningful and with moral principles, so that to know the law in hard cases one must know the principles, and that the historical narrative of past political decisions all really give an insight into what is going on.

Chapter 5: The Chart of Legal Philosophy

I have now introduced representative philosophies of the four major general legal philosophies, legal realism, legal positivism, natural law, and legal interpretivism. I will now give a scheme for understanding them all in relation to one another. This is meant to be a helpful tool, I will also give us a narrative tale of the story thus far in the scheme of 20th century legal philosophy presented so far.

Imagine a line, with three parts two it, meaning two lines dividing it; each of the two lines are about a third of the way along this line horizontally. Perhaps you think I am turning this into a piece of geometry, and perhaps it is. Imagine the line as such ---|--|-. I purposely made each section smaller as one goes right to left, as it is in some sense a scale from generality to particularity.

In the far right piece is the home base of the legal realists. They regard only that section as law, it is where the institutional last hand is, like the judge's decision, or President's pardon, where the last knot is tied with material force. They regard all the sections before as mere sources of law. Thus law proper is a very small island, of judge's decisions, and perhaps all that is before is a source, and a place of prediction but not true law. Imagine for the legal realist only that right side is shaded in as true law. In the middle is the home of legal positivists. It is where there is the external institutions of the law's major external sources, such as the statutes, the laws passed by the legislator. Hart's focus is on rules, and rules ordinarily come from some institution like a legislator. All of this is placed here. It is bigger, allows for more to be law than just judge's decisions, and it is more general, and thus bigger than a judge's decisions. Hart would regard both the institution producing the major rules, and the judge's decisions, as in the

middle and the right a category as law, both are shaded. The big category on the left is regarded by the positivist as a place of sources of law that legislators and judge's draw from.

The left category is the home of the natural law philosophers, like Lon Fuller. It is also where big moral principles are. Someone like Fuller sees those principles as true law, and thus that part is shaded as law proper. The stuff that comes later, the legislators, the courts, are only part of law in so far as they stay true to these principles. It is sometimes highlighted, and sometimes not. For Fuller, law flows down from these principles through the legislation and into the courts in our ordinary modern scheme of law as being of legislation and courts.

The big principles, like ideas of justice and fairness, or even the idea to have a specific fair law on let's say a certain tax, starts on the left side, gets in the mind of a legislator in the middle, and trickles into a judge's decision on the right. This is a scheme to account for various sources or parts of law, and who regards what as law and not.

The legal interpretivist has no clear home, perhaps nothing is shaded, perhaps everything. He or she tries to give equal attention to all parts, and has no home base. The historical narrative, the communities' principles are law, but so are the specific judge's decisions, as the judge's decision are part of the current practice as well. The statues, the big laws passed by a legislator are law, and are as much the part of the history even if they were passed yesterday. Everything gets it shade, the biggest demand is coherence, that perhaps there is one, dark, shaded line that cuts through all three areas, that all three parts compose the best interpretation. So the law as best interpretation refers to the line, that accounts for everything, and when we see if a judge's decision is law, we see if it is on that line in the scheme, scale, or chart I have made.

This is intended as a helpful map, guide, chart, or scheme, for understanding legal philosophy. Now for a recap of the story that has been presented about legal philosophy. A fun narrative story can be told about legal philosophy, and it is my intention to maintain the reader's interest. In the beginning, was the mythic time of the legal formalist, imagine an idyllic Arthurian kingdom, where knights beat dragons, and the heroes win. Everything is good, as law is seen as being easy as 1+1=2. Then the barbarians arrived, raiders, from the north (there is a Scandinavian legal realist movement, although it is quite different), the legal realists, with chieftains such as Frank. They took down the formalist kingdom, brought down old Christian Rome, and divided the land into competing judge-fiefdoms, with no coherence or grand values, only the decisions with justice allowed.

H.L.A. Hart arrived on the scene, and brought order to the lands of legal philosophy. He argued law as a coherent concept was not destroyed because of hard cases, but he retained some influences of the legal realists, he let the barbarians stay in their land, with their judicial discretion culture. Then arrives Ronald Dworkin, the bright, dazzling, moralizing knight and contender to the legal philosophy throne, who wants none of this no-right-answer nonsense, and wants to bring moral principles up there with law proper.

This is nothing more than a quick story, meant to be entertaining, a silly narrative with a chart, to illustrate the positions, and developments in 20th century legal philosophy, and to remind the reader it is always exciting.

Chapter 6: Holmes on Law

Thought Experiments and Law

What is law to Oliver Wendell Holmes Jr.? Perhaps the most memorable, endearing, pithy, and clearest elucidation of law according to Holmes is this following line from his influential 1897 article *The Path of the Law*. "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law" (122). Admittedly in the right mood it is a humorous take, how could something so unintuitive not be regarded as at least a little pretentious? Few people, if asked on the streets what the law is, would respond with Holmes' laconic, supposedly unpretentious response. For better or worse, Holmes is remembered for his witty, somewhat aphoristic lines such as "The life of the law has not been logic, it has been experience (*The Common Law* 3). It is in this stylistic character in writing that he bears a semblance to Nietzsche. Back to the main point, this pithy line from the *Path* seems to indicate clear realist leanings, as if he would easily prefer Frank to Dworkin, but is that the whole story?

Holmes' ideas are couched in language about it being a description of the profession of law, as in, Holmes is hinting it is the lawyer's point of view (*The Path* 120). Yet more important is his little thought experiment about the bad man. "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience" (121). It is an epistemic endeavor. There are several ways of looking at this, all of which I would regard Holmes as thinking illuminate the point he is

making. One is that, quite frankly for a common law system as ours it is bad men who will force us to decide on questions of law. That is to say, if no one ever broke the law, if no one ever did actions that went against the dominant moral principles of their legal community, many laws would not need to be written and many court cases would not happen. Certainty, exact statutes, anything one may desire in law that will help articulate the law's position on things will not be necessary, as what it intends to regulate is already regulated. It seems reasonable to assert that many hard cases at law, where we have to decide between two different principles, were more or less created by bad men.

One important thing to remark and ask about this epistemic thought experiment is, what is the perspective of the bad man, the one who cares only for material consequences, as in, does he have primarily an internal or external disposition towards the law? It seems clear that the bad man sees a wholly external law. He does not regard the law as a reason to do anything in itself, only in so far as there are consequences to certain actions, and that the law can be a reason given by others, such as a judge, for bringing such consequences on the bad man. In other words, the bad man views the law from the perspective of the outsider.

The thought experiment has another point, that I think is most important for Holmes. It prevents confusing law and morals. Holmes claims, and makes many assertions of this sort that "the first thing for a business-like understanding of the matter is to understand its limits, and therefore I think it desirable at once to point out and dispel a confusion between morality and law" (121). With material consequences, that more or less have to be given out by some legal official in the system like a judge, as the focus of law, the questions of morals can be avoided. Yet can material consequences suffice as a guide to knowing the law? On one hand, this way of thinking does allow us to know and

see law in different ways. A bad person getting into trouble causing a court case may force a court decision that gives answers to legal questions that previous cases did not answer directly. In this sense, the bad man's court cases are like experiments testing out what is law and not by forcing judges to make decisions on certain issues. Also one can just take a theoretical, hypothetical inquiry about what the law would from the bad man's perspective. These will give us a different view of the law to consider. I cannot imagine a legal community whose laws are identical to the morality with its 'sanctions' of 'conscience.' One assumes there would be some laws, but not all, and perhaps few of the pettiest laws like parking tickets. So it is a viewpoint that may be said to be necessary to knowing all of the law. It is probably a viewpoint sufficient for navigating a legal system successfully, as if you were someone who took the internal point of view. So Holmes could be construed as having two claims. The first that since you can sufficiently navigate your way through a legal system with an empirically fixated, external point of view that only regards material consequences such as a judge's decision as law, that is what the law is. The second is that someone who ignores this view, who only has the good person's internal perspective, will have an incomplete view of law because he is not interested in pushing the boundaries of the moral principles in law while still avoiding material sanctions.

However I do not think this is exactly Holmes' position, regardless of what other fiery rhetoric can be seen in the *Path*. Holmes also mentions that morality does have a noteworthy effect on law; these passages are fewer, but they must be seen as balancing what seem to be Frankish claims. "The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men" (121). Now this is

a different story. It must be mentioned, that the passage above is in a sense a summary of his project in *The Common Law*, which more will be said of later. The passage above can be seen as somewhat Frankish, in so far as Frank would regard a lot of law as just sources of law, and is not Holmes saying that morality is a sources of law, but not law at all, and that it is just vaguely represented in law? That is true, but Frank rejected any sort of hierarchical privileging and ranking of source of law. This arguing about the hierarchy of sources of law comprises much of legal theory, debating about the merits of statutes, precedents, principles and so on. To Frank such theorizing is missing the important point that a judge's mind is going to already be ranking these things inevitably on less lofty reasoning and biases. Any claim about the sources of law and their relevancy are equally valid in so far as a judge can reach for almost anything, claim it is authoritative, and be good to go. Holmes is making a huge claim about the hierarchy of sources, that ultimately our law is in some sense a reflection, of a development of us and our morality.

We can see the influences of the civil war and the legal changes it brought. How would Frank regard such developments? Before I answer that, it is interesting to note that implicit in Holmes' claim seems to be an endorsement of the Dworkinian perspective of a robust sense of the legal community personified, making the law an evolving principal-animated cloak for this community. Frank would deny any sort of quasi-teleological development of the community or 'race' personified, as the particular decisions of judges and their incoherence rule out such fanciful notions in Frank's eyes.

Frank could give his own reasons, perhaps far more crude, for vast changes in the legal order. For example that the sanctions of people's conscience drove a collective number of judges and politicians to see the law as properly against slavery, and another group enchanted by their economic order revolted. Either way you cut it for Frank, I

doubt he would endorse a more lofty view of a development. This is not to say that Frank would not appreciate or commend moral developments, but he thinks he is being realistic, and the realistic attitude towards the human mind is always cynical. It is this sort of cynicism that Holmes rejects as he says "I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism" (121). No such statement or sentiment is echoed by Frank, who, if anything, wants to start some cynical fires to tear down the mythologized, deified legal order he was living in.

So how can we regard Holmes' original pithy statements in light of these more nuanced claims about morality being an important, dignified source and influence on the law as well as Holmes' implicit endorsement of a more Dworkinian, general way of speaking about law than Frank's skeptical particular focus on law? I think much of the *Path* should be read as a polemic. This is another similarity with Nietzsche, as the subtitle for the *Genealogy* is that it is *A Polemic*. Both want to be provocative, to push the envelope, to let loose. Nietzsche's target was Christian morality, and more broadly slave morality and what it says about a person's psychology, health and value of life. Holmes wants to trim the overgrowing garden of morality whose flowers are preventing a clear view to the law. As Holmes even says "when I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law" (121). Holmes undertakes this polemical fight against more robust notions of law, ultimately to learn the law. Dworkin's project has an epistemic focus as well, but he finds principles are the key to know the law.

Legal Theory and Narrative

Could Holmes accept the Dworkinian epistemic project to know the law, or would he regard only the realists as offering a new insight? I think Holmes would accept Dworkin's project as well, just because he does not advocate knowing the law from someone who has a strong grasp of the principles in play, that is not his point in the *Path*, his point is to trim the fat from such positions, but not to annihilate them as Frank does. I think we can see this view in Holmes because of *The Common Law*. The passages cited above echo the sentiments of *The Common Law* and are evidence Holmes did not abandon his positions. Holmes says in his chapter on early liability that "my aim and purpose have been to show that the various forms of liability known to modern law spring from the common ground of revenge (36). What is it that we are seeing Holmes do in *The Common Law*? The sort of legal theorizing that Frank would likely regard as illusory. Holmes' does say that new reasons are given to support rules "from more primitive times, that were originally created for different reasons (36). This has a similar sentiment to Frank in that precedents should not be followed dogmatically without good reasons, but Dworkin also thinks the same as he believes legal systems have a healthy evolution, and Holmes' words are far closer to the sober balance of Dworkin than the drunken separation from history advocated by Frank. Holmes evidently accepts a more robust, general conception of law to even be engaged in that project. Holmes talks about "the paradox of form and substance in the development of the law," which I interpret as the following (*The Common Law* 34). Substance refers to the old content or belief of older laws, and the form is the legal institutions and ways of doing things like precedent (7). Forms, like precedent, can keep old substances and beliefs that would be regarded as too crazy for being a part of the law of a community alive (7).

Holmes traces how in many old legal systems that influenced our modern system, that the modern Anglo-American legal culture is descended from, originally viewed taking revenge on an object as just. So if a tree fell on a friend, killing them, one could legally be entitled to destroy the tree. Or if someone was hurt by a weapon, the weapon would be seen as guilty and revenge could be taken on it. Holmes says this doctrine lived on, but under the new reading that it was a form of limited liability, even though it originally was not. By limited liability if a horse injured someone, as a limit to damages to be claimed the person could hand over the offending horse rather than pay for the damages. Originally the law was only hand over the horse so one could take their revenge on it, but then as an option to save the horse you could pay for the damages. By our times, we look back and understand the logic of it and apply it as the idea of limited liability. In case the horse caused so much damages that it would bankrupt the person, as a limit on their damages they can turn over the horse.

That is to say, the sort of mysticism Frank does not like, Holmes traces to how it originally was, and finds that such mystic notions of a ship being a living person not only ironically still in effect colloquial speech, but is actually the underlying, guiding hand of maritime law. Perhaps Frank would accept this if Holmes described it in less Platonic ways and more as an unconscious convenience, but Holmes views it all more robustly than Frank would. Holmes also sees how it is helpful, pragmatic, he does not outright condemn that sort of thinking lingering and surviving, Frank does, and sees it as just a block in the way to the ultimate justice that could be achieved from a judge freed of mystic notions. Holmes does not totally endorse these older ways of thinking, but he is intrigued and seems to tolerate their presence, and bases such instances for the claim we see echoed in the *Path,* that “the law is the witness and external deposit of our moral

life," and that includes stuff deposited by ancient, mystically-minded people (*The Path* 121). What Frank wants to clear out, Holmes seems to accept as a fixture.

Holmes could also be read as outright accepting legal interpretivism, or at least strong elements of it, in *The Common Law*. Consider this statement. ". . . while the terminology of morals is still retained, and while the law does still and always, in a certain sense, measure legal labiality by moral standards, it nevertheless, by the very necessity of its nature, is continually transmuting those moral standards into external or objective ones, from which the actual guilt of the party concerned is wholly eliminated" (36). This seems compatible, if not a description of much of Dworkin's legal interpretivism. Holmes accepts on some level a connection between morality and law in so far as moral standards inform particular legal standards. Dworkin does. He sees how our values and principles like fairness, define and animate what is law for us. Also, Dworkin does not think law and morality are the exact same thing either, but that they are closely related, and to really know law one should know some element of morality. If Holmes can accept moral standards, he would not think Dworkin's claims as unacceptable. If law is 'transmuting' moral standards of a community, that sounds quite Dworkinian, whereby our interpretive attitude transmutes them into the actual specific interpretations of judges or the laws we write in statutes. Dworkin does think law has an external side that is informed by the moral standards and principles of the community. Holmes' project is also dealing with the whole of Anglo-American law, a project specific to a certain legal culture as Dworkin would suggest. The line on the guilt being eliminated can be compatible with legal interpretivism as well. Dworkin is concerned with knowing the law, and to know it you should look to moral principles and a historical narrative, this is neutral on whether or not a sense of moral guilt is necessary in certain

legal cases. It may be, or it may not be, it would be an issue sensitive to a particular legal culture, and Dworkin does not consider it.

Not only is what Holmes says about law in *The Common Law* compatible with legal interpretivism, but the whole project Holmes does on tracing the history of legal liability can be seen as legal interpretivism at work. Holmes tells a historical narrative, a story, this is what Dworkin says we must do with law. Holmes treats the legal community like it is personified overtime, and tracks how its values and principles change, and how in later times to justify current practices and decisions, old laws that had a different point were interpreted as having the point of modern legal liability. Holmes paints this as odd, but Dworkin accepts it as part of law. It is not being unfaithful, it does not undermine law for Dworkin or Holmes. Both Holmes and Dworkin see law as relating to a historical narrative with an intimate connection to moral principles as influencing the law, and how the present times will tell changing stories of their legal pasts to justify their present practices that they think are meaningful. Holmes may not accept all the details of Dworkin's legal interpretivism, but what Holmes does in *The Common Law* is something like a legal interpretivist endeavor, and is evidence he would have a better home there than in the matured legal realism of 1930 Jerome Frank.

Of course, Frank praises Holmes as they do agree in so far as they think moral notions are getting in the way of complete knowledge of the law and its best uses in society, but Holmes has a more nuanced view, and this more nuanced view would find a better home in Dworkin than Frank. After all, Holmes main targets were the legal formalists, who really thought law was a lot of simple syllogistic reasoning and application, stuff that is far more straightforward, and just because one is against formalists or intense natural law positions does not mean that one is a full blown realist

like Frank. Frank takes the spirit in Holmes, that is, a spirit against excessive moralizing, and Frank continues this dark crusade farther than Holmes would ever go. On the other hand, Dworkin would agree with the development of the legal community through history, as being a collection of moral notions deposited in the law, and Dworkin having some realist heritage would be able to accommodate Holmes' pragmatic, bad man thought experiments as a necessary feature to trace the sometimes erroneous, external material consequences of legal decisions. It must not be forgotten that Dworkin positions his law as integrity between the conventionalist, like the formalist, and the pragmatist like Frank, and he ultimately is committed to some form of judge made law, that seems to animate the bad man's relevance to knowing the law.

One should ultimately read *The Path of the Law* as a polemic against formalists, and as a practical tool for seeing the law as those who take an external view. This does not mean that Holmes rejects the insights brought on by a robust, interpretive, internal perspective, and Holmes engages deeply with this thinking in *The Common Law*. Holmes supplied many of the themes, tropes, and focuses of the legal realists, he may have been the inspiration of the legal realists, but this does not mean he would automatically default to preferring legal realism to legal interpretivism. Legal interpretivism can appeal to the pragmatism of Holmes, and still have a redeeming place for his historical and moral principle based inquiries, while Frank's legal realism has no place for such thinking. Dworkin's legal interpretivism can account for the different moods of Holmes in *The Common Law* and *The Path of the Law*, while Frank's legal realism does not. Holmes did not entirely abandon his way of thinking in *The Common Law*, as he echoes the sentiments early on in *The Path of the Law* about emphasizing the historical developing nature of law. In a sense, Holmes wants to show that a ruthless, external perspective

exists in *The Path*, but when Holmes takes the internal perspective himself, it is interpretive, and a full-fledged legal realist sees the internal perspective as an illusion. The point is, if we take Holmes' *The Common Law* seriously, as well as his words in *The Path*, Holmes could not be a legal realist in the sense that Frank is outside of just using a legal realists external perspective to give a different perspective on the law.

Chapter 7: Nietzsche on Law

General Themes and Law

What is law to Friedrich Nietzsche? We have no clear answer on really any direct questions of law. In the larger picture with Nietzsche being an unsystematic philosopher, there are not many clear things about Nietzsche's philosophy as whole, let alone trying to isolate any particular work of Nietzsche in particular. If anything, the most endearing and recurrent themes of Nietzsche are his attacks on Christian morality and his penchant for the ancient Greeks. For the question of Nietzsche on law, the closest substitute is his writings on the morality of custom.

Custom has its treatment in philosophy of law. There is this notion sprinkled about in legal philosophy that before political states there were primitive cultures being guided by superstitions and customs, and the issue of how these customs relate to law. Frank, in describing the magic of words and superstitions is talking about ideas that pervaded those lost worlds of customs, and for Frank these notions relate to law in that their falsehoods have trickled down through history and have infected many conceptions of law. Frank also regards custom as a source of law, as almost anything else can be a source of law. Hart treats custom as being a pre-legal stage, a sort of precursor to law proper. Dworkin introduces his interpretive concept in regards to a fictitious state that runs on a type of custom called rules of courtesy, and could imagine a legal system centered around what Frank and Hart call custom and not law.

Hart gave us his idea as to what is the concept of law, and Nietzsche gives us, as written in the title of aphorism 9 in *Daybreak*, his "Concept of morality of custom" (9). This aphorism is lengthy, and Nietzsche breaks down and gives us definitions for many

of the terms he uses. Most remarkable of all is that midway through the aphorism he begins to seemingly jumble the word 'custom' with the word law. Nietzsche says

> This is . . . the *chief proposition*: morality is nothing other (therefore *no more*!) than obedience to customs, of whatever kind they may be; customs, however are the traditional way of behaving and evaluating. In things in which no tradition commands there is no morality; and the less life is determined by tradition, the smaller the circle of morality (9).

One free from tradition is an immoral and free individual (9).

> if an action is performed *not* because tradition commands it but for other motives (because of its usefulness to the individual, for example), even indeed for precisely the motives which once founded the tradition, it is called immoral and is felt to be so by him who performed it: for it was not performed in obedience to tradition. What is tradition? A higher authority which one obeys, not because it commands what is *useful* to us, but because it *commands* –What distinguishes this feeling in the presence of tradition from the feeling of fear in general? It is fear in the presence of a higher intellect which here commands, of an incomprehensible, indefinite power, of something more than personal – there is *superstition* in this fear (9).

This is a long aphorism, and Nietzsche even breaks down what he means by tradition. Perhaps all of it could be justified to be reproduced, but I will try not to do that. What is most fascinating of all is in this aphorism he begins to use the word law instead of custom, as if he thinks of them as one in the same. There is something in that, as both custom and law command normatively like morality in this sense.

At first glance, one could see this as a resounding victory for Frank, that Nietzsche would find a home in Frank rather than Dworkin. After all, Nietzsche wants free individuals, and Frank's account of law would make people free from custom and law until the gavel falls in the courtroom to tell them otherwise. The following discussion will depart from the quote above, but I will return to it. Frank attacks what he sees as part

superstition, and part childhood desire for a father-authority, the idea of an omnipotent law that has certain answers to everything, that its commands are backed by the vast power of the state, and its reasons are the sort of incomprehensible mystic wisdom that make up legal reasoning. In this sort of view of the law, a judge is an oracle, receiving divine insights from the law that are summoned up by the ritualistic dance of the plaintiff and defendant's legal counsel in the temple-courtroom. Frank is against that, and while my exegesis did not emphasize this element of Frank, his way of tearing down and criticizing conceptions of law based in certainty is loaded with this mystic language. Although the targets of Frank's attacks would not say that about their philosophy, he says that this is essentially their view of law, and he regards it as false. Frank spends a lot of time giving a small psychoanalysis of other scholars on law. I neglected emphasis on this in my earlier exegetical process, because before I was principally concerned with Frank's positive thesis on what law is, and only referenced his scathing criticisms when it was necessary. Frank would say that a view of the law as this certain, higher power is from bad psychological development, of people reverting to the mind of a child as they deal with the law.

What Frank is doing in his criticism of other theories is very similar to what Holmes outlines at the beginning of the *The Common Law* and is a central part of his study, the paradox of form and substance. Whereby, in a sense, old substance, or substantive ideas or values from years past whether ancient or medieval times, trickles down through our legal systems because of the same forms in the sense of judicial precedents. This allows for a legal system that cites rules that their original meaning would be regarded as unacceptable or crazy, such as the desire to get revenge on a physical object that you see in the old Scottish laws of deodand (*The Common Law* 24-

25). Frank employs similar techniques, but adds a psychological element, whereby he talks about what he sees as the flawed form of precedent, and the flawed substance within the forms as not just having a historical basis worth examining but a psychological one. It is what I will call the historicist attack, backed by psychology, so it is a psychological-historicist assault on the accepted wisdom of the legal community.

This bears a striking similarity to Nietzsche's project in his work most celebrated by scholars, *The Genealogy of Morality: A Polemic*. In the *Genealogy,* Nietzsche gives a psychological historicist assault on Christianity. Now, there is a difference in the way of attacking between these three thinkers. Holmes is strictly historical in his approach. Frank adds a psychological dimension; as revealed in the title of his great work, *Law and the Modern Mind*, he deals with the psychological state of modern legal thinkers. Nietzsche's psychological attack applies both to current Christians, as well as the psychological origins of Christianity in the minds of the original ancient Christians.

While Frank resorts to psychoanalysis and various contemporary thinkers of his time like Piaget, Nietzsche, existing before such vast psychological developments and being an influence on it, uses his own psychological theories. What is central to this is the idea of the will to power. There are many facets to the will to power, and scholarly debates rage over its exact meaning and intent, as well as what Nietzsche's compiled notes in the form of the book titled *The Will to Power* had to say in either deviation or clarification of the will to power in his earlier works. For now, I will look at the will to power as primarily psychological, which is largely a canonized interpretation of the will to power. I find the clearest elucidation of the will to power to appear in the third treatise of the *Genealogy*.

> Every animal, thus also la bête philsophe [the philosophical animal], instinctively strives for an optimum of favorable

> conditions under which it can vent its power completely and attain its maximum in the feeling of power; just as instinctively, and with a keenness of scent that 'surpasses all understanding,' every animal abhors troublemakers and obstacles of every kind that do or could lay themselves across its path to the optimum (-it is *not* its path to 'happiness' of which I speak, but rather its path to power, to the deed, to the most powerful doing, and in most cases in actual fact its path to unhappiness) (Nietzsche Genealogy 75).

That is to say, beneath our conscious mind, in our unconscious, lurks the will to power, a desire to in a sense be all we can be, reach the highest status of power. I say unconscious because Nietzsche describes it as an instinct, and it is a sophisticated instinct residing in our mind. The example of it that Nietzsche is driving towards is explaining the ascetic ideal, or the idea of asceticism that often includes "poverty, humility, chastity" (76). Thus Nietzsche asks why are great philosophers normally unmarried and chaste to some degree, why do they value elements of the ascetic idea as good? It is because of the will to power, namely the philosopher's will to power, and to cut down on distractions and things that would get in the way of producing the lasting, thoughtful insights that philosophers aim for (75).

Nietzsche would say Christianity with its morality is like a narrative to give meaning to someone's life, ultimately this story springs from the will to power. This is similar to Frank saying people have their own biases, and they will be constructing their own narrative from the sources of law to justify their decision while falsely thinking they are limited by what they first immediately think is right. The point is, both Nietzsche and Frank see our minds as generating narratives, and both want us to be conscious about this to form better narratives.

One major difference is that Frank would claim people's psychological biases destroy any coherent narrative about law that involves principles or values. Law as a

concept is limited to the small sphere of judicial decisions precisely because Frank does not think people can be uniform, coherent, or certain enough in moral principles to the degree he wants. That is to say that Frank uses his psychological perspective to take down a big, general idea like law. Nietzsche does not use psychology to claim that Christianity is just what the priest says the bible is or something to that effect. Nietzsche does not think different practices in Christianity destroy any unified or meaningful sense about what Christianity says. Frank uses psychology to attack law, it leads him to say at one point that "the word 'law' is ambiguous and it might be well if we could abolish it" (51-52). Nietzsche never says that Christianity is a vague movement, that the word should not be used, that the practice of Christianity is so uncertain, so incoherent, that Christinaity as a unified, meaningful, singular phenomena is destroyed as being a meaningless term. Nietzsche, on the contrary, thinks you can theorize about Christianity in big ways, that it is such a coherent phenomena, and he uses psychology to if anything strengthen what he sees as really going on in Christianity, such as it being an instance of slave morality and a vehicle for revenge.

I am asking what Nietzsche would say on law, but what would Frank say on Christianity based on his writings in *Law and the Modern Mind*? Frank could attack Christianity as a coherent phenomena, that although Christianity seems centered on the Bible, and Jesus, different Christian groups vary so much in their practices that it is no longer a meaningful word. Essentially this is his take on law, the actions of judges, how they differ from the sources before them, makes him say that is all law is. Admittedly this comparison is difficult, but the point stands that Frank uses psychology to undermine a coherent, general idea as being capable of general theorizing, while Nietzsche uses

psychology to try and get to the truth of the phenomena of Christianity using general theorizing.

The above discussion of the will to power, and the psychological-historicist based arguments was lengthy, but its point was to show a commonality in style between Nietzsche, Frank, and also Holmes. Frank and Nietzsche both tear down ideas in the same way, and both think that modern ideas influenced by unreasoned superstition and dominated by psychological drives are bad and worth questioning and changing. So there is a similarity in the style of attack, and a criticism of dogmatic obedience to some normative system. Although Frank criticizes law as a general idea, both Holmes and Nietzsche are comfortable about general theorizing about widespread practices like law or Christianity.

Although Nietzsche does not think one should be blindly obedient to a normative system, this does not mean Nietzsche would prefer Frank to Dworkin, because Dworkin offers the same thing. Recall that Dworkin thinks law is an interpretive concept, which means law is not a matter of "unstudied deference to a runic order" (Dworkin 47). Frank, also sees it fine to distinguish general rules, and other elements or sources of law, from law proper. It is unlikely that Frank would deny that these sources of law influence and guide society, but that is not enough to grant it the status of law. This is a commonality between Dworkin and Nietzsche, that both are more likely to say something that greatly guides society politically is law, and this even hints at something behind Nietzsche's conflation between custom and law and his probable rejection of positivism. There is the idea that whatever governs important affairs, such as politics, is what law is. It is this idea, of important things that guide a society as being a part of the law that lurks behind interpretivism and also behind Nietzsche on custom. There can be a society lacking

everything that Hart wants, but they have such a strong deference to their vast customs that their lives are almost analogous to people living under a legal system in so far is there is an ordered way of doing things.

Dworkin's system allows for labelling such a system as law, because first law is an interpretive concept. Although Dworkin goes on and on about law as integrity, this is only so because his theory and general ideas composing law as integrity give the best descriptive account of our Anglo-American legal practice. Yet what is the legal practice before it? There is the pre-interpretive stage, that is what Dworkin would regard as Hart's philosophy, of figuring out what everyone means by law. It is a very basic endeavor of laying the groundwork for what law is to become. To Hart, from his Oxford 1950s look at things, law is separate from custom and our usage of the word and the concept more or less denotes a system of rules that is outlined in his book *The Concept of Law*. For Nietzsche, it would include custom. Dworkin, one must remember, is advocating a philosophy he calls interpretivism, and nothing stops a legal system of being almost all custom, what would be regarded by Hart as more like a pre-legal system.

It is likely Nietzsche would like the interpretive focus of Dworkin as well. Strictly speaking based on the lengthy passage earlier, Dworkin's interpretivism is immoral, because it sees doing this as having a point, as serving a usage. There is not the blind obedience to custom. In a sense, Nietzsche's concern about having a life affirming view is like having an interpretation of life that accepts life, and finds it meaningful. As in, Nietzsche wants us to take an active, interpretive attitude as defined by Dworkin towards life, and sees Christianity and other giant normative systems as failing in some regard.

It is time to return to some passages from *Daybreak* to have more commentary. I will present another lengthy passage, not out of some love of block quotes, but because I must track Nietzsche's precise usage of the words law and custom.

> Originally all education and care of health, marriage, cure of sickness, agriculture, war speech and silence, traffic with one another and with the gods belonged within the domain of morality: they demanded one observe prescriptions *without thinking of oneself* as an individual. Originally, therefore, everything was custom, and whoever wanted to elevate himself above it had to become lawgiver and medicine man and a kind of demi-god: that is to say, he had to *make customs* – a dreadful, mortally dangerous thing! Who is the most moral man? *First*, he who obeys the law most frequently: who, like the Brahmin, bears a consciousness of the law everywhere and into every minute division of time, so that he is continually inventive in creating opportunities for obeying the law. *Then*, he who obeys it even in the most difficult cases. The most moral man is he who *sacrifices* the most to custom (9).

This is an example of Nietzsche seeing custom and law as essentially the same thing. He is talking about customs, but gives the lawmaker as an example. Is this endorsing Hart's view that systems of customs would be pre-legal? No. In the next passage he talks about creating custom, so the lawmaker, is now the custom creator. Then in the next passage instead of the most moral person being the one who follows custom, he uses the word 'law'. By the very end of the passage law has been replaced again with sacrificing to custom. If we take this seriously, then Nietzsche cannot be a legal realist, but would prefer and even be a legal interpretivist. Someone could try to claim that since Nietzsche is encouraging one to be the custom and law maker, it is like Frank encouraging people and judges to wake up to how law is made with the last institutional hand, but this would be an incorrect reading. As to follow through and make this complete, Frank says the only law, or in Nietzshce's case, custom that exists is from one making it at the end, and

what comes before is only a source of custom or law. For Nietzsche, he seems confident enough in describing the early customs and laws as custom and law without needing to say they are sources before some later custom maker.

Nietzsche does alternate beginning in those passages, almost every other line, between custom and law. We might not take Nietzsche seriously, but I think we should. Hart's philosophy more or less falls out of tracking the usage of the word 'law', and this is the most sensible place to start in trying to figure out someone's views on what law is. For Nietzsche, it is deference to a normative system, what is captured in his usage is something more akin to Dworkin's legal interpretivism, which as I said earlier has the theme that what guides society is law. Even then, Dworkin takes a view on law that Nietzsche likes, as finding it meaningful, and using history to spin narratives to justify the present.

Perspectivism and Interpretivism

Both Nietzsche and Dworkin are hesitant to engage in universal theorizing. Dworkin's philosophy begins with the general assertion of law being interpretive, and thus a full-fledged, complete theory of law is only applicable to an individual legal culture. Dworkin does not think there is any neutral or universal perspective into the truth of the concept of law outside of it being an interpretive concept filled with the principles that guide life in a legal community. Nietzsche is a perspectivist, and is skeptical of those who think they lay claim to universal or transcendent truths.

> There is *only* a perspectival seeing, *only* a perspectival "knowing"; and *the more* affects we allow to speak about a matter, *the more* eyes, different eyes, we know how to bring to bear on one and the same matter, that much more complete will our "concept" of this matter, our "objectivity" be. But to eliminate the will altogether, to

> disconnect the affects one and all, supposing that we were capable of this: what? Would that not be to *castrate* the intellect? . . . (85).

What Nietzsche is saying is that we are all limited by our own perspectives in viewing things, we do not have access to, nor is there a non-perspectival 'knowing' of things. In many way Nietzsche's words seem to highlight and draw attention to a major difference between Hart, Frank, and Dworkin's philosophy. Particularly Hart, who does think he is getting at the concept of law. For Nietzsche, you need more perspectives than just one like Hart's. Frank tries to be universal, pointing to instances in history of laws without something like an explicit judge or last hand, and claims that you will need something like a judge to handle legal indeterminacny and that this judge-figure is the real creator of law. Frank tries to tear at the concept of law as if he has universal truth, but he only has his own perspective.

Dworkin up front makes his universal claim that law is interpretive, but the contents of this claim, law being interpretive, make for law to vary significantly and from different culture perspectives, up front. It starts with people finding their practices meaningful, and justifying them with regard to their political history and principles. It is in a sense value neutral outside of valuing practices to justify in the first place, and it is open enough to accommodate all sorts of persepctives and cultures. This is a major similarity to Nietzsche, and for this alone Nietzsche would likely reject Frank's universal legal realism in favor of Dworkin's legal interpretivism, because the notion of interpretation incorporates the claims of Nietzsche's perspectivism. The word interpretation pervades Nietzsche's works, he even refers to sense perception as being an interpretation of things (85). The prevalence of the word interpretation in Nietzsche's

writings flows from perspectivism, as even the ordinary meaning of interpretation implies it is one of many possible views.

Thus far I have considered the broad themes of Nietzsche's *Genealogy* in regards to law, and specific passages on custom in *Daybreak*. I used the broad themes of *Genealogy* because those themes are often seen as central to Nietzsche's philosophy, as well as the *Genealogy*. While the passages in *Daybreak* can be accommodated in Dworkin's legal interpretivism and not Frank's legal realism, there is a passage in *The Gay Science* that can only be made intelligible if we would say Nietzsche would prefer Dworkin's legal interpretivism to Frank's legal realism.

The important bits of the passage are reproduced below.

> *What the laws betray*. – It is a grave error to study a people's penal code as if it were an expression of its character; the laws do not betray what a people is but rather what appears to it as foreign, strange, uncanny, outlandish. The laws concern the exceptions to the morality of custom, and the severest punishments are for things that accord with the customs of the neighboring people (*The Gay Science* 58).

After that Nietzsche makes a remark on some older Arabian and Roman laws (58). This is a passage along the lines of Holmes' comments in *The Common Law* and Dworkin's interpretivist philosophy. The law reflects the morality, or the morality of custom, of the community, and thus the penal code laws punish those that fall out of the law, and are in that sense the exception. This passage assumes a connection between a legal community's moral principles, and their law being a reflection of that, and their criminal law being a condemnation of what falls out of their moral principles. It assumes the sort of personification, and principles, the likes and dislikes, that Dworkin's legal interpretivism says is up front with law. Frank would not make such statemetns, or find them vague. In Frank's view broad statements about "the laws concern the exceptions to

the morality of custom," are ridiculous, and only have meaning in so far as they are predictions of material consequences from someone with the last institutional hand on the sources of law. Evidently, Nietzsche thinks the law has a deeper, more meaningful connection to the principles of the community the laws are from, and this is the language of a legal interpretivist

Someone could read the passages above and think that Nietzsche is saying that every community has their morality of custom, and the law breaks this, as it deals with the exceptions to what is ordinarily governed by morality of custom. Thus Nietzsche is asserting that law is entirely separate from morality of custom. This would be a flawed reading. To begin, in *Daybreak* it is clear that law and custom are interchangeable, in everything we see that confirmed, if anything Nietzsche is just hesitant to use the word morality of law because morality of custom is associated with a strong sanction of inner guilt whereas law in modernity is not as closely related with guilt for not obeying as the laws are so vast and sometimes deal with meaningless bureaucracy. Second, even if we are to read this as laws create and thus deal with exceptions to morality that still supposes a very strong connection to morality. This is because it supposes that what the law is concerned with is already limited by the sphere of morality of custom.

Frank's legal realism would reject all of this, as well as any sense of a community having a coherent morality of custom that could be spoken to meaningfully. Nietzsche gives specific examples of a Roman law embodying their values. Frank gives specific cases that show the ridiculousness of law as a general idea, and historical examples showing law always needing some last hand to make it meaningful. They are fundamentally different approaches to law, as Nietzsche thinks law can be meaningfully spoken of with regards to a community and their moral principles, while Frank does not.

On the other hand, Dworkin's legal interpretivism would welcome the sort of thinking embodied in Nietzsche passages in *Daybreak*, *The Gay Science*, and even his questioning the meaningful value of Christianity, perspectivism, will to power psychologizing and theorizing that we see in *The Genealogy*.

Perhaps the reader is not buying any of this. How could Nietzsche accept Dworkin with all his lofty moral principles of justice, and fairness, when Nietzsche rejects Christianity morality! What I see such a statement as saying is, there is some intuitive sense of similarity between a legal realist like Frank, and Nietzsche. I have already explained the similarity of their psychological-historicist approach of attacking ideas, and I did point out how their targets are fundamentally different in character. Frank destroys the general idea of law, while Nietzsche accepts speaking about Christianity meaningfully in a general way, but criticizes what he finds to be the real content of Christinaity as revealed with his examination of history and the psychological state of Christians with his idea of the will to power. The other similarity is in the character, the flavor of their works. Just as both Holmes and Nietzsche write memorable, quick lines, Frank and Nietzsche do have a similar style and flavoring.

The flavor of Frank's work has an air of controversy. It suggests what we regard as important, as meaningful, as very logical—law—is really an outpost of our dated superstitions. This is the same as Nietzsche trying to show that Christianity, something people regard as important, as meaningful, as making sense, is just an ancient value system designed to guilt and overthrow the Romans while making the suffering life of oppressed Jews in the Roman Empire seem more meaningful. In a sense, Nietzsche takes the external attitude to Christianity, just as Frank does to law. This yields the same flavor to their works, of both Frank and Nietzsche presenting dark truths that we do not want to

acknowledge, that we need courage to face. The difference in these tones is that Nietzsche's can be accounted for under Dworkin's interpretive attitude, Frank's cannot. Frank does not view law meaningfully in the way that Dworkin outlines as necessary for the interpretive attitude. Frank is not concerned with justifying current law and practices, as I mentioned, he draws historical examples of the necessity of courtroom life and judges. He thinks law, with its last hand, is a practical necessity that we must bear with, the same with the word law. He begrudgingly accepts it as a reality to be dealt with, and nothing more. Does Nietzsche view this for Christianity? Not at all. Interestingly, Frank does not encourage lawlessness, getting rid of law as a practice, but just navigating this runic necessity as best as possible, which means largely ignoring precedents and history. I think it's reasonable to assert that Nietzsche thinks Christianity could go away, after all, it did not always exist.

The reason why Nietzsche can be accounted for in the interpretive attitude is that Nietzsche can be seen as regarding there being a society with current practices worth justifying. That is to say, Nietzsche seems externally skeptical because he does not live in any legal order, or even moral community, that he approves of. He is skeptical in the way Dworkin says we are skeptical of immoral law like Nazi law because it lacks everything worthwhile that we find intrinsic to any legal system worth keeping. Frank's legal realism is a kind of legal skepticism. After all, it even hints at bad outcomes for the democracy we think we live in. We like to say we are ruled by laws, not people, but Frank thinks the only thing deserving of the word law is a judge's decision. This is essentially saying we try to be ruled by laws, but we are always ruled by people, by tyrants even. It paints a dark legal landscape, whereby we try to be ruled by order and rules but are instead just living under fiefdoms of judges, and we need heroic judges and lawyers like Frank,

Holmes, and other legal realist leaning thinkers to guide us in this dangerous world. There is a superficial reading of Nietzsche that some can have, that make people think Nietzsche wants us all to be lone wolf barbarians who do whatever they want, with no regard to any sense of a community with principles, but this is simply not what Nietzsche is about even if some people walk away thinking that (Solomon 20-21). The thing is, on the question of law, Frank does not take the interpretive attitude, and is skeptical of law as a whole let alone of any coherent moral principles animating law; he does not even try to open the door to legal intepretivism. If Nietzsche did find something, like a legal community, having meaningful practices, would he want to preserve it, treat it as a flourishing instance of law, and see it animated by principles that insiders, those with internal perspectives, really understand?

History, Meaning and Narrative in Law

I think he could, and this brings us to some passages in *Thus Spoke Zarathustra*. Once again, these passages are important, and as Nietzsche's precise words are important, I will be resorting to several large block quotes and discussions as previously. It is important to keep in mind that the words here are of the character the prophet Zarathustra, and may not reflect Nietzsche's own thoughts, but just the thoughts of this character. I will briefly consider the objection to using this as evidence of Nietzsche's legal interpretivism sympathies, but I will do so later when I discuss Nietzsche's writings in *The Use and Abuse of History*. For the Zarathustra passages as follows.

> This is my compassion for all that is past, that I can see: it has been abandoned - - abandoned to the favour, the spirit, the madness of every generation that comes up, and which reinterprets all that has been as a bridge to itself! A great despot could come, a shrewd fiend who would and could compel all that is past with his favour and disfavour: until it

> became a bridge to him and a portent and herald and cockcrow. This, however, is the other danger and object of my compassion: - whoever is of the rabble, his memory goes back to his grandfather – but with the grandfather time stops (*Zarathustra* 176).

Is this Zarathustra critiquing people for being legal interpretivists like Dworkin? After all, Dworkin does see history as justifying the present, and did not see current people having to account for all previous generations in their historical narrative. Yet at the end of this passage, Zarathustra warns about the 'danger' of 'the rabble,' who have a limited memory. This last passage is the key to understanding the previous one. It is because people are like the rabble, who remember nothing, and thus out of a total blindness to the past see history as being what they are. The despot is described as a fiend, so this despot is bad, and this despot is doing exactly that, weaving a historical narrative that justifies this despot. In a sense, this is essentially Zarathustra outlining Frank's legal realism. There, judge's have power like despots, and they have enough sources to regard the past as leading to their current decisions, just as this despot has all the metaphors of a new age at his disposal to get away with anything.

How does this happen? It happens because most people are like rabble, that is, with limited memories, and not able to construct any historical narrative that could show an unjustified, incoherent change that a fiendish despot could bring along. In other words, the rabble can be seen as being limited in their approach to grand theorizing as Frank more or less outlines for every person. What Zarathustra is really condemning is the legal realists utter disregard for history, and a sensible historical narrative, outside of producing some immediate "good" decision in a case before the judge. Once again, this is all assuming we can sensibly translate these talks about history to law, which I think we can, because how to treat the past and our legal history is a huge theme and point of

contention between Frank and Dworkin. Frank views it as a source of law to dress up a decision, and Dworkin sees it having a substantial relationship to principles and the law.

I will jump ahead of myself, and also add some evidence that this is what Nietzsche thinks, that we should not just blindly look at the past as being a herald to exactly what we are. It should be noted, Dworkin wants us to regard history as it is, so some things that are so different can be abandoned, but what can be salvaged should be taken as is, we are in some ways limited by history, but should not feel utterly confined either by history as history should serve the justification of present political practices. Nietzsche writes about truth in history in his short essay *Homer's Contest*. "Thus the Greeks, the most humane men of ancient times, have a trait of cruelty, a tigerish lust to annihilate-a trait that is also very distinct in that grotesquely enlarged mirror image of the Hellenes, in Alexander the Great, but that really must strike fear into our hearts through their whole history and mythology, if we approach them with the flabby concept of modern 'humanity'" (*Homer's Contest* 32-33). What Nietzsche is doing is criticizing a common theme in Western historians to see the ancient Greeks as these wonderful humane precursors to modern liberal democracies, when we take the Greeks as they are their repulsive violence should not be ignored.

He is criticizing people making historical narratives that are too blind to the past. Just as a legal interpretivist would critique a judge for interpreting the law in away so unfaithful to past political decisions and moral principles just to get away with their own incoherent decision, Nietzsche criticizes the same impulse in modern German classicists in regards to ancient Greece. Recall that while Dworkin allows us to see history as justifying the past, it does not mean reconstructing or ignoring the past to tell a more coherent narrative, we should not ignore the civil war just because one side did not

embody anything resembling our practices today. While Frank sees history as just a cover for current decisions, Dworkin takes its continuity and discontinuity seriously.

We also get another value laden comment on law in *Homer's Contest*. "Further, it was in truth from murder and the expiation of murder that the conception of Greek law developed; so, too, the nobler culture takes its first wreath of victory from the alter of the expiation of murder" (34). This is something analogous to what Holmes was doing, and that was demonstrated to be more legal interpretivist in nature as legal realism thinks such theorizing is all fiction and illusions. Greek law developed from some easily had basic principle condemning murder, and needing a means, mechanism, for getting rid of guilt, and then Nietzsche hints that war being legal did so as well, as I interpret wreath of victory to refer to victory in combat that involves killing or murder, and soldiers are praised and decorated not condemned by their community. These statements seem rather uncontroversial, but the extremeness of legal realism, and its myopic focus on the courts, renders such statements about law developing as beside the point of law, but even a very basic sense of the history of a legal system beginning with condemning murder has its place at the start of the historical-legal narrative that legal interpretivists make.

I brought up these passages, because they are further support of the point in the *Zarathustra* passage, they also serve as evidence that Zarathustra's words can be taken as evidence of Nietzsche's thought in so far as it relates to this specific passage. I bring this up because there is always the issue of whether or not the words of a character in a book can be seen as actually representing the author's thoughts. To summarize the meaning of the first part of the *Zarathustra* passage, people who have no memory of the past are at the hands of despots who can make their self-serving, or awful, or however bad regimes seem to be the product of the history of the community, and the despot can be read as

what the legal realists encourage, while the legal interpretivist wants a nuanced balanced take on history. However, there is more goodness in this aphorism than just that beginning part, here is Zarathustra, or Nietzsche's proscription against the despotic opportunism in regard to historical ignorance. The passage below is the next part of that passage, and together, they comprise the entirety of this section.

> "Thus all that is past is abandoned: for it could come to pass one day that the rabble would become master, and all of time be drowned in shallow waters. Therefore, O my brothers, there is need for a *new nobility* that is the opponent of all rabble and everything despotic and writes anew on new tablets the word 'noble'. For there is need of many nobles and many kinds of nobles, *that there may be nobility!* Or, as I once spoke in a parable: 'Just this is Godliness, that there are Gods, but no God!' (176).

The rabble in control, as master, forgets history, the past has no value to them and this is bad to Zarathustra. We know he thinks this is bad because he is calling for nobility, creating a dichotomy between the noble and the rabble, or the commoner, or peasant, or however we regard that which is not the nobility, that which is ripe for being controlled by a despot. So to counteract the rabble ignoring history is a bunch of nobles, who are all different in some sense, but united in their nobility or noble virtues that they write on a tablet. The parable at the end suggests the nobles are like a bunch of different polytheistic gods competing, as opposed to one powerful monotheistic God which is like a despot.

What is really going on in this passage? Let us read it through the lens of the rabble as the legal realists, and the nobles as the legal interpretivists. The legal realists as rabble have no care for history, and open themselves up to any number of despots. The nobles have their own values, compromised in the general term 'noble', written on tablet, suggesting their law. The tablets seem to suggest the metaphor of some sort of holy law, like the ten commandments, and the law is akin to the values that unite these

different nobles. Since the nobles must care for the past otherwise they would not be different from the realist rabble, and if we treat the tablet metaphor as law it follows that the nobles as legal interpretivists are constructing a narrative that is faithful to history. The interpretivist nobles are sensitive to their values of nobility, and different enough that it sparks debates about right answers in the way that legal interpretivism privileges the individual's take on law.

Perhaps this seems a bit much, to read legal realism and legal interpretivism in this passage. I do not deny that there is speculation, but I defend it as healthy speculation. It is a fruitful way of reading the passage because legal realism and legal interpretivism both have a concern for history and narrative, the legal realist finding it illusory, useless, and having no real part in law other than being a mythic roadblock to good decisions, and the legal interpretivist as part of the unfolding narrative of law as the best interpretation. It is the fact that these two philosophies make such strong stances towards their legal communities' respective histories and politics that make writings on politics and history applicable. Both legal realism and legal interpretivism have a view towards history, and Nietzsche so far seems to prefer the legal interpretivists attitude towards history.

Before I move onto a directly history based text, *The Use and Abuse of History*, there is one more interesting lines from Zarathustra that construct a view of legal realists. This view will contrast well with another view of them that can be found in *The Use*. This is Zarathustra's talk about a type of person known as the last human. There are many negative traits of the last human, but I will draw out only a few for this discussion. Zarathustra gives examples of what the last human would say. "'What is love? What is creation? What is yearning? What is a star?' – thus asks the last human and then blinks. 'For the earth has now become small, and upon it hops the last human, who makes

everything small" (16). We can see the character of the legal realists in here. The last human does not care to create, love, nor desire any big project, all things are small to the last human. This is the legal world of Jerome Frank, whereby law is reduced to the tiny despotic islands of a courtroom. It is a philosophy where any yearning for law as a grandiose, unified enterprise of principles of a vast legal community are cut down by the cynical sword of skepticism. Ambition, preserving a great community of healthy, life-affirming principles has little place in the legal realist's legal landscape, as law is only a transient shifting phenomena, a reflection of a judge's wishes.

If grand projects are possible, why would anyone have the energy to pursue beautiful ambitions? Thus there is the tiredness of the last human. "One no longer becomes poor or rich: both are too burdensome. Who wants to rule anymore? Who wants to obey? Both are too burdensome. No herdsman and one herd! Everyone wants the same thing, everyone is the same: whoever feels differently goes voluntarily into the madhouse" (16). It is a grey, lifeless world. No one strives above others, the few that do are seen as crazy. Thus to Frank the legal interpretivist, with his or her grand principle laden schemes, saying that some judge's decisions probably are not really law because their interpretations are so incoherent is seen as mad. No one aspires for more, no point in making a community of principle, because there is only a transient herd. This may seem too harsh a characterization of Frank's legal realism, but a motif of tiredness about law, of law being not something to yearn for nor love, is in Frank's work, as it is in the last human. After all, the culture of legal realism gave us such lines as "what the judge ate for breakfast determines what the law for the case is." No legal realist ever said this, but it is a phrase seen in legal realists works, and even echoed by those sympathetic to legal realism. It can be interpreted as a bad person's cynical quip about the courts, or it can be

seen as part of the tiredness of the last human element of the legal realists. What is there to aim for when the judge's unconscious mind might shift his or her decision last minute because his or her cereal tasted a certain way setting off his or her unconscious or something like that? Now Frank does not say this, but, for whatever reason, walking away from legal realists this is the sentiment often perceives in them.

There is another portrait of the legal realists, and this is found in *The Use and Abuse of History*. Broadly construed, I read this text as endorsing the legal interpretivist views history, and thus as evidence of Nietzsche being more at home in Dworkin's legal interpretivism than Frank's legal realism. Nietzsche says about history that "we would serve history only so far as it serves life; but to value its study beyond a certain point mutilates and degrades life" (*The Use* 3) At first glance, as many things in Nietzsche do, it seems like a praise of realism only using history in its most base fashion to justify decisions. Yet this is not the case. Also keep in mind that such a reading would be in tension with the *Zarathustra* and *Homer's Contest* passages. If history only serves as something to take out of context to praise our times, then Nietzsche would not criticize classicists for utterly ignoring the ancient Greek's cruelty because they are concerned with seeing them as human precursors to modern Western Europe.

The comment about history being used too much should be seen as a nod to light, pragmatic flavor of Dworkin's take. There is no need to excessively account for, and keep track of, every meaningless detail of the past and its relation to the present, but the big things matter, and matter not to be abused out of context. After all, Dworkin's view of history is that it will justify the present, but within limits so as not to misrepresent the past, but neither to keep us in some 'runic' deference to it either. I will add again that

Nietzsche sees that "the knowledge of the past is desired only for the service of the future and the present, not to weaken the present or undermine a living future" (22).

Nietzsche talks about history in language similar to law as the thinkers in this work do. "Historical knowledge streams on him from sources that are inexhaustible, strange incoherences come together, memory opens all its gates and yet is never open wide enough" (23). This is like the legal realists first set up of legal history. There are innumerable potential sources of law residing in precedents, from rules, opinions of people, any number of principles, it seems incoherent, our memory, our minds struggle to make sense of it. While the legal interpretivist says we can, the legal realist says we cannot, so it proves law with its relation to history is an illusory general idea, it is only to be looked at externally, and so judge's have their great discretion, and history is ignored, the rabble's view for just the most basic, appearance level justification that is unfaithful to history. Nietzsche characterizes modern man as having too much knowledge of history and that "the modern man carries inside him an enormous heap of indigestible knowledge-stones that occasionally rattle together in his body, as the fairy tale has it. And the rattle reveals the most striking characteristic of these modern men- the opposition of something inside of them to which nothing external corresponds, and the reverse" (23). The practice does not seem to comply with the knowledge. When looking at the world the modern man sees that "its real motive force that issues in visible action is often no more than a mere convention, a wretched imitation, or even a shameless caricature" (23). This is like the external, skeptics view of law, as just action, with no interpretive meaning or force. Essentially Nietzsche is sketching the legal realists. A realist like Frank wants a view of law that is coherent enough to explain all court decisions, finding anomalies, bits of information, bad cases, he tries to undermine law. Frank takes too much historical

knowledge, he cannot pragmatically view some cases as possibly errors in representing the principles of the community. He does not want to regard a case like Angelos as perhaps a theoretical legal error, because he is too fixated on having some certainty attached to law. He takes in too much information in trying to get in law, and failing to find a theory to explain every blip, he is skeptical of law.

In the history sketch Nietzsche gives us, the equivalent of the legal realist is the "unhistorical man" (24). They ". . . have the custom of no longer taking real things seriously, we get the feeble personality on which the real and the permanent make so little impression. Men become at last more careless and accommodating in external matters, and the considerable cleft between substance and form is widened until they are no longer have any feeling for barbarism" (24). This is because there is nothing to be barbaric about. The careless one is the breakfast eating judge who is too easily swayed. The too accommodating is the absolute discretion in the external matters, which is all where law resides to a legal realist like Frank. Nietzsche thinks too much history is bad, because you get thinkers like legal realists, who cannot see history or law as being worthy of any interpretive attitude which requires finding it meaningful with values as the form of principles. Too much history makes us give up on any sense of history, and leaves us to despots of the present. The lack of personality is akin to Frank's lack of legal personification, thus for the realist the sense that wild, external judicial decisions do not affect law because for them, an internal view of the personality of the legal system having its own principles is so small that wild judicial decisions barely impress on it. That is to say a judge's decisions will not be able to alter the personality or principles of a legal system because in the legal realist's eyes the personality of the legal system does not exist or barely exists as something small in the first place.

As Nietzsche then says "the people that can be called cultured must be in a real sense a living unity, and not be miserably cleft asunder into form and substance" (25). There is no culture with no legal community, no principles, no values for anything, and thus no sense of coherence between form, the external legal world, and the substance, the inner meaning of it all. When the form and substance is separated too much, you get legal realism, which sees law as only the external form. Hart's philosophy in this scheme can be seen as saying a coherent concept of law still resides on this form, and Dworkin's philosophy can be regarded as trying to get a union again between form and substance, of the external reality of law as rules and courts, with the inner meaning and purpose of law with its moral principles felt by us when we read about cases we think as unjust. Frank rejects hierarchy ranking sources of law, and thus has an information overload that naturally makes a nuanced pragmatism in Dworkin's philosophy, that is confined to a legal community of principle, a seemingly impossible task, and perhaps a positivist like Hart inherited Frank's pessimism.

It is interesting to note that legal realism and legal interpretivism delve into history, and Nietzsche's take on history uses almost the exact same language found in the philosophy of law world. Nietzsche also condemns the "antiquarian," whose view on history zaps the life of the present (20) because he or she treats history in the way Frank and Dworkin do not want law, as a matter of "unstudied deference to a runic order" (Dworkin 47). Recall the interpretive attitude sees meaning the present that is justified in the past, and guided by a sense of our present principles of the legal community personified. Nietzsche says that "*You can explain the past only by what is most powerful in the present.* Only by straining the noblest qualities you have to their highest power will you find what is greatest in the past, most worth knowing and preserving" (40). So our

virtues, or moral principles guide our view of the past, just as the legal interpretivist would advise approaching the past, with principles in mind.

Some may object to trying to read 20th century Anglo-American legal philosophy into Nietzsche's discussions of history. As said before, there is some speculation in this, but Nietzsche's language is the same as legal philosophy in these discussions. It could be the case he would object to reading legal philosophy into it, and want it only applicable to history, or say that the terms are far more nuanced. These criticisms are valid, as Nietzche did not write in legal philosophy directly, nor in the Anglo-Ameircan tradition of legal philosophy, but even if this is the case, in considering his earlier direct marks on law and values in *Daybreak* and *The Gay Science* there are grounds already for Nietzsche supporting legal interpretivism, and this guides the reading of *The Use* and supports it as well. Thus we should not be surprised that when we read what he says on history, and find the language and concerns of a legal interpretivist, that it is for what it is, evidence of Nietzsche being more sympathetic to the legal interpretivist than the legal realist.

Some may say that Dworkin is too much of a moralist, justice, fairness, and procedural due process, all these modern virtues. We can look at Dworkin more abstractly, imagine there is a Rudolf Dworkin, the 19th century German version of Dworkin, with a Nietzschean nostalgia for some sort of past aristocratic nobility order. Perhaps they would have law too, and it seems reasonable that Nietzsche, or this Rudolf Dworkin, could make an interpretive scheme to account for. It is merely taking Dworkin's philosophy abstractly, as it should be for approaching another or fictitious legal culture. Imagine if in Rudolf Dworkin's philosophy he says that law is animated by the principles of nobility, virtue and perfection, or something of that sort.

Rudolf Dworkin could call this scheme law as noble perfection, whereby the community's value of perfection in their most capable members, the nobles, guides the reading of the statutes and all of that, whereby the system aims to produce as many brilliant artists and creative geniuses as it can. It aims for Goethe tier writers, poets, and composers. Of course then, Rudolf Dworkin and Nietzsche would not take the external, skeptical view of this system as Nietzsche does towards Christianity, because this is a legal culture and tradition that in all likelihood Nietzsche would find meaningful, and worth preserving. However, perhaps he would not like the legal order I described above; it is a very quick gloss on themes that Nietzsche might find praiseworthy. The point is, Dworkin's philosophy is flexible to account for all sorts of values, even the ones Nietzsche would approve of even if they are in direct opposition to Dworkin's favored values, and considering the other evidence presented, Nietzsche would prefer Dworkin's legal interpretivism to Frank's legal realism.

Chapter 8: Conclusion

Much has been said on legal philosophy. I take legal realism and legal interpretivism as good contrasting poles to then plot Holmes and Nietzsche on. Holmes was chosen as an illumating figure because he is seen as the inspiration to legal realism, and the question is live to the extent he would accept the legal realism as it unfolded in something as raw as Jerome Frank's legal realism. Nietzsche, seeming to have the flavor of the legal realists and even Holmes, is another illuminating figure to use. I have given an exegesis of Frank's legal realism, that sees law as a judge's decisions and predictions thereof. Then I moved to describing Hart's system for the purposes of better illuminating Dworkin's legal interpretivism. Hart sees law as primarily the union of primary and secondary rules, with a rule of recognition, and an internal and external view, and those contrasting views provided fruitful ways of examining Dworkin, Frank, Holmes and Nietzsche.

I then accounted for natural law with Lon Fuller's principles of a failed law. After that I dove into Dworkin's complex, multitier philosophy that broadly sees law as an interpretive concept, more specifically as the best interpretation of past political decisions and the moral principles of the legal community personified that justifies current political practices and the use of force. Then Dworkin's more particular claims of law as integrity is that our broadest animating principles are justice, fairness and procedural due process. Holmes was first considered, and although introducing the tools of the legal realists, his more careful language in *The Path* and general theorizing in *The Common Law*, suggest he would find the more nuanced take on history offered by Dworkin's legal interpretivism better than the brash present focus of Frank's legal realism.

Nietzsche was considered last, not writing directly on law in the fashion of the other thinkers, and having a style, a flavor similar to the legal realists in some ways. It was shown some of his few comments on law directly, see law laden with values, and more or less the same as custom. Rather than taking this as unsophistication, I argued it is read as endorsing legal interpretivism, as legal interpretivism can account for the usage of the words like that, as both Nietzsche's usage of the word law, and custom, and legal interpretivists suggest it is more akin to guiding forces in a community than a judge's or institutional last hand's decision. His general themes as displayed in the *Geneaology* bear the appearance of Frank, but the substantive way of affirming general ideas as real enough to criticize is a fundamental difference from Frank. I then considered his writings on history and people in *Zarathustra* and *The Use and Abuse of History*, showing that they at least can have sensible, coherent readings that produce positions on the issue of legal realism versus legal interpretivism because both those philosophies have a view on history integral to their understanding of law, the legal realist having a high demand of truth, wanting to analyze the oddest data points leading to ignoring history, while the legal interpretivist has a practical and principle guided take towards a coherent narrative to justify the present. The latter position of the legal interpretivist is far more palatable to Nietzsche than the path to despotism laid down by the legal realists.

What is the take away with this project? After all, some may still disagree. To those that disagree with my findings that Holmes and Nietzsche would probably prefer Dworkin's legal interpretivism to Frank's legal realism should consider this take away point. The legal realism of Jerome Frank is perhaps just far too extreme for any but the most hardened external skeptic to commit to. Frank's legal realism has a myopic focus on hard cases, it also has a level of sophistication perhaps only possible by a lawyer in a

modern legal system who might have an excess of Holmes 'bad' person clients. Dworkin begins with the notion of interpretation, something that is less rooted in our legal system than judge's decisions. Frank's philosophy also breathes of a person who wants a new legal age, it was the Great Depression, the laws, the lack of regulation, the past, failed to prevent the economic meltdown. A young regulator like Frank had much to find in legal realism, which gave a philosophical ground for new regulation and laws. Legal realism allowed Frank to attack old laws, and to build his own with his legal realist cohorts, and the future generations did not in turn tear down everything from that order.

By the time Frank was a judge he certainly was not whistling the tune of *Law and the Modern Mind*, perhaps this is an unfair choice then. I defend it in that Frank is the most legal realist of the legal realists, and if you want to see legal realism and nothing more, Frank's philosophy is the only choice. He also quite explicitly offers a general theory of law, and defends it, something other legal realists do not as clearly do, or do not do. On the other side of the ring is Ronald Dworkin's legal interpretivism, which takes legal reasoning and the narrative tales found in law very seriously. Both are new additions to legal philosophy in the 20th century, and both take almost the exact opposite views on history and legal reasoning, and in that sense Frank and Dworkin are good choices because they are both so extreme from each other.

Although another take away is that Dworkin's philosophy is not as extreme, as there is a legal realist heritage, there is skepticism flowing in the veins of *Law's Empire*, and thus it can give a home to the sometimes practical minded words of Holmes and Nietzsche. This is a point illuminated in this work, that might otherwise not be gleaned from it. Dworkin's philosophy can quickly be turned into something far more lofty than he wanted it to be, it does have beautiful moral principles, it does privilege mental

engagement with the law, but Dworkin is ultimately engaging in a descriptive endeavor of how people treat the law, which is with the interpretive attitude. Which also brings up while Frank flirts with universality, Dworkin's interpretivism renders true legal knowledge more or less to the internal perspective of someone in that community. This is a major point of appeal, and something explicit and different about Dworkin's legal interpretivism than other philosophies such as Frank's legal realism. My ultimate concluding note is that considering Frank's legal realism, and Dworkin's legal interpretivism, Holmes and Nietzsche would both likely prefer Dworkin's legal interpretivism, and the wider banner of legal interpretivism compared to Frank's legal realism and the wider banner of legal realism as a general philosophy of law.

What is the practical take away from this work? It is about the value of having a meaningful narrative of law's role in our life. In a sense, Frank pronounces that law is dead. In the aftermath of this announcement, he prescribes a legal world free of value schemes, history, and any justificatory narrative. This conscribes law to the small island of judicial decisions, and we then associate law as just being the cumbersome moments when are forced to pay parking tickets or otherwise face material consequences from the state. As this paper demonstrates, Dworkin thinks it better to regard law as meaningful, as requiring some reasoned justification, and with a meaningful narrative. I have also shown that Dworkin finds unlikely allies in Holmes and Nietzsche, who are often, even ordinarily, taken to be legal realists. So I have posed a challenge to those few but important legal scholars who believe their legal realism gains weight by association with Holmes and Nietzsche.

I reconstructed Dworkin's legal interpretivism that first broadly supports this view of law. Then I showed how Holmes regards law as being related to a meaningful

historical narrative and relating to the values of the people of the legal community. Nietzsche famously declared the death of God, but in its place he prescribed creating new value schemes, a life-justifying view of history, a new, meaningful narrative for life. He does, not promote a life free from any values or history, like Frank. The more practical point is that, Dworkin, Holmes, and Nietzsche would all think there is more to law than the unlimited pronouncements of a judge and the associated material consequences. So I have raised an dealt a blow to those who take pride in the thought that Nietzsche would support their own cynical, or even dismissive, view of the law.

To those that say that this was a boring tale, a horrible movie, a saddening waste of time, this theater of legal philosophy offers no refunds. To those that consider this a metaphor, keep in mind another metaphor, time is money.

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