Aufsätze

The Kobe Lectures for Legal and Social Philosophy

The Kobe Lectures were founded to commemorate the 13th World Congress on Philosophy of Law and Social Philosophy held in August 1987 in Kobe, Japan. The lectures are administered by the Japanese National Section of the International Association for Philosophy of Law and Social Philosophy (IVR Japan). Every two years, a scholar engaging in creative research of basic issues of legal, social, and political philosophy is invited to Japan. The lecturer usually gives two lectures in major cities of Japan and leads several informal seminars in various cities in Japan. Professor Ronald Dworkin (Oxford and New York) gave the inaugural lecture in 1990. Professor Ralf Dreier (Göttingen) was the second lecturer in 1992. In 1994, Professor Joseph Raz (Oxford) gave the third series of lectures.

The Kobe Lectures aim to advance our understanding of the legal, social and political spheres of life. Important theoretical issues are explored from a perspective that is philosophical yet also sensitive to problems of implementation and administration. Through this program we hope to arrive at a deeper mutual understanding of both the similarities and differences between the Eastern and Western forms of life.

The lectures are published in the Archiv für Rechts- und Sozialphilosophie*, the official publishing organ of the IVR. This journal is known since 1907 for its contribution to legal, social and political thought.*

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Law, Philosophy and Interpretation*

Thank you very much for those splendid introductions. To those of you who have not experienced it, I must tell you it's a very great pleasure to be introduced and perhaps praised in the language you don't understand. Because then you can make up for yourself part of the introduction. In any case I am very grateful. You can imagine how pleased I was to be asked not only to give one lecture but a series of inaugural lectures. I am very grateful.

I shall give two lectures on general jurisprudence in two different cities. The first lecture, here in Tokyo, will emphasize the role of interpretation in law. The lecture in Kobe will be devoted mainly to questions about the interrelation between political philosophy and law – in particular the connection between law and democracy. This split gives me a convenient opportunity. If people ask me in the question period today why I didn't discuss a certain subject, I will say, "I shall discuss that in Kobe." If in Kobe people ask me why I didn't discuss a certain subject, I will say, "I talked about that in Tokyo last week."

* The form of a lecture has been kept.

In the beginning of today's lecture, I shall in some part simply be summarizing views that I have explained at greater length elsewhere. I do this, though perhaps some of you are familiar with those views, because others are not and I thought I had better begin with a brief summary of what I have argued before so I can then develop some new material in the main part of the lecture.

The general problem I want to discuss has two separate aspects. I begin by reminding you – though the lawyers among you won't need much to be reminded – that even experts often disagree about what the law is on some subject. They disagree, moreover, in a particular and special and deep way. Even when lawyers agree about what we might call the ordinary historical facts of the matter – even when lawyers agree about what happened on some occasion, about who did what to whom, and even when they agree about what words are written in the statute books and other books of law, and about what judges in past cases have written and said – they may still disagree about what the law is. I offer you two examples, both drawn from American law, to illustrate this.

The first is a famous case decided long ago called Riggs v. Palmer. That case arose when a young man, who knew that his grandfather had written a will leaving the young man all the grandfather's property, learned that the old man was about to marry again and make a new will, and murdered his grandfather to stop him from doing so. Of course, the young man was sent to jail. But then the question arose, "Was he still entitled to inherit the property of the man he had murdered?" There was no disagreement about the facts. Everyone agreed that the young man had murdered his grandfather. Everyone agreed about what was said in the statute dealing with wills. The statute said nothing about murderers: it did not say that if the heir murders the testator, the heir is disqualified from inheriting. Nevertheless, the lawyers disagreed about the right answer to that case, and the judges also disagreed. Two judges said that the law is that murderers may not inherit. And one judge, the dissenting judge, said, "No, that is wrong. The law is that the murderer can inherit the property."

I mention another famous case just to have another example. This is the case of Buick Motor Company v. McPherson. At one time, most American lawyers thought that if someone bought an automobile which was defective, that person could only sue the dealer, the automobile dealer, from whom he or she had bought the car. He could not sue the manufacturer of the motor car, they thought, because there was no contract between the purchaser and the manufacturer. In the Buick case, the plaintiff, who was injured because her automobile was defective, decided that she would sue the manufacturer, the Buick Motor Company which is part of General Motors, in spite of the widespread opinion that she would lose. Again the judges disagreed. The majority, in a famous opinion written by Judge Cardozo, said, in effect, "If we look at the previous decisions carefully, in the right way, then we see that, in spite of the general opinion among lawyers, actually the law does allow someone who has bought a defective automobile from a dealer to sue the manufacturer directly." The dissenting judge said, "No, if we look at the cases the right way, we will see the opposite. The law forbids a law suit directly by the purchaser against the manufacturer. The purchaser can sue only the local automobile dealer from whom she bought the car." Once again, there was no disagreement about what actually happened. Everyone agreed that the motor car was defective. Everyone agreed that there was no contract directly with the manufacturer. Everyone agreed about what was written in the past cases and, nevertheless, very learned, able, capable lawyers and judges disagreed about the correct statement of the law.

Now, that raises a problem of a philosophical kind, which we can describe in two different ways. We can describe it from what philosophers might call an epistemological

perspective, as a problem of legal reasoning. When all the facts are settled, what is the right way to reason to a conclusion of law? We can also describe the problem (again to use a piece of philosophical jargon) as an ontological problem, that is, a problem about what must be true about the world – about what must have happened there – in order to make a proposition of law true or false.

But though these are different formulations, the underlying issue is the same one. Let me illustrate that point with a non-legal example. Suppose I ask whether Japan is a rich country. Someone might be puzzled about the epistemological issue: how would we go about discovering the right answer to that question? What would count as good evidence for deciding whether a country was rich? Or someone might be puzzled about an ontological issue. No one thinks that the proposition that Japan is a rich nation is true because Japan is a person with a lot of money in her pocket. We might therefore ask: what different kinds of facts – about the wealth of actual, individual people, for example – make it true that a nation is rich?

The same two kinds of questions, epistemological and ontological, are raised by the disagreements in law that I described and illustrated. We have, as I said, first the question of legal reasoning: what would count as a good argument that a murderer is not allowed, in law, to inherit from his victim? And second, equally mysterious, we have the ontological question: if it is a fact that murderers cannot inherit, what kind of fact is it? Is it a hard fact, like the fact that there are nine planets in our solar system? If not, is it the same kind of fact as the fact that Japan is rich – is it a summary of a large number of other, more basic facts about what particular people do or have done? Those are, to my mind, the central questions of jurisprudence. Those are the philosophical questions behind the familiar, traditional jurisprudential question "What is law?"

For a long time, not just in America and England where I teach but around the world, one family of answers to these questions, one general legal theory, has been very influential, which is usually called legal positivism. In America and Europe, the most influential philosophers in this tradition have been Hans Kelsen and John Austin and H. L. A. Hart. I can best summarize the answers that positivism gives to my two questions by beginning with the ontological question.

Positivism says that the propositions of law, like the proposition that the law forbids murderers from inheriting, can be true only in virtue of historical events – of particular people thinking or saying or doing particular things. John Austin said, as most of you know, "Law is the command of the sovereign." He meant that what makes a proposition of law true, when it is true, is an historical event of a particular sort, namely a sovereign, a person in undominated political power, issuing a command to that effect. That is the only thing, according to Austin, that can make a proposition of law true.

H. L. A. Hart has offered a much more sophisticated theory. He said that propositions of law are true, most fundamentally, in virtue of a sociological fact: that the general public (or at least the officials) of a community have accepted a general principle, which he calls a Rule of Recognition, stipulating procedures and conditions that make laws valid. "For example," said Hart, in effect, "in Britain the Rule of Recognition, a general principle accepted by everyone, is that whatever Parliament declares to be law is in fact law." It follows that a proposition of law is true, in Britain, if Parliament has enacted the rules that proposition describes.

To summarize: positivism's answer to the ontological question is "law is true in virtue of facts about what particular people – either sovereigns, as in the case of Austin, or people generally in the case of Hart – have decided or think. If you give that answer to the ontological question, then the answer you will give to the more practical,

epistemological question is straightforward. According to the positivist, you discover what the law is simply by looking to history to find out what law has in fact been made by the historical acts that, according to the version of positivism in question, make law. So, in the case of that bad young man who murdered his grandfather, you simply look to the books to see whether the legislature has ever said – one way or the other – what the answer is.

But there is an obvious difficulty with all this. How does it explain how and why judges and lawyers disagree? You remember I said that all the lawyers and all the judges agreed, in Riggs v. Palmer and in the Buick case, about what the historical facts were, including the facts about what the legislators had done. But if positivism is right, if the only thing involved in the legal question is what past decision had been reached, how could there be a disagreement? The positivist answers that question this way. There is no disagreement in these cases about what the law is. That is an illusion. Judges may say they are disagreeing about what the law is, but they are not, since they agree about what the past decisions were. What then are they disagreeing about? They are disagreeing, according to positivism, about what the law should be. They are arguing with one another about how far they should change the law in the exercise of their discretionary power to do so.

Now, I shall just summarize my reasons for thinking that that is a very bad answer. Lawyers and judges think that they are disagreeing about what the law is. That is how they understand themselves. That is how it feels to be a lawyer or to be a judge. You feel that there is a hard problem to solve, and that this is the problem of what the law really is, not what it should be, which you may think a much easier matter. We need a theory of law, an answer to our questions, that does not lead us to the surprising conclusion that the disagreement that seems so genuine and so demanding is really illusory. That is the reason that I have tried to defend a different kind of answer than the answer positivism gives. This answer finds the nerve of law not in past official decisions alone but in the process of interpretation of past decisions, which I am now going to try to illustrate.

It is sometimes helpful to introduce a complicated idea by an analogy. So I am going to imagine a game for rainy afternoons when there is nothing else to do. Imagine ten people, novelists, who spend such an afternoon together and pass the time by arranging the following game. They draw lots – pieces of paper with different numbers on them. The writer who draws No. 1 writes the first chapter of a novel, a new original novel, and then she gives the chapter that she has written to the novelist who has drawn No. 2, and then novelist No. 2 reads the first chapter and writes a second chapter continuing the story, trying to make the novel as it develops as good as it can be. And then the first two chapters are given to the novelist who has drawn No. 3, and he writes another chapter, still continuing the story, trying to make it as good a story as it can be. This process continues until the novelist who has drawn No. 10 has completed his chapter. By this time they have produced a very thick novel. Novelist No. 10 had to read the whole story so far, and write a new chapter with new events but regarding that new chapter still as a continuation of the same story.

Now, I want to compare the development of law to that chain novel, as I call it. My idea put in a very crude way (I will try to do better later) is that when a lawyer or a judge has a new problem like the problem of the murdering young man or the problem of the defective Buick car, the lawyer or judge must read all the law up to that point as if it were the opening chapters of a novel and must understand that the decision he or she must reach in the new case must be one that continues the story in the most appropriate way.

Now, I hope it will be clear from my imaginary game that two different writers would write the same chapter in the story in different ways. So, too, different lawyers or judges will have different opinions about the best way to continue the story. They will have different opinions in part, not entirely but in part, because which way makes the continuing legal story better will depend on one's own moral and political convictions. So, if a judge is very conservative, that judge will decide the Buick case in a different way from the way a judge who was more radical would decide it. But still, in spite of that fact, if judges are in good faith trying to decide as interpreters rather than legislators, then for each judge there will, nevertheless, be a difference between two questions. The first is the question of interpretation. What is the best reading I can give to this legal history so far? How can I interpret or understand it to make the best story from a political standpoint so far? The second is the question not of interpretation but of legislation. If I could make the law fresh, with no responsibility to the past, the way a legislator can – if I could, in effect, start a new novel -how would I do it?

I claim that even though any judge's legal opinions will reflect his political conviction, nevertheless there will be a difference for each judge between interpreting the story so far and deciding how that judge would rule if there were no story so far. For example, suppose (I agree it's very unlikely) there is a Communist judge in the United States, and he is faced with the Buick case. Suppose he says, "I would like to establish the legal principle that anyone who sues a large capitalist company automatically wins." If he actually tries to interpret the history of American law to see whether that principle could be regarded as continuing the story, he would fail. The story of American law so far is very much not the story in which capitalism always loses: no responsible judge could think it was, and that fact underscores the difference between interpretation and original legislation. Or, as we might put it, the difference between interpretation and invention.

Very well. That concludes my attempt at a quick summary of the position that I have tried to defend in the past, particularly in the book mentioned in the introduction, *Law's Empire*. Now, I want to report to you various important objections that have been made to my position. I do so not just because any author likes an opportunity to reply to his critics, but because the objections seem to me to require an answer which is a more general and illuminating account of interpretation than just repeating what I said in *Law's Empire.* So, this afternoon, I want first to describe the objections and then to try to develop, with you, a more general theory of interpretation. You will see, I hope, what I mean.

Here are the objections that I would like to discuss with you. The first insists that I have misunderstood what interpretation is really about. This objection has been made by many people including literary critics. They say that in my view interpretation is always an attempt to make of a story the best it can be. I said that when the writers were writing the chain novel, each was trying to make the continuing novel as good a novel as it could be. I say that when judges decide a hard case, each should be trying to continue the story so as to make it the best story from the standpoint of political justice. Now, the objection is that interpretation aims to describe the object of interpretation as it really is, not to make it the best it can be. In my view, interpretation aims to improve the object of interpretation, whereas, according to the first objection, interpretation is not a matter of improving something but describing it accurately.

The second objection is related to the first. It says that my view of interpretation applied to the law has the undesirable effect of making law seem more attractive than it is. Suppose you were interpreting "Mein Kampf" or the Holocaust or the rise of Joseph Stalin to power. Would you be trying to make any of those stories look good?

There is something horrible, according to this second objection, about the idea of trying to rewrite history to make it as good as it can be. Sometimes it is important to show it to be as bad as possible.

The third objection is different from the first two; it is more philosophical. The third objection says: you can't believe, can you, that there is always a right answer to a question of interpretation. Interpretation is inherently a subjective matter. For every person there is a different interpretation. If two people look at the same painting or look at the same play or go to the same performance of a Noh drama, they will see different things. Because interpretation is not objective but subjective. So, if I am right that law is essentially a matter not of discovery of historical events but of the interpretation of these events, then law becomes, according to this objection, subjective rather than objective.

Those are the three objections that I believe require me (or us I should say) to think more generally about the phenomenon of interpretation. So with your indulgence, I am going to turn my back for a few minutes on law. I know this is a legal conference and you are all lawyers. But I am going to turn away from law for a while because, of course, we interpret over a very great range of phenomena and contexts. Let me just remind you of the different kinds of activities in which one way or another interpretation is a central idea.

There is law. But there is also literature and art and aesthetic interpretation. There is scientific interpretation. Scientists, we say, interpret the data. There is historical interpretation. Historians don't just describe the events of the past, they interpret them. And there is psychoanalytic interpretation. Sigmund Freud's most famous work, at least among the general public, was called the Interpretation of Dreams. I need hardly remind you, of course, that there is a much more mundane occasion of interpretation called conversation. Indeed that form of interpretation now going on before your ears, because those admirable translators speaking into your earphones are struggling to make sense of what I am saying. They are interpreting what I say, and interpreting it in a different language from the language that I myself am using.

Now, the fact that we have such a wide range of activities in which the idea of interpretation figures suggests a problem that, so far as I am aware, has not been taken up by philosophers, at least not in these terms. I mean the problem of offering an answer to the following question. Are all of these various activities interpretation in the same sense? If so, what is interpretation, if it can be understood so abstractly that the interpretation of dreams and the interpretation of statutes both count as occasions of interpretation?

If we can find some theory of interpretation so general as to cover all these different cases, or even most of them, then a further problem arises. How do we then distinguish between these different kinds or occasions of interpretation? We certainly do distinguish. Suppose behind me right now there suddenly appears a series of flashes of light. And I then asked you to interpret those lights. You wouldn't know even how to begin until you knew what kind or form of interpretation was appropriate. You would have to decide whether the lights were a natural phenomenon – some mysterious lights just appearing in the atmosphere, for example – or whether it was a coded message by someone signaling in dots and dashes, or whether it was a new art form composed of the play of light directed by some kind of artist.

So we have two problems that any general theory of interpretation must confront. The first is: what (if anything) makes all of these kinds or occasions of interpretation occasions of the same thing? And the second problem, equally difficult, is: what makes the difference between each form as deep as that example suggests it is? And when

we develop, if we can, a general theory of interpretation answering those questions, we must design it so as to answer two other questions at the same time. The first is this. It is a feature of all these different kinds of interpretation that those who practice each of them – the scientists, the lawyers, the historians, the translators, the psychoanalysts – when they disagree with one another each thinks, at least on most occasions, that he or she is right and the others are wrong. That is: we typically think of interpretation as something that can be done better or worse, that an interpretation can be true or false. And that adds to the problem. Because there aren't many activities, if you think of all the different activities we engage in, which are in that sense truth-seeking or truth-claiming.

But once we understand that it is part of interpretation in this very general sense that it claims truth, then we see a fourth feature that the theory must also account for, which is this. A general theory of interpretation must leave at least room for skepticism, because it is also a feature of each of the kinds of interpretation I described that there are skeptics who say the whole field is a kind of nonsense. I gather there has been much discussion in Japan recently, for example, of the deconstructionist movement in literary theory, which is a kind of skeptical position. We are familiar in America with varieties of skeptical positions that say that law is nonsense, that there is no law. So a general theory of interpretation must explain not only why most practitioners view the enterprise as truth-seeking, as hoping to establish truth, but also why some practitioners see it in a skeptical way as devoid of truth.

Very well, that is the challenge. And I am going to offer a very quick response to it. This will not, of course, be a complete theory, not only because I don't have time to develop the details, but because it will fit only some of the contexts of interpretation I described. It is a partial theory, part of an even more general theory that I shall try to describe on some other occasion. But the part of the more general theory that I shall try to describe now is particularly important for us, because, though it does not fit all of the contexts, it does fit the class of these that includes law. I call this form of interpretation constructive interpretation.

You will already have noticed that interpretation takes place within organized social practices, and that the concepts we use in forming interpretations of different sorts take their sense, not from the natural world, but from these social practices. Consider, for example, the concepts that figure in aesthetic interpretation: the concepts of novel, fiction, poem, sonnet, drama. These concepts have their life in, take their meaning and sense from, human enterprises and activities. There must have been a time when people first began to think that inventing a story was creating something. Before that, it was simply telling lies; suddenly telling lies becomes a way of creating art. There must have been a moment at which a drawing of a buffalo on the wall acquired a new dimension of meaning as art. That was the moment at which it was absorbed into a distinct human enterprise. Of course, conversation and translation are also parts of a distinct human enterprise.

Now, all the practices and enterprises that I have named so far are regarded by those of us who take them up not as pointless but as beneficial or worthwhile in some other way. We regard them as having a purpose or point. We think that law serves a function for the community whose law it is. We believe art serves a different kind of function, that it brings a valuable dimension of experience into our lives. We regard history as having a different kind of narrative value, and so forth. That is, we don't regard these enterprises as just rituals. We regard them as something important, as something having value.

Now, with that background I can offer this account of constructive interpretation. Constructive interpretation arises when people engage in a practice of this kind, which they all regard as serving a purpose or a point but disagree as to what, exactly, the purpose or point is. In that event, participants will regard the extension or range of application of the concepts that make up the practice as sensitive to, determined by, the point.

Now, that is very abstract and I am going to illustrate it in various ways in a moment. But even at this level of abstraction you might see how this account might be thought to respond to the series of problems about interpretation I listed. I began with the problem of range. What is common to different kinds of interpretation? My answer would be that constructive interpretation is general because we have many practices or enterprises that meet the test I just described. That is, we think of them as serving a purpose but to some degree we disagree about what the purpose is. And we judge the range of application of the concepts tied to those practices as determined by the purpose we ascribed to the practice as a whole.

Since that is so, we now know how to distinguish one interpretive practice from another. Interpretive practices will differ because they serve different kinds of points. We may disagree about what the point of law is but we agree that the point of law is different from the point of poetry. Why can we be truth-seeking about the matters of interpretation? Because we are truth-seeking about the matters on which interpretation depends. Suppose we disagree with other lawyers, about some matter of legal interpretation, because our views about the point of law, or about justice so far as we think it is law's purpose to provide justice, differ from theirs. We will think our interpretation true (not just different) if and because we think our opinions about the point of law or about justice are true. We hold our views on these subjects as a matter of conviction, which means that we think they are true.

But you also see, I hope, why skepticism is always in the background. Because skepticism is always on offer whenever we are dealing with matters in which people feel deeply, as a matter of conviction, but disagree, and none of them can prove that they are right. I might think, with great passion, that the true point of literature is to celebrate God. But others think the value of literature is very different. I have no way to demonstrate that I am right, and therefore I am vulnerable to the challenge of the skeptic who says that no one is right, that there is no truth or falsity about such questions. So, as a formal matter, just in the abstract, the sketchy theory I have given you (which you might call the teleological or purposive theory of interpretation) has the right shape to answer to the various requirements I said that the theory of interpretation should meet.

Let's look in more detail at some examples of this theory at work, and since I promised that I would return to law sooner or later, I will return to it for my first example. How does this account of interpretation help us to understand the argument in Riggs v. Palmer, the case about the young man who murdered his grandfather, or the case of Buick v. McPherson, about the woman who sued the Buick Motor Company? Many views can be and are held about the purpose or function of law as a collective enterprise, of course. But in order to simplify this illustration, I shall suppose that there are only two that are held by anyone in a particular community. The first insists that law exists to provide certainty and strict guidance in order that collective life can be more efficient, so that people can plan their lives knowing what rules the police or the state will enforce against them. Now, if one took that view of the point of law – roughly speaking that law exists in order to allow society to function efficiently in spite of the fact that people disagree about justice and morality – then he would be drawn to a

positivist approach to law. In particular, he would be drawn to the ontological view that law exists only in the form of explicit past decisions by political officials which can be read and known. He would be likely to think, in the case of the murdering heir, that the murderer should be allowed to inherit, because the statute is very clear about the formal tests a will must meet to be valid, and says nothing at all about murderers. It would defeat the purpose of law, on this view of that purpose, if we had to decide such moral questions as whether and when murderers should be allowed to inherit in order to know whether a particular will was enforceable. A judge disposed to positivism, because he held the view that the purpose of law was to promote predictability, would therefore think the law allowed the murderer to inherit, though he might also think that the law should be changed for the future, though by the parliament not by the judge. Similarly, in the Buick case, a positivist holding that view would be disposed to decide not to allow a suit against the manufacturer, for the simple reason that no past case had ever allowed such a suit, and the legislature had not said that this practice should be changed.

Now consider a different view of the point or purpose of having law. It holds that the positivist view I just described is too narrow. It acknowledges that law does serve the purpose of allowing people to plan their affairs, and that for that purpose predictability is desirable. But it adds that law should do more than that for a community. Law should also make government more coherent in principle; it should seek to help to preserve what we might call the integrity of the community's government, so that the community is governed by principles and not just by rules that might be incoherent in principle. And it insists that this latter purpose is so important that it might well, in particular cases, be more important than predictability and certainty.

Now, someone who takes that view might well think, in the case of the murdering heir, that it goes so far against general principles of morality and law to allow a murderer to profit by his terrible crime that we should understand the statute of wills as forbidding that, just for that reason. Even though nothing in the statute explicitly says that a murderer may not inherit, when we read that statute against the background of the law as a whole, with the aim that law should be coherent in principle, then we are led for that reason to decide that the law, properly understood, does not allow a murderer to inherit. That is what the court actually decided.

In the Buick case, which was, as I said, a very famous decision by Judge Cardozo, the court used a similar kind of reasoning. If we want the law to be coherent in principle, it said, then we must not understand it, so far as possible, not to make decisions that are morally arbitrary. If the defect in the automobile is the fault not of the dealer who simply sold it but of the manufacturer who created the defect, then what principle of morality could justify not allowing the person who was injured recovery against the institution that actually caused the damage?

I can now, I hope, begin to answer the questions I listed earlier. What are judges who disagree about the law, even though they agree about the facts, really disagreeing about? They are disagreeing (we may now say) about the correct interpretation of the story so far, and they disagree about that because interpretation is purposive, and they disagree about the best ascription of purpose or point to the general enterprise of law.

Let us test the generality of this account by considering other occasions of constructive interpretation. We might begin with literary interpretation. There are, of course, many schools of literary interpretation; there are heated arguments, no doubt in Japan as well as in the rest of the world, among advocates of different ways of understanding poetry or plays or novels. But again, to simplify, and just for purposes of

illustration, I will contrast only a few views about the point of literature. As in the case of law, this simplification neglects many interesting subtleties, but I do it for the purpose of illustration.

The first of the few views I shall mention holds that the point of literature is moral instruction. It should aim to increase our sensitivity to genuine moral issues, to show us, in a compelling way, truths about conflicts and choices and tragedies that we see only inexactly and without the right depth apart from literature. That was the view, for example, of the very influential British critic, F. R. Leavis.

The second view is, in contrast, formalist. It holds that the point of literature is internal to aesthetics, that it consists in creating a kind of beauty or power that must be valued for its own sake, on its own terms, and not because it teaches us anything about morality (or psychology or history or anything else.) A third view is Marxist. It holds that the purpose of literature is to contribute to the historical triumph of the working class.

Now I suggest to you, though I can hardly hope to demonstrate it, that people who held one of these three views about the point or purpose of literature would be likely to interpret a complex play or poem very differently from the way in which a critic who held either of the other two views would do. On the surface it might be unclear what people who disagree (for example) about the correct analysis of the character of Shylock, in Shakespeare's play *The Merchant of Venice* are really disagreeing about. On this suggestion, the root of the disagreement might lie in sharp differences about the correct understanding of the point of valuing and interpreting art. A Marxist interpreter might be drawn to see Shylock as both oppressor and victim of Venetian capitalism. A Leavisite would be tempted to a more profound study that might emphasize, for example, the complexity of Shylock's relations with his daughter, Jessica. And a formalist might reject both views as too external, too little connected to the vocabulary, metaphor and other linguistic aspects of the play.

Now consider the most common form of interpretation: conversational interpretation. Philosophers have become puzzled about the following difficulty. It is impossible to understand what someone else is saying, what that person means, before you understand many other things about that person including, for example, what he believes and what he wants. Intentions, meanings, and beliefs are tied together in a system. How can the interpreters here today translate what I am saying into Japanese without knowing a great deal else about me? I say to you, "This is a glass of water." How do the translators know that I use the word "water" to refer to water, so that they should translate me by using the Japanese word for water? How do they know that "water" isn't just my own, perhaps cute or ironic, way of referring to vodka? They must be assuming, for example, that I think that what is in this glass (from which I have been drinking from time to time throughout the lecture) is water.

Now the puzzle is this. How can the translators decide what I think before they know what I mean by the words that I use? And how can they decide what I mean by those words until they know what I think? Philosophers led Donald Davidson, who built on the work of Williard Van Orman Quine, have proposed that we must think about beliefs, meanings and desires not one by one but as an interconnected system. We bring a variety of initial assumptions to any problem of translation, but our overall aim is to make overall sense of what the speaker is doing as well as saying. That is, we don't just translate sentence by sentence but we look to the person's entire behavior with the tentative assumption, at least, that the speaker is rational. So if I am giving a lecture and I drink from this glass, then if you assume I am rational, you might also assume that I wouldn't be drinking so much if I thought it was vodka. You are

relying on that kind of evidence, as well as a thousand other assumptions about me, in order to translate my statement, "This is a glass of water." Any particular translation, you might say, is only the tip of the iceberg, because beneath the surface are thousands of other assumptions that contribute to making sense of the speaker's behavior as a whole.

I remind you of that problem in the philosophy of language, because I want to make the following claim. There are some occasions of personal interpretation in which our aim, our ambition, is not just like that. Ordinarily we try and make the most sense we can of someone's behavior to allow us to predict and mesh our lives with that person's. But on some occasions we add other requirements. Consider for example another interpretive occasion I mentioned earlier: psychoanalysis.

According to some students of psychoanalysis, doctors interpreting what a patient dreams or the jokes he tells or the linguistic mistakes he makes are not just trying to find an interpretation that helps explain the patient's behavior in the ordinary way. On this view, the doctor has a slightly different purpose: to find an explanation which will transform the patient's behavior – not simply explain it but transform it by supplying an explanation that the patient will internalize in such a way that the patient will be helped toward a cure. That is such a special purpose, on this view, that it justifies us in saying the point or purpose of the psychoanalytic interpretation of dreams or jokes is different from the point or purpose of conversational interpretation – of listeners trying to interpret a lecture in jurisprudence, for example. If so, then a jurisprudential critic would come to different conclusions about my intentions, in telling a certain joke in this lecture, than a doctor would in interpreting the same joke if I were her patient.

I have now supplied three examples, an example drawn from the law, from literary criticism, and from the difference between psychoanalytic and conversational interpretation. These different examples are meant simply to illustrate the general thesis (and, I hope, suggest its power) that we must understand interpretation as tied to a practice and as governed by or sensitive to one's sense of the purpose, the telos, of that practice.

We may, finally, return to the beginning. You will remember that I mentioned a variety of objections to the interpretive account of jurisprudence that I summarized. The first objection was this. "You say that legal interpretation aims to make the best of the story so far, to make the best of a community's legal record. Whereas we say that interpretation means accurate reporting not rose-tinted-glasses reporting." Now, my answer is, "Interpretation is in principle purposive and, therefore, it is in principle an attempt to make the best of the object of interpretation." But that claim is easily misunderstood and that is why I included the second objection I mentioned.

The second objection (as you remember) argues that the interpretive method is a way of whitewashing, a way of making things look better than they should. Would you interpret the Holocaust in that way? But constructive interpretation aims to make the best of its object only in the special sense I described. It aims to make the best of it given the purpose or point of the general enterprise to which the occasion of interpretation arises. So consider the case of Hitler and Holocaust. That is historical interpretation. And the point of historical interpretation is rather similar to what I described as the normal point of conversational interpretation, that is, to provide a description of what happened that makes the most complete, coherent sense. We cannot entirely succeed in explaining the holocaust as the behavior of rational people. But still interpretation or historical interpretation requires us to do the best we can. And that means that we must attribute to the monsters who were in charge motives that make sense of what they did. And once we do this, then of course we are doing the best we can,

given the purpose of this kind of interpretation. But the best we can means showing them for what they were, and that is as beasts.

Law is different. Why? Because the purpose of legal practice is not the explanatory purpose of historical interpretation. Lawyers are not trying to make their account of what happened the best possible explanation of the behavior of particular people. For one thing, the law we interpret is not the doing of any particular group of people. It is the doing of a society or a civilization over a long time, even centuries. So making the best of our legal tradition means something very different from making the best historical interpretation. It means, I think, making the law as just as we can. That is what accuracy means in legal interpretation.

I have said that we aim to make the object of interpretation the best it can be. But that is just a slogan summarizing the longer account I have now given you. It means making the best of it, given what we believe to be the right view of the point of the enterprise in question. Of course, as I said, lawyers will disagree about what it means, in detail, to make the law as just as it can be. Your own view will reflect your more concrete views about the purpose of the law, and also about what justice is. So, to go back to what I said earlier, if you think the purpose of law is certainty, then you make the law best by making it most certain. If you think as I do, that the point of law is to make our governance a governance of principle, then you will think making the best of it has a more substantive character. It means making it the best from the point of view of law's integrity.

Now, almost in closing, I take up the third of the three objections. The third objection is in a way the most powerful of the three, because, I think, it will seem right to many of you. It claims that interpretation, as I have explained it, is subjective, so that once we agree that law is a matter of interpretation it makes no sense to say, as I do, there is one best answer even in hard, disputed cases like Riggs v. Palmer and the Buick case. Interpretation depends too much on how things look from the particular point of view of the single interpreter to suppose that there is one best answer to the interpretive questions posed in those cases. Now, that is a deep objection and I am not going to explore it in full detail, you will be pleased to hear, this afternoon. But I do want to make some observations I believe pertinent.

First, once we understand the full range of interpretation, the full range of activities that have that interpretive character I have been trying to describe, then we will see that there are some theaters or departments of interpretation where we do naturally assume that there are right answers. One example is conversational interpretation. Your understanding what I say in a foreign language, indeed your understanding what each of you say to the others in your own language, is a much more complex matter than is commonly thought. Such understanding draws on many kinds of normative assumptions including assumptions about rationality. Yet most of us think that we get it right almost all the time. Now, of course, that is special. There are evident reasons why conversational interpretation has that character. I mention this only because I want to deny there is anything inherent in the enterprise of interpretation that makes it distinctly subjective.

My second observation is this. If my general account of interpretation has been correct, or anything close to correct, then whether interpretation is subjective or objective depends on the character of the underlying claims about the purpose of the enterprise. If I am right that interpretation in law is sensitive to one's view about the purpose of law, and the purpose of law has something to do with justice, then legal uncertainty is simply derivative from moral or political uncertainty. If we are skeptics about law, if we want to say, "Oh, there is no right answer in any really hard case," this

must be because we are skeptics about political morality. If we think there is a right answer to questions of justice, then we will think there are right answers to questions of law, even the most complicated ones about which law professors and judges disagree.

That may seem a surprising point for me to make, because it is a very popular idea, particularly among American law students, that morality is subjective, that there is no truth or falsity about profound moral issues, that it is just a matter of opinion. I am going to say more about that question in other lectures in this series, and I will be discussing its impact on the work of the United States Supreme Court (for example, on the question of abortion) at the Tokyo Seminar at the American Center. For now, however, I want only to say this.

I have never met any student who actually believes the moral skepticism that students so commonly announce. I don't mean to say that students are hypocrites. But I do think that they often fail to understand the contradiction inherent in their position. Many of the people I have in mind say to me there is no right answer to these very difficult questions confronted by the Supreme Court, for example. I say, "Why is that?" And I explain about interpretation and how interpretation connects law and political morality. Then the students say to me, "Uh-huh, we told you so. Because now you say law depends on justice and everyone knows justice is just subjective." Then I say, "Do you have an opinion about the morality of abortion?" And every student has an opinion. Many of them say, "Abortion is murder." Most of them say, "Anti-abortion legislation is tyranny." I say, "Do you really believe those opinions?" They say, "Yes, I will march this afternoon carrying banners that proclaim them." I say, "But you say there is no right answer in matters of politics, it is just a matter of opinion." And they think and then they say, "Ah, but that is my opinion."

Well, the contradiction is evident, isn't it? It is certainly logically possible to take up a fully skeptical position about abortion, or any other matter of political or social justice. But then you have to give up your own opinion. And most people confronted with that choice will give up bad philosophy rather than intensely held convictions.

I am at the end. I won't bother you with much of a summary. I do want, however, because this is the first Kobe lecture and the Kobe lectures will be devoted to jurisprudence, to make a final reference to the subject. I have been emphasizing the contribution that philosophy – for example, the philosophical study of interpretation – can make to law. It is my view, in fact, that law is in large part philosophy. But I also hope – and this is more imperial – that these remarks might suggest the contribution jurisprudence can make to philosophy, and beyond philosophy to intellectual life in general. I said earlier that philosophers have insufficiently studied the phenomenon of interpretation. I believe interpretation is a very important subject, and that considering its character at a general level, though in much more subtlety and detail than I did, will illuminate very important issues in, for example, the study of art and literature. I also think that lawyers who work professionally with interpretation have a great deal to contribute to that general theory. Indeed, I go so far as to suggest that lawyers are better equipped than members of those other disciplines self-consciously to reflect on the nature and character of interpretation. But you will now be saying, "How like an American professor of jurisprudence to claim that his subject is at the center of the universe!"

So, I'd better stop. Thank you.

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