INTERPRETATION AND LEGAL THEORY by Andrei Marmor, Oxford, Clarendon Press, 1992, 193pp, $75, ISBN 0 19825691 4.

The interpretation of texts — statutes, case reports, contracts, wills — has always been an activity central to legal practice but interpretation has now become a popular topic of legal theory. A number of influential theorists have turned to theorising about the nature of interpretation and more particularly to a comparison of literary criticism and legal interpretation as a way of providing material for a better account of the responsibilities of the judiciary and of legal reasoning in general. Andrei Marmor's challenging and well-written book is a worthy addition to this evergrowing body of literature. What distinguishes his contribution from many others is that he is well read in contemporary philosophy — he can call upon Davidson and Dummett as well as Dworkin and Raz — and, secondly, that he writes with an attractive degree of respect both for the difficulty of the subject matter and for the intellectual abilities of his opponents.

If there are two faults with this work, one is that the separate chapters do not hang together sufficiently to amount to a book-length argument. Three chapters (3, 4 and 6) are concerned with different aspects of Ronald Dworkin's account of legal interpretation. The other four chapters offer a general discussion of interpretation (ch 2), a criticism of Michael Moore's "semantic natural law" theory (ch 5), a discussion of the possibility of "easy cases" (ch 7) and an analysis of the role of legislative intent in the interpretation of statutes (ch 8). The author (in the Introduction) presents all of this to his readers as a critical assessment of Ronald Dworkin's approach to legal theory. But the Dworkin discussion extends to only three chapters and the points made against Dworkin in these chapters are never brought together in a way which could be fairly called a critical assessment. For better or worse, Marmor's book should be treated as a collection of essays on different aspects of legal interpretation (two of which, incidentally, have appeared beforehand as journal articles - Chapters 4 and 7). What is common to the essays is an approach, "conventionalism", and a method, conceptual analysis, which Marmor associates with the legal positivism of H L A Hart and Joseph Raz (pp8, 52, 84, 124, 155, 184). And as the book is based on a doctoral thesis submitted at Oxford University it is no surprise that the author writes from this particular standpoint.

A second and more serious criticism is that while the discussion in each chapter is invariably complex, the argument at times breaks off at too early a stage to be convincing. Here, briefly, are two examples of this tendency. Chapter 4 is taken up with a discussion of Rawl's notion of reflective equilibrium and a summary of the Fish-Dworkin debate on legal interpretation. The problem which emerges is (the by now familiar) one of whether Dworkin's concepts of "fit and soundness" are sufficiently distinguishable to operate as constraints upon any particular legal interpretation. Dworkin's position of course is that they are, for the interpreter's beliefs will prove to be sufficiently complex and structured to allow for something like the process of reflective equilibrium. Marmor's answer to this — one paragraph on the last page of the chapter — is that there can be no complexity of beliefs in the terms of

Dworkin's theory for both fit and soundness come down to the same evaluative judgment, namely, coherence. But surely more work must be done to show just why in Dworkin's account of these matters the substantive values of justice, fairness and due process are all ultimately reducible to the one basic value of coherence.

Alternatively consider Chapter 7 which sets out to defend Hart's familiar distinction between the core and the penumbra of concept words against the challenge of Lon Fuller and more recently Michael Moore. After much to-ing and fro-ing and the invoking of Wittgenstein and Dummett, Marmor establishes that, at least on some occasions, a concept word will have standard examples which can be understood and applied without interpretation. The application of such words is not mechanical for there is always a gap between a word (or a rule) and its application. This is a gap however which, according to Marmor, cannot be bridged by interpretation. For interpretation is the activity of substituting one expression for another and the meaning of these concept words is determined through an understanding of their use and not by further interpretation. Now if interpretation is to be defined in this rather limited way then so be it. But it is a little too swift to conclude the discussion by asserting the separateness of understanding, application and interpretation, when it is a theme of modern hermeneutics that these three notions are inseparable.

The most rewarding chapters of the book are Chapters 3 and 6. Chapter 3 offers a rich discussion of Dworkin's claim that all interpretation is a matter of presenting the object in the best light. Marmor raises three counter examples. Firstly, a literary critic may present a play, say, in a different light but make no claim that this is the best light. Secondly, there can be no best light because not all interpretations are commensurable. Thirdly, the legal theorist has a different perspective from the legal practitioner so that best light will mean different things in each case. Now whether these are telling criticisms or not depends upon what it is that Dworkin is claiming for his account of constructive interpretation. If, as I understand it, the claim is only that any new interpretation tries to make the work better in the sense of enhancing our understanding or our appreciation of it then the hypothesis is rather empty, but it would seem to contain within it the variety of readings suggested by Marmor. Best or most favourable light is always for Dworkin a matter of achieving coherence from the interpreter's standpoint (coherence with the interpreter's commitments, ideals, etc). And it must be remembered that it is to Dworkin's advantage that he is primarily describing an interpretive practice, law, where (unlike literary criticism) there is a projected and institutionally-imposed consensus within the interpretive community concerning the aim of interpretation. In these circumstances the claim that the interpreter presents the law in the best light becomes more than a formal claim.

Chapter 6 canvasses a central claim of Dworkin's account: that a legal system comprises not only source-based law but also those norms which can be shown to be consistent in principle with the bulk of source-based law (p103). It follows from this claim, according to Marmor, that Dworkin is committed to the view that a norm can be a legal norm even though it has never been created as such. Marmor — relying on Raz's analysis of authority — attempts to show that this is an untenable position for it is an element of how we understand law that we treat its directives as someone's view of how subjects should behave. In other words we identify the law by way of the (presumed) intention that someone, the legal authority, intended to make this the law. This

criterion fits the standard sources of the law according to Raz ("Authority, Law and Morality" 1985 68 *Monist* 295 at 305f) and Marmor (p115). As Raz puts it:

> Legislation ... expresses the legislator's judgment of what the subjects are to do in the situations to which the legislation applies ... (A) judicial decision expresses a judgment on the legal behaviour of the litigants ... Similarly with custom. It is not normally generated by people intending to make law. But it can hardly avoid reflecting the judgment of the bulk of the population on how people in the relevant circumstances should act.

Case law and custom are, of course, the product of human activity but it would seem a little strained to say that we identify the law from these sources as directives issued by someone. And it is because the law from these sources is so depersonalised that we do not use the canon of author's intention, as we do with statutes, to help determine the meaning of these types of law. Further, any source-based account of law has to acknowledge that the sources can only be understood when they are placed within a context — of other texts, of our political/legal tradition, of our historical situation, etc which cannot be precisely delimited. This inevitably brings into the interpretive process considerations which are not the creation of any particular authority.

Now is all of this so different from Dworkin's account of the objects of legal interpretation? For whether this is approached by way of his discussion of the "preinterpretive stage" of the process of interpretation, or via his frequent references to the "scheme of principles" which underlines or justifies the existing law, Dworkin is still claiming to be giving an interpretation of our existing legal practices. His legal interpreter must start with the same standard sources as the positivist interpreter. No doubt there are differences between Dworkin and his positivist critics as to how interpretation should be carried out but these differences do not appear to extend to the initial question, the preinterpretive question, as to what in principle are the primary materials of legal interpretation.

I have focussed in this review on some aspects of the work with which I disagree with but this is intended as a compliment to a thoughtful and thought-provoking book. The great strength of the book, apart from the subtlety of Marmor's comments, is the way in which it presents complex philosophical argument in a clear and followable way. I recommend to those interested the author's exposition of semantics and pragmatics (ch 2), Dworkin's theory of interpretation (ch 3), the Hart-Fuller debate (ch 7) and the role of intention in the interpretation of legislation (ch 8).

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