Canadian Journal of Law & Jurisprudence XXIX No.2 August 2016, 431-456
© *Canadian Journal of Law & Jurisprudence* 2016 doi: 10.1017/cjlj.2016.19

Action in Law's Empire:
Judging in the Deliberative Mode

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1. Introduction

Dworkin advances the view that judges decide legal cases according to the methodology of constructive interpretation and, hence, in their answer to a legal question judges focus on providing the best possible interpretation of the law in light of the two criteria of fitness with past legal materials and moral soundness. The aim of this constructive interpretative exercise is to justify the coercion of the State. This is key to understanding Dworkin's criticism of the rule-based account of legal decision-making processes by judges. A trivial implication of this view is that officials and citizens comply with the law because of the justification advanced by judges in their exercise of constructive interpretation. Consequently, neither officials nor citizens comply with the law because they have been coerced or because they have been simply told to do so. It must be questioned, however, whether constructive interpretation really can provide any guidance since officials and citizens have been asked to *accept* the interpretation of the law put forward by the judges and, arguably, this interpretation is the best possible interpretation of what the law is in a particular case. Moreover, why should officials and citizens accept the indicated interpretation? Do officials/citizens simply *accept* the justification provided by judges or do they, rather, simply believe that the indicated interpretation is the sound and desirable interpretation of legal practice, and this belief causes the appropriate action? Is this a plausible conception to explain our compliance with legal decisions?

A possible response to this set of interrelated questions is to say that citizens and officials, like judges, also engage in constructive interpretation and, therefore, their best possible interpretation of what the law is coincides with the interpretation provided by the judges. I will show that this is an implausible account of compliance with the law and will further show that even were this account accurate, legal decisions in this scenario could guide neither the citizen nor the official. I will argue that the mistake of the theory of constructive interpretation lies in a misleading and implausible conception of action and intention that construes action as the result of bodily movements that are instantiated in a practice and upon which a meaning is *imposed*. I will -in addition- defend a more plausible conception of action along the classical tradition that understands practice as originating in agency and deliberation. The outcome is that constructive interpretation and its conception of 'imposing meaning, value or purpose' on practice is a theoretical perspective that neglects and misunderstands action and practical reason.

I am most grateful to an anonymous referee of this journal and Richard Bronaugh for their helpful suggestions. Thank you also to Chris Essert, Michael S Greene, Raf Geenens, Sari Kisilevsky, Alan Norrie, Danny Priel and John Snape for their insightful comments on an earlier draft.

https://doi.org/10.1017/cjlj.2016.19 Published online by Cambridge University Press

The study shows that judges engage with the activity of deciding *what* is of value and *why* we should value it in order to produce legal decisions. They do not 'impose' value on the social practice. On the other hand, legal participants, including citizens, engage with the structure of practical reasoning of the judges, i.e., the values and purposes that the judges intend to promote.

The paper is divided into two sections. In §2 I will show the shortcomings of Dworkin's theory of constructive interpretation. I argue that constructive interpretation relies on a mistaken conception of both *what an intention is* and *how we understand intentional action*. In §3 I will defend a conception of intentional action that provides a plausible solution to the problem of 'justification' and 'compliance' in law.

2. Dworkin's Theory of Constructive Interpretation: The 'Compliance' question

Dworkin has argued that a key feature of law is that it justifies the coercion of the State.[1] Judges offer the grounding principles that underlie the law in order to justify the imposition of specific ways of acting upon officials and citizens. Thus, the law demands that we act in *this* way rather than *that* and provides principled justifications *for us* to follow the law. Let us take, for example, the view that a victim who suffers psychiatric injury should receive compensation.[2] The substantive principle that grounds this view is that individuals can be held responsible for the foreseeable psychiatric harm suffered by another.[3] Dworkin puts forward the view that these principles are not discovered[4] but rather they are 'constructed' through an interpretive exercise. The latter being inevitable because judges and practitioners genuinely disagree on what the best possible solution is to a particular legal case. Thus, the disagreement is neither about the facts of the case;[5] nor about the underlying moral principles of the law that can be discovered;[6] nor about applicable rules since, according to Dworkin, there are no applicable rules. Genuine theoretical disagreements[7] are due to the fact that the answer to the question, "*What is the law in this case?*" presupposes an answer to a more abstract and theoretical question that concerns what the law is.[8] Consequently, when judges have been asked to decide about a particular case they cannot but help ask themselves the theoretical and abstract question "What is law?", and they need to advance their own conception of law to answer both the abstract question and the particular

1. Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1987) at 94, 96, 109, 110.
2. See the example of the English case *McLoughlin v O'Brian*, [1983] 1 AC 410, discussed by Dworkin, *ibid* at 240-50.
3. See Dworkin, *supra* note 1 at 240-50.
4. See his criticism of metaphysical views in Ronald Dworkin, "Objectivity and Truth: You'd Better Believe It" (1996) 25:2 Philosophy and Public Affairs 87.
5. Dworkin, *supra* note 1 at 6-11.
6. *Ibid* at 35.
7. See my article, "Genuine Disagreements: A Realist Reinterpretation of Dworkin" (2001) 21:4 Oxford J Leg Stud 649, for a metaphysical criticism of Dworkin's idea of genuine disagreements.
8. See Dworkin, *supra* note 1 at 31-43, 87-90.

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question of the case. The former, in particular, gives rise to numerous, genuine theoretical disagreements. Many practitioners and judges, for instance, argue in favor of law as a set of conventions;[9] others argue that law is about pragmatic decisions;[10] while yet others consider that law should be conceived according to the guiding principle of integrity.[11] According to Dworkin, the only way to solve genuine theoretical disagreements concerning what law is is to resort to constructive interpretation. This requires an interpretation in terms of two criteria, fitness with previous practice and moral soundness.

Dworkin argues that viewing law as sitting within a nested set of principles (law as integrity) provides the best possible interpretation of the abstract question of what law is. Law is, hence, a practice that searches for a point, purpose or meaning. Its core purpose or meaning is to provide justification for the coercion of the State and the best way to achieve this is when judges are guided by integrity.[12] Once judges understand that the model of integrity provides the best possible answer to the question of what law is, then they need to engage in answering the question of what the law is in a particular case, and again the model of integrity provides the best interpretive solution. The judge will, naturally, review past legal materials and needs to read this past legal material in the best moral light and guided by integrity.[13] In the previous example of psychiatric injury the judge demands that the defendant pays compensation for the psychiatric injury. It might be that previous legal cases only provided compensation for physical injury and not psychiatric injury. The judge needs to pose the question as to what the law is in this particular case. The judge would argue that to compensate only for physical injuries, excluding psychiatric injuries, is not morally appealing. On the other hand, to compensate for psychiatric injury regardless of the foreseeability of the harm does not fit well with past legal materials. The best possible answer in terms of the two criteria of constructive interpretation is that the victim should be compensated for psychiatric injury and only for foreseeable harm. This decision is the best possible interpretation of what the law is in the particular case since it fits the bulk of the legal material and is morally appealing. In this way, the key purpose or point of the law has been satisfied. In this particular case, the judge's decision, which has become law, *justifies the coercion* of the defendant and other legal participants. The judge exercises this coercion by demanding that the defendant pays compensation to the victim who has suffered psychiatric injury and the scope of the harm is limited by its foreseeability. The coercion is not *de facto* coercion. It is not an illegitimate force that is exercised over the defendant, but is rather a *legitimate* power or force.

The question that arises concerns *the role of this justification* and *how this justification is part of the practical reason* of the defendant and other legal participants in this particular case. Arguably, justification plays two key roles. First,

9. *Ibid* at 114-50.
10. *Ibid* at 151-75.
11. *Ibid* at 176-224.
12. *Ibid* at 109-10.
13. *Ibid* at 224-75.

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it enables compliance by the defendant. Thus, in our example, the defendant proceeds to make payment to the victim for the sum that was decided by the Court. Second, like any justification, it invites the engagement of our rational capacities and therefore it guarantees the exercise of our freedom within the legal domain. Therefore, we act *because* of justifications, *because* we think that this is a justified or legitimate request from the judge. But then the puzzle that arises is how the defendant and other legal participants are able to grasp the decision *as justified*. One possible answer would be that this happens because the defendant and other legal participants also engage in a similar interpretive exercise to the judge. Thus, the defendant constructs the best possible answer to the question of what law is and on that basis provides the best possible answer to the question of whether there ought to be compensation to the victim for the psychiatric injury that the defendant has caused. The defendant might agree with the judge on the answer to the question of what law is and thus she might consider that the model of law as integrity best fits previous practice and is the most morally appealing. However, this does not guarantee that the judge and the defendant will reach the *same* interpretation in terms of what the law is in this particular case. In other words, there is no guarantee that the defendant will reach the same *justification* as the judge, or at least that the capacity to reach the same justification by most of the legal participants can be ensured and *explained* by the model of constructive interpretation. Thus, the defendant might disagree with the judge in terms of whether compensation for psychiatric injury is morally appealing. The defendant might argue that it is not morally appealing because we cannot be responsible for what is not under one's control.

Take, for instance, the following case of psychiatric injury. A mother arrives at a hospital a short time after a car accident in which her children and husband were injured but as a result of seeing her children injured, the mother suffers psychiatric injury. The defendant could argue that it is not morally substantively sound to attribute responsibility for consequences that are not under the control of the agent. Therefore, the best possible interpretation of the case that fits the legal material and is morally appealing is not to compensate for psychiatric injury, but only for physical injury. I am not saying that this is the correct view, rather I am merely posing this as a *possible and different* constructive interpretative conception of what the law is in the particular case that fits the bulk of the legal material and is morally appealing. Constructive interpretation does not guarantee an objective answer to the question of the justification of law. You might, however, object that this is not important since there are justified decisions that are imposed on us regardless of our recognition of them as justified decisions. Thus, it is considered justified that parents demand certain behavior from their teenage children, who might not recognize the justifying reasons of parental demands. It is also justified that morality demands a certain moral conduct from us; however, we might be incapable of recognizing the force and justified moral principles that ground the conduct. However, my argument is not that empirically we might fail to recognize the justification provided by the judges. My argument is that constructive interpretation cannot guarantee that the defendant will reach the same

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justification and this seems odd since the justification that results from constructive interpretation is addressed to the defendants and *their capacities*.

But why should all legal participants be able to engage in constructive interpretation and reach the same or similar interpretation as the judge? The answer is as follows. If the purpose of legal adjudication, following Dworkin, is to justify the coercive nature of law or the force of law upon addressees of the law, then one would think that this justification needs to be intelligible and accessible to the addressee of the legal decision. If it is not, in the eyes of the addressee of the law, the coercion is not justified. If the law is merely quibbles, words, speeches, brute force, or raw material without argumentative justification, then the addressee cannot comply with the law and see it as justified. According to Dworkin's constructive interpretation, intelligibility and accessibility cannot be reached unless one engages in constructive interpretation, i.e., interpreting past legal material in light of the best moral principle. Consequently, the defendant needs to be able to reach the same or similar interpretation of past legal materials in light of the best moral principles as the judges have done. If the defendant reaches a different interpretation and sees the decision as having a different meaning or value, or perhaps no meaning or value at all, then the coercion of the State might not be justified in the eyes of the defendant.

In the case of moral demands we might fail empirically to live up to the high demands of morality, but arguably and moral scepticism apart, we have the rational capacity to live up to that standard and to understand its justified requests. All moral philosophies presuppose that we are able to either discover or construct the principles of moral conduct. However, there is no similar process or presupposition in constructive interpretation. Constructive interpretation is not able to show that we all will achieve the *same* justification, or at least that we have the *capacity* to reach the same justification. The PUZZLE can be formulated as follows:

> PUZZLE: The aim of constructive interpretation is to provide a justification that can ground the legal decisions of judges and that therefore justifies the coercion of the State. Constructive interpretation involves the idea that judges provide their own best possible interpretation of what the law is in a particular case according to fitness with past legal materials and moral soundness. The justification *is addressed to* the defendants and other legal participants but the process cannot ensure that judges, defendants and other legal participants will reach the *same* justification. Therefore, constructive interpretation can neither guide our conduct nor be the correct process for the justification of the coercion of the State.

Correct diagnosis of the PUZZLE directs us to the need to examine the nature of constructive interpretation. If constructive interpretation is merely a theoretical exercise, then it is an interpretative exercise that should be guided by truth and the way the world is. Thus, if we are trying to determine whether we *believe* that compensation for foreseeable psychiatric injury is justified because it is based on an objectively legal or moral principle, then we are trying to track whether the proposition is true and whether we have good reasons to believe in it. By contrast, if the judge intends that compensation for foreseeable psychiatric injury is justified because it is, according to integrity, morally appealing, then we are

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trying to produce something in the world i.e., actions that are morally just. These two enterprises have different directions of fit and they are not unrelated, but they belong to two different domains of how we and our cognitive capacities and agency relate to the world.

In the former case, when we are trying to track how the world is, we are exercising our theoretical reasoning. In the latter case, when we are producing things or states of affairs in the world through our intentional action, we are exercising our practical reasoning.

What is then the nature of constructive interpretation? Is it an exercise in either theoretical or practical reasoning? In the next section I will argue that constructive interpretation is mainly conceived as a theoretical exercise, that is to say as a theoretical-creative exercise. By contrast to a mere theoretical exercise it does not track truth in the world, but rather it imposes 'meaning' or 'purpose' on social practice, on the actions of the participants, or on the work of art. For Dworkin, constructive interpretation as a theoretical-creative exercise is required for both the interpretation of works of art and the interpretation of social practices. Therefore, constructive interpretation cannot succeed in providing a *practical* process through which all participants of a practice or all interpreters of a work of art are able to reach the *same* justification.

2.1 Constructive interpretation as theoretical-creative reasoning: the limits of the theoretical mode?

Constructive interpretation invites us to begin by observing the relevant practice and search for the meaning of the practice. In this way, as interpreters we ask ourselves what is the point or purpose of the practice.[14] We 'impose' our values, meanings or purposes onto the practice[15] and we reflect on whether our imposed values, meanings or purposes satisfy the two criteria of fitness with existing practice and moral soundness. For example, to provide an answer to the theoretical

14. Dworkin's constructive interpretation focuses on the legal participant's point of view to understand legal actions, such as court decisions, and since law is a social practice that is constituted by actions, then an understanding of actions in legal or institutional settings will enable us to understand law as a social practice. However, understanding legal practices is different from understanding natural phenomena. The difficulty in the former lies in the different kinds of explanation. When I act in my capacity as a scientist and try to provide a theory about a natural phenomenon, e.g., human cells, I observe, carry out an experiment and make predictions about the nature of the phenomenon. By contrast, if I aim to understand legal practices and the activities of judges, I need to look at the meaning or point of law. We cannot view judges' activities from the outside as a spectator or *as a representation*, i.e., as mere observers of their actions since we will not understand 'what' they are doing and 'why' they are doing what they are doing. Mere observation does not provide a complete and satisfactory story of what is happening. The methodological question will be whether understanding of the meaning or point of the legal practice is reached by imposition of meaning or value, i.e., Dworkin's constructive interpretation, or by understanding how judges' practical reasoning engages with values and activities. The latter is the proposal that I defend in this paper. I argue that to merely 'impose' meaning or values on legal actions and practices is to engage in a theoretical enterprise and entails to lose sight of judges' practical reason which is the active principle of action; we lose sight of the intelligibility of the action which is given from the first-person perspective, i.e., the point of view of practical reason.

15. See Dworkin, *supra* note 1 at 47.

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and abstract question of what law is, we observe what judges are doing. We observe that their practice has a meaning or purpose and from this we interpret that judges provide principles according to the requirements of integrity. These principles ground their decisions and justify the coercion of the State. We then reflect on whether this interpretation of what the law is in the particular case fits legal practice and is morally appealing.

Let us take the previous example of a case where the victim has suffered psychiatric injury. In previous decisions the Courts have not awarded compensation for psychiatric injury and in this case the judge relies on his answer to the abstract and theoretical question and proceeds as he believes the model of integrity requires. The judge observes the practice and interprets, for example, that the purpose of compensation for injury in Tort Law is to correct the wrong committed by the act of the defendant. In the particular case to be judged, the judge advances the view that psychiatric injury should also be compensated as this fulfills the purpose of Tort Law.[16] However, he cannot depart too much from existing legal material and needs to argue that the scope of the damage needs to be within what is foreseeable. Another legal participant might argue that previous legal cases support the interpretation that the scope of harm is determined by the direct consequences regardless of foreseeability of harm and might, moreover, argue that this interpretation is more morally appealing. Furthermore, a third legal participant might argue that there should be no compensation for psychiatric harm as this fits the bulk of past legal material and is also more morally appealing, i.e., one cannot be responsible for what one does not have any control over and one cannot have control over negligent actions whose results are too remote. The participants will thus disagree over which of the three interpretations best fit the two criteria of constructive interpretation. It seems that in any legal case the number of interpretations can be multiple and that constructive interpretation cannot offer a solution that brings them all together.

Within Dworkin's constructive interpretative model, the task of the judge and legal participants is presented as a theoretical-creative task. Legal participants need to determine the value, meaning or purpose of the legal practice by 'imposing' value, meaning or purpose upon the legal actions, practice and decisions. If this is a theoretical task, what are the judges and legal participants tracking? Arguably, they are tracking the 'intentions' construed as mental states of the legal participants and judges. But Dworkin explicitly rejects the mental-state model of intentional action and creative intentions.[17]

Constructive interpretation demands that we give value, purpose or meaning to the social practice. The premise of constructive interpretation is that the practice, from the point of view of the interpreter, is merely raw behavioral data,[18] i.e., the bodily movements of human beings. He argues that the raw data is underdetermined and that we need constructive interpretation to 'give meaning' and show the practice in its best light. He puts this as follows:

16. See Dworkin's discussion of the legal case *McLoughlin*, *supra* note 2.
17. Dworkin, *supra* note 1 at 51, 52, 53-55.
18. *Ibid* at 52.

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> The raw behavioral data of the practice—what people do in what circumstances-will underdetermine the ascription of value: those data will be consistent, that is, with different and competing ascriptions… If the raw data do not discriminate between these competing interpretations, each interpreter's choice must reflect his view of which interpretation proposes the most values for the practice—which one shows it in the better light, all things considered.[19]

I will argue that this a mistaken conception of both *what* intentional action is and *how we understand* intentional action and the resulting social practices. Why does Dworkin assert that the primary material on the basis of which constructive interpretation operates is merely raw behavioral data? We might infer that according to Dworkin the structure of intentional action and practical reason is inscrutable by the interpreter or the observer of the action and that therefore the interpreter of the action and social practice needs to engage in a *creative process of reconstructing intentional action* and social practice. The interpreter is therefore condemned to understand the social practice theoretically, albeit creatively. Dworkin tells us that since social practices and works of art are not the result of *causes*,[20] but are created on the basis of values, purposes or meaningful intentions, the interpreter needs to engage in a theoretical-creative exercise that involves 'imposing' values, meanings or purposes on the practice.[21] Dworkin, correctly in my view, rejects the idea of intention as a mental state;[22] however, he proposes an alternative that is equally theoretical and consequently misunderstands intentional action and its connection to practical reason.

Arguably, one might object that Dworkin resorts to the special skills and integrity of the judges. Herculean judges, Dworkin might argue, are able to find the best possible interpretation of what the law is due to their integrity and understanding of past legal materials. The raw material becomes intelligible for the judges because they are able to reconstruct it in its best light by imposing meaning or value. If everyone is able to find the same or similar justification as the judge does, then, arguably, the role of the judge is redundant. Furthermore, the addressee of the law does not need to have full understanding of the justification. It is sufficient for there to be a general obligation to obey the law[23] that emerges from the constructive interpretation of the judge. This objection is interesting, however, as I will show in the following section, where I explain that general or particular obligations cannot arise if there is no engagement with the addressees of the law, the role of the judge is to make salient the justification in terms of the values that the legal practice has. But there needs to be intelligibility and understanding of the justification by the addressees of the law for it to be part of their practical reasoning. It would be paradoxical to think that we can have justifications that are unintelligible, inscrutable or obscure *qua justifications*, and only

19. *Ibid* at 52.
20. *Ibid* at 51.
21. See Finnis on his review of Dworkin, John Finnis, "On Reason and Authority in Law's Empire" (1987) 6:3 Law & Phil 357, where he insists that we should resist the temptation to think that Dworkin is defending practical reason.
22. For a criticism of intentional action as a mental state see my monograph, *Law and Authority Under the Guise of the Good* (Oxford: Hart, 2014).
23. See Dworkin, *supra* note 1 at 191.

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accessible to Herculean judges with appropriate skills and integrity.

I now turn to defend a conception of intentional action and practical reason that can shed light on our understanding of legal practices and their justification.

3. Understanding intentional action and social practice

3.1 The key features of intentional action

We take intentional action as the paradigm of action and we aim to show that we cannot understand how the addressees of legal decisions are able to engage with the legal decisions of judges unless we understand how the addressee's will and practical reasoning capacities can be engaged with the justification of the legal decision provided by the judges. The latter cannot be grasped without understanding in the first place what intentional action is and how the will operates in relation to action.

The first question that requires our attention is whether there is a distinction between an intention to act, where my will is active and involved in the action, and a voluntary action. Let me clarify. Actions can be voluntary or involuntary. Examples that illustrate the latter are the movements of my stomach, the respiratory functions of my lungs and so on. Walking, talking, lifting my arms, etc., all exemplify the former. But is it the case that for all voluntary actions the will is involved? Let us imagine two different cases. In the first, I move my arm but my foot moves instead. In the second, I move my arm and my arm moves. In both cases my actions are voluntary. However, in the first case my action is not intentional as my will, i.e., the moving of my arm, is not satisfied. Let us now suppose that you are observing what am I doing, i.e., you are observing my foot moving and then my arm moving. How do you know whether my will is satisfied in one case and not in the other? We can assert that a volitional act is one initiated by a person whereas a willful act is a volitional act performed with an intention. But can we know this distinction by merely observing from the third-person perspective what a person is doing? The only thing you can observe is that I move my foot and arm, but you cannot observe, so to speak, my will; you cannot observe that I have moved my arms intentionally. The only way to identify whether or not the will is involved in the action is to understand the action as described by the agent.

This is one of the few commonalities between Donald Davidson's account[24] and the model of intentional action advanced by Anscombe. Davidson relies on some of Anscombe's ideas, but her argument does not rely on a general theory or system. For this reason, it was assumed about intentional action that Anscombe and Davidson were saying the same thing.[25] Davidson explains intentional

24. Donald Davidson, "Actions, Reasons and Causes" (1963) 60:23 Journal of Phil 685.

25. See Julia Annas, "Davidson and Anscombe on the 'same action'" (1976) 85:338 Mind 251. On related aspects of Anscombe's work such as 'practical knowledge' see Kevin Falvey, "Knowledge in Intention" (2000) 99:1 Philosophical Studies 21; Kieran Setiya, 'Knowledge of Intention" in A Ford, J Hornsby & F Stoutland, eds, *Essays on Anscombe's Intention* (Cambridge: Harvard University Press, 2010); Kieran Setiya, "Practical Knowledge Revisited" (2009) 120:1 Ethics 128; Grunbaum, "Anscombe and practical knowledge of what is happening"(2009) 78:1 Grazer Philosophische Studien 41.

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actions in terms of the reasons that the agent provides when explaining what he did. The aim is to rationalise the action. The agent has a reason whenever he can be characterised as a) having a pro-attitude toward the action and (b) believing (or knowing, perceiving, noticing, remembering) that his action is of that kind.[26] The belief/desire pairing is called a primary reason and Davidson asserts that 'a primary reason for an action is its cause'.[27]

Davidson argues that beliefs and desires can cause action because they are mental events.[28] Thus the action 'my flipping the switch is caused by my desire to flip the switch and my belief that this action is of that kind'. We can observe the result of the action, i.e., the flipping of the switch. However, Davidson denies that there are psychophysical laws that connect actions and reasons, he says that if there are laws they ought to be neurological, chemical or physical.[29]

Davidson's view on intentional action has been extremely influential in the last fifty years. The tendency has been to assimilate practical reasoning into intentional action as a mental state.[30] This assimilation has two main important advantages over other competing views such as Anscombe's model. First, it has enabled neo-Humeans[31] to explain in a more sophisticated form the Humean view that our pro-attitudes or desires are the key motives for, and explanation of, our intentional actions. Second, it is compatible with a scientific explanation of action as caused by our mental states. However, the major flaw of this view is that it cannot ensure that the causal connection between a reason and the action is of the right sort.[32] Davidson's legacy is palpable in a number of contemporary explanations of what an intention is. For example, Bratman[33] follows Davidson

26. See Davidson, *supra* note 24 at 685.
27. *Ibid* at 685.
28. *Ibid*.
29. *Ibid*.
30. For example, Jay Wallace in the entry 'Practical Reason' of the *Stanford Encyclopaedia of Philosophy* points out: "Practical reasoning gives rise not to bodily movements per se, but to intentional actions, and these are intelligible as such only to the extent they reflect our mental states. It would thus be more accurate to characterise the issue of both theoretical and practical reason as attitudes; the difference is that theoretical reasoning leads to modifications of our beliefs, whereas practical reasoning leads to modifications of our intentions."
31. See G Harman, *Change in View* (Cambridge: MIT Press, 1986); G Harman, 'Willing and Intending' in Richard Grandy & Richard Warner, eds, *Philosophical Grounds of Rationality* (New York: Oxford University Press, 1986) 363-80; S Blackburn, *Ruling Passions* (Oxford: Clarendon Press, 1998); M Smith, *The Moral Problem* (Oxford: Blackwell, 1994).
32. Some scholars denied that intentional actions are causes (J Dancy, *Practical Reality* (Oxford: Oxford University Press, 2000)). Others attempt to develop a notion of causation closer to the Aristotelian notion of causation as opposed to the empiricist or Russellian view. The Aristotelian notion of causation relies on the idea of a process whose actuality is required to produce what should be achieved for the agent's intended ends to be achieved (R Stout, *Action* (Bucks.: Acumen, 2005) at 88-98). The underlying idea is the Aristotelian and Thomist view that one knows the nature of things by its capacities, and its capacities by its activities. See §3.2 of this paper for a more detailed explanation of the Aristotelian idea of causation in the context of intentional action.
33. M Bratman, *Intentions, Plans and Practical Reasons* (Cambridge: Harvard University Press, 1987) at 4-5. However, for Bratman intentions are mental states (at 119). Bratman criticises Davidson (see his article "Davidson's theory of intention", reprinted in *Faces of Intention* (Cambridge: Cambridge University Press, 1999) at 209-24), but still continues to think that intentions are mental states. However, Bratman separates the idea of 'intention' from the notion of 'desire'.

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but he develops a richer psychological picture of desires and beliefs and consequently, for Bratman, intentions seem to commit the agent in a way that desires cannot commit him or her.[34] Intention then is a very elusive concept and we need to avoid the temptation of thinking of intention to act as a mere 'state'. Velleman[35] criticises Davidson's view and aims to show the limitations of this theory. However, he endorses the desire/belief pair and modifies it in terms of a reflective justification in which the agent is involved. Thus, being reflective is being disposed to do what is justified in terms of what makes sense to oneself.

There are other problems that affect the standard model of intentional action. An intention to act involves the view that something will be carried out and that I can control my action and make adjustments to my behavior, that there are successive steps towards an action and that it has a beginning, a middle and an end. However, if an intention to act is a mental state, it entails that I can remember my mental state, I can reflect on it, but it seems that the memory or reflection on my intention as a mental state vanishes. Wittgenstein points out:

> "For a moment I meant to." That is I had a particular feeling, an inner experience; and I remember it. -And now remember quite precisely! Then the 'inner experience' of intending seems to vanish again. Instead one remembers thoughts, feelings, movements, and also connections with earlier situations. It is as if one had altered the adjustment of a microscope. One did not see before what is now in focus.[36]

If intentions are purely mental states, they can vanish, we might not remember them correctly, they might not endure, and then our intentional action might also vanish. Imagine a man who sits down to write a lecture which has to be delivered in three days' time. He needs to work continuously in a focused manner. He opens his books, makes notes, and then gets distracted by the thought of a great meal he had the night before; now his intention stops as he is in another mental state. To continue in his intentional action, he needs to re-remember his intention; he needs to remember that he has three days to prepare a lecture and that he intends to do so. His memory comes back, but in the following three days he sleeps, has lunch and talks on the phone among other things. Does he need constantly to remind himself about his intention? Does he have to explore his inner sense and mental

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34. It seems that this commitment is the result of a conception of personhood. For a critique of Bratman, see R Moran & M Stone, "Anscombe on Expression of Intention" in C Sandis, ed, *New Essays in the Explanation of Action* (London: Palgrave McMillan, 2010) at 132-68. See S Shapiro, *Legality* (Cambridge.: Harvard University Press, 2010) for the application of Bratman's conception of intentional action to the understanding of law. See my article "From Shared Agency to the Normativity of Law: Shapiro's and Coleman's Defence of Hart's Practice Theory of Law Reconsidered" (2009) 28:1 Law & Phil 59. For a criticism of Bratman's notion of intention and its relationship to coordination see T Pink, "Purpose Intending" (1991) 100:3 Mind 343.

35. JD Velleman, *Practical Reflection* (Princeton: Princeton University Press, 1989) and *The Possibility of Practical Reason* (Oxford: Oxford University Press, 2000). In spite of his more sophisticated account, Velleman advocates the standard model in which the agent's desires and beliefs jointly cause an intention to act, which, in turn, causes the corresponding movements of the agent's body. JD Velleman, "What Happens When Someone Acts" reprinted in *The Possibility of Practical Reason* (Oxford: Oxford University Press, 2000) 123-43. For Velleman, the intention tends to cause an outcome by representing itself as tending to cause it.

36. Ludwig Wittgenstein, *Philosophical Investigations*, translated by E Anscombe (Oxford: Blackwell, 1953) at para 645.

https://doi.org/10.1017/cjlj.2016.19 Published online by Cambridge University Press

states to check for his intention? An intention can be carried out on any day and at any time but a mental state might be forgotten or vanish altogether.[37]

As already mentioned, the only way to identify the will and whether it is involved in the action is to understand the action in terms of the description provided by the agent himself. We elicit such a description when we ask 'why'[38] such and such an action is performed. This way of eliciting the description of the action is called the why-question methodology and is Anscombe's central device in *Intentions* for elucidating the connections between the different parts of an action and (our) practical reasoning.[39] There are a number of considerations that need to be taken into account to fully grasp this methodology:

a) An intentional action is, paradigmatically, a successive series of actions directed towards the final end of the action.

b) We know that the explanation finishes because the last step is described in terms of good-making characteristics that make intelligible and illuminate as a coherent whole the successive steps of the action.

c) We do not have different actions but only one action unified by the final intention as a reason for action formulated in terms of good-making characteristics.

d) It is a reason which might be given to others in a genuine way within a framework of justification, but it is also the reason that the agent gives to oneself.

Taking these considerations into account, let us now explain the why-question methodology.

Anscombe begins *Intention* by stating that the subject of the book should be studied under three headings: expression of an intention, intentional action, and intention in acting[40] and that all these should be understood as interdependent.

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37. For a discussion on this point see R Sheer, "The 'mental state' theory of intentions" (2004) 79:307 Philosophy 121.

38. Moran and Stone explain the why-question methodology as follows: "Hence all psychic forms are performance modifiers: insofar as they are employable in action-explaining answers to the question 'why?', they express forms of being on-the-way-to-but not-yet having Φ-ed, of already stretching oneself toward this end". See R Moran & M Stone, *supra* note 34 at 148.

39. Anscombe's exposition follows very closely Aquinas's explanation of intentional action. A Kenny, *Aristotle's Theory of the Will* (New Haven: Yale University Press, 1979) points out that Aquinas' model should be understood more as a Gestalt psychology. Recent work on Anscombe emphasises the point that acting intentionally should be interpreted as a series of successive steps towards an action. See R Moran & M Stone, *supra* note 34, and Michael Thompson, *Life and Action* (Cambridge: Harvard University Press, 2008) at 85-119.

40. R Moran & M Stone, *supra* note 34 at 137, explain the transformation of these three headings in the post-Intention literature. Most of the authors ignore the heading 'expression of an intention' and conflate the other two subheadings: intentional action and the intention with which the action was committed. Consequently, intention becomes a mental state. "Given the possibility of 'pure' intending, it becomes hard to see how this category could fail to designate a mental state, attitude or disposition of some kind. So the divisions of 'intentions' now take shape around the philosophical polestar of the division between mind and world: two notions of intentions find purchase only where there is behavior causing things to happen; a third refers to a mental state, attitude or disposition which, though in some way is present in such behavior, is also abstractable from it and capable of existing on its own."

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Thus, an expression of an intention cannot be understood as a prediction about my future acts or as an introspective explanation of an intention such as desires, wants, etc. Anscombe tells us, however, that people formulate expressions of intentions that are about the future and that they turn out to be correct.[41] How is this possible? In order to answer this question, she tries to understand how we can identify intentional actions and demarcate them from non-intentional actions. The logical step is to understand what it means to say that 'I have acted with an intention'. Anscombe identifies acting intentionally with acting for a reason or 'reasons for actions' and such acting involves the view that the question 'why' applies.[42] In other words, when we act for reasons, we act intentionally and therefore we are sensitive and responsive to a justificatory framework. If we perform an action Φ and, for example, either one of the following is true: 'I did not know I was doing Φ', 'I was not aware I was doing Φ', then it follows that we neither have an intentional action, nor an action performed while guided by reasons. We might have a voluntary action, but not an intentional one.[43] But if the response has, for example, any of the following forms: 'in order to Φ', 'because Φ', then we might have a *prima facie* case for an intentional action or an action done for reasons. In other words, reasons, so to speak, show themselves in intentional action and indicate, by 'showing themselves' how they are able to operate and be part of the agent's practical reasoning.

Do we have any control over the truthfulness of the answer given by the question 'Why?'? Anscombe points out that we have a set of contextual conditions that enable us to say whether the person has expressed his genuine intentions.[44] For example, if a man is poisoning a river with toxic substances and we ask him 'why are you doing this?', his response might be 'I am just doing my job', we can verify whether this is part of his routine job, but if it is not we have reason to think that his response is not genuine.

Intentional action or an action done for reasons involves a successive number of steps or actions and subsequently a successive number of reasons that explain each step, but when do we know that the explanation provided by the agent can stop? Anscombe tells us that the explanation and justification stop when the end of the action is described in terms of what is good or desirable. The final end of the action is something, i.e., a state of affair, events, facts, objects that seems or appears to be good or desirable to the agent. The state of affairs, event, fact or object is believed to be a good sort of thing by the agent. In some ways, this is the most common sense and naive explanation of our actions.

For example, when I collect you at the train station, I do not say that I collect you because I am in the mental state of desiring to collect you at the train station and have the mental state of believing and remembering that this is that kind of action. On the contrary, in order to pick you up at the train station, I start my car, drive down the road, park my car at the train station and get out of my car and

41. Elizabeth Anscombe, *Intention*, 2nd ed (Oxford: Blackwell, 1963) at §3-4.
42. *Ibid* at §4-6.
43. *Ibid* at §17.
44. *Ibid* at §25.

https://doi.org/10.1017/cjlj.2016.19 Published online by Cambridge University Press

enter the train station. The successive steps of action find unity and intelligibility in my reason as good-making characteristics that, for example, you are my friend and it is good to welcome friends at the train station.

The core motivation behind the why-question methodology is to pay attention to the structure or articulation of an intentional action.[45] The action is not given and therefore the matter is not to discover the propositional attitudes, i.e., beliefs and desires, that will explain the action. The issue is to unveil the structure of the intentional action in order to understand whether there is an intentional action.

According to Anscombe, evaluation and motivation do not come apart. I ask from the deliberative viewpoint 'what should I truly do?' and 'why should I this or that'?

In her book *Intention*[46] Elisabeth Anscombe identifies a number of key features that characterise intentional action. These features include:

a) The former stages of an intentional action are 'swallowed up' by later stages

Intentional action is composed of a number of stages or series of actions. For example, if I intend to make a cup of tea, I first put on the kettle *in order* to boil water, I boil water *in order* to pour it into a cup of tea. While I am making tea, however, there are many other things that I am doing that are irrelevant to my intentional action and to what is happening as intentional. For example I sneeze; I look through the window; I sing; and so on. Similarly, many other things are happening in the world that are irrelevant to what I do and happen as a result of what I do intentionally. Thus, the kitchen has a specific location, the flowers in the garden are in bloom, the wind is blowing and blows open the window, and so on. Because my action of making tea is intentional, I impose an order on the chaos of the world and this order is the order of reasons. Thus I put on the kettle *in order* to boil water and I boil water *in order to* pour it into a cup. This is how I understand the sequence of happenings in the world that I, as an agent, *produce or make happen*. But, arguably, there could be an infinite number of series of actions; there could be a continuous infinite, or ceaseless, seamless web of actions. The question 'Why?' can always be prompted: 'Why are you making tea'? and the agent might reply, 'Because it gives me comfort in the morning'. There is, however, an end to the 'Why?' series of questions and the end comes when the agent provides a characterization of the end or *telos* as a good-making characteristic. The action becomes intelligible and there is no need to ask 'Why?' again. The end as the last stage of the 'Why?' series of questions swallows up the former stages of the action and makes a complete unity of the action. Intentional actions are not fine-grained, they are not divisible into parts. Thus, parts of series of actions are only intelligible because they belong to an order that finds unity in the whole.

45. C Vogler, "Anscombe on Practical Inference" in E Millgram, ed, *Varieties of Practical Reasoning* (Cambridge: MIT University Press, 2001).
46. See Anscombe, *supra* note 41.

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b) Intentional action is something actually *done, brought about according to the order conceived or imagined by the agent*

Intentional action is not an action that is done in a certain way, mood or style.[47] Thus, it is not an action plus 'something else', i.e., a will or desire that is directed towards an action. Intention is not an additional element; e.g., an interior thought or state of mind, it is rather something that is *done* or *brought about* according to the order of reasons that has been conceived by the agent. Consequently, if the question 'Why?' has application to the action in question, we can assert that the action is intentional. The prompting of the question 'Why?' is the mechanism that enables us to identify whether there is an intentional action. Intentional action is neither the mere movements of our body nor the simple result of transformations of the basic materials upon which agency is exercised, e.g., the tea leaves, kettle, boiling water. It is a doing or bringing about that is manifested by the expression of a future state of affairs and the fact that the agent is *actually* doing something or bringing it about according to the order of reasons as conceived or imagined by the agent.[48]

c) Intentional action involves knowledge that is non-observational, but it might be aided by observation

If I am an agent who acts in an intentional way, I know that I am bringing about something and I know this without the need to observe every single step of my series of actions to verify that (effectively) I am acting.[49] In performing my action I might be aided by observation, but I know *what* is the order of the series of actions and *why*. This is the essence of practical knowledge. You do not need a theoretical stance towards yourself, a verification and observation of the movements of your body to know that you are performing an intentional action and bringing about *something*. Following the previous example, you do not need to observe that 'you are making tea' to know that you intend to 'make tea' and that you are bringing this about. You put on the kettle and boil the water, you do not ask yourself, 'let me see what my body is up to, let me observe what I am doing', and then infer from the movements of your body that you are actually bringing about 'making tea'. Of course you can be aided by observation, you need your sight to put the kettle in the right position and to pour the boiling water without spilling it. But you do not use your observation and inferences from the observational data to know that you are making tea. On the contrary, the more you need this verification or theoretical stance towards yourself, the more likely it is that your action is not intentional, you are not controlling the action and you are not guided by the order of reasons. You are not an agent on this occasion, rather something is happening to you.

The state of affairs that you intend to bring about is at a distance, it might not be within your sight.[50] Imagine a painter who intends to make a painting. He

47. *Ibid* at §20.
48. *Ibid* at §21-22.
49. *Ibid* at §28-29.
50. *Ibid* at §29-30.

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has an idea about what the painting will look like, e.g., how the colours will be distributed across the canvas, and what topics and concepts will be at work in the painting. The painting is at a distance and the painter does not need to observe the movements of his body and the motion of the brushes to know *what* he is painting and *why* he is painting what he is painting. Certainly, his sight will help him to find the adequate colour at the correct time and to shape the figures at the right angle, but his intentional action is not what he observes; it is not the result of his painting but what he is actually doing. We do what happens.

d) In acting intentionally we exercise our practical knowledge. We can understand practical knowledge if we understand the structure of practical reasoning

Intentional action is not in the mind, it is not primarily a mental state, it is not an internal thought.[51] Rather it manifests itself publicly and within the public reasons that we share as creatures with certain constitutions and belonging to a particular time and place. For example, we eat healthy food because it is good to survive, we look after our family because we love them, we avoid harm because we aim to enjoy pleasant things and so on. Similarly, we know that to make a cake you need flour, sugar, eggs and butter. If I see you mixing grass and earth and you tell me that you are making a cake then I can assert, if I consider that you are in sound mind (your full capacities), that there might be a mistake in your performance or that you do not understand what it is 'to make a cake'.

According to Anscombe, Aristotle establishes a strong analogy between practical and theoretical syllogism and this has led to misinterpretations about what practical syllogism is.[52] Like theoretical syllogism, practical syllogism is often systematized by Aristotelian interpreters as having two premises, i.e., major and minor, and a conclusion. It is said that, as in the case of theoretical syllogism, the practical syllogism is a proof or demonstration. The typical form might be as follows:

Vitamin X is good for all men over 60
Pigs' tripes are full of vitamin X
I am a man over 60
Here are pig's tripes

But in this case nothing seems to follow about doing anything. Furthermore, the practical syllogism is sometimes interpreted as having an ethical or moral character and establishing a way to prove what we ought to do. Following the previous example, the conclusion might be 'I should eat pigs' tripes'. Anscombe rejects this view since Aristotle's examples are not in ethical contexts, i.e., 'dried food is healthy', 'tasting things that are sweet' that are pleasant. Additionally the word 'should' (*dei*) as it appears in Aristotelian texts has an unlimited number of applications and does not necessarily refer to the ethical or moral context.[53]

51. *Ibid* at §21-22, §25, §27-28.
52. *Ibid* at §33, §33-34.
53. *Ibid* at §35.

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Aristotle insists that the starting point of any intentional action is the state of affairs or something that the agent wants and is wanted because it is presented to the agent as having good-making characteristics or as being valuable. For example, the man wants to have vitamin X because it is healthy. Furthermore, the practical syllogism is not limited to two premises and a conclusion, there can be many intermediate instances that are part of the syllogism. After a close analysis, the analogy between practical and theoretical syllogism breaks. Unlike theoretical syllogism, practical syllogism is not a proof or demonstration of a true proposition, nor is it a proof or demonstration of what ought to be done or what we ought to do. It is a form of *how* and *why* we are bringing something about when we are *actually* bringing it about.

Anscombe presents us with an alternative analysis to the practical syllogism and a different way to understand practical reasoning. Thus, the series of responses to the question 'Why?' manifests or reveals the practical reasoning of the agent and enables us to identify whether the action that the agent is performing is intentional or not. However, she warns us, the why-question methodology is as 'artificial' as the Aristotelian methodology of practical syllogism.[54] When we act intentionally, we are exercising a kind of reasoning which is not theoretical and which is grounded on a desire for that which seems to the agent to be constituted by good-making characteristics. You know the thing or state of affairs that you are bringing about because you desire the thing or state of affairs that you are bringing about, and you are able to desire the thing or state of affairs that you are bringing about because you know *practically* the state of affairs. Your desire arises because you represent the thing or the state of affairs to be brought about as valuable or good. Volition and knowledge do not fall apart.[55] For example, if you are a painter, you know how and why the shapes and colours on the canvass are what they are, it is because you desire and value the painting you will produce that it should be such and such a colour and shape. But it is also true that because you desire and value *this* and *not that* arrangement of colours and shapes, that you are able to know it *practically.* Consequently, moral approbation is irrelevant for practical reasoning and for our practical engagement with the world.[56] This does not mean that there are no instances of objectively justified reasons for actions.

Whatever strategy we follow to show the structure of intentional action, whether we take the Aristotelian practical syllogism or the Anscombian series of actions revealed by the question 'Why?', we are able to grasp the mechanism of practical reasoning in its different manifestations.

In the following section I will argue that if Anscombe is right and both strategies are 'artificial' ways of understanding,[57] then a deeper and more 'natural' way of understanding practical reasoning is by grasping the nature of the capacity that is exercised by the agent. *In other words, the answers to the 'Why?' questions reveal a capacity that the agent is exercising when acting*.

54. *Ibid* at §41-42.
55. *Ibid* §36.
56. *Ibid* §37-38.
57. *Ibid* at §41-42.

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Let us remember that my aim is to show that legal actions and legal practices, including judges' past decisions, *qua* intentional actions cannot be understood as 'imposing' meaning or value in the way advanced by Dworkin's constructive interpretation. This is because intentional actions are constituted by an order of reasons that find intelligibility in values or good-making characteristics. The agents engage with these values through their practical reasoning. So far I have shown that intentional action is not, at an initial stage, merely bodily movements or raw data that needs interpretation. Thus, intentional action is from its beginnings an activity that from the first-person perspective connects reasons with other reasons (for actions) and finds an end as having value or good-making characteristics.

In the next section I will show that the Aristotelian potentiality/actuality distinction sheds light on understanding the exercise and nature of our practical reasoning capacities. Furthermore, the potentiality/actuality distinction illuminates each of the key features of intentional action (a, b, c and d) and their interplay as identified by Anscombe.

3.2 Aristotle's Distinction Between Actuality and Potentiality

Aristotle defines motion as a kind of actuality which is hard to grasp. In other words, *the actuality of what exists potentially, in so far as it exists potentially*.[58] Motion is an actuality that is incomplete. The idea is hard to grasp and the tendency is to say that motion is the actuality. In the example of the house, it is the house that has been built. The other tendency is to say that motion is the privation of something, i.e., the going from nothing to something; from not being a house to being a house. Finally, the tendency is also to think that motion is what exists before -potentiality- e.g., the bricks, steel, wood, cement and so on. Contrary to these tendencies, Aristotle insists that motion is what happens exactly at the *midpoint*, neither *before* when nothing has been moved and is mere potentiality, and neither *after*, when something *has* been moved. Furthermore, motion is not privation, it is rather constitutive actuality. For example, if the baby has not learned to speak English, we say that the baby is potentially a speaker of English; when a man knows how to speak English and is in silence, he is also potentially a speaker of English; and finally when the man is speaking English, we say that he is actually an English speaker speaking English. However, the potentiality of the baby (p1) is different from the potentiality of the man in silence (p2), and motion is located in the second potentiality (p2), when the man is in silence, but begins to pronounce a sentence to speak English. Motion is midway and is not privative, but rather constitutive. We do not say that the man speaking English went from being a non-speaker of English to a speaker of English, we say that he spoke English from being in silence (he knew how to speak English, but did not exercise his capacities).

The previous example locates us in the domain of the particular instance of capacity and change as exemplified by the potentiality/actuality distinction.

58. Aristotle, *Physics, Books III and IV*, translated by E Hussey (Oxford: Clarendon Press, Clarendon Aristotle Series, 1983) at III.1.201a9-11.

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Aristotle argues that there are many different types of capacity, i.e., active/passive, non-rational/rational, innate/acquired, acquired by learning/acquired by practice, and one way/two way capacities. Two way capacities are connected to rational capacities, whereas one way capacities are linked to non-rational capacities. For example, bees have a natural capacity to pollinate a foxglove flower in normal circumstances,[59] ('normal' circumstances might include a healthy bee in an adequate foxglove, and the absence of preventive circumstances). In the case of two way capacities there ought to be an element of *choice or desire* to act, and the rational being can exercise her capacity by producing or bringing about 'p'. Furthermore, she also knows how to produce or bring about 'non-p'. The paradigmatic example used by Aristotle is medical skill. The doctor knows how to make the patient healthy (p) and how to eliminate disease or illness (non-p). Therefore the doctor can bring about two opposite effects.[60] For Aristotle, to have a rational capacity is to have an intellectual understanding of the form that will be transmitted to the object of change or motion. Thus, the doctor will have an understanding of what it means to be healthy and without illness. Let us suppose that a chef is making a cake. He needs to understand the order of the series of actions that will result in a cake and he needs to possess knowledge about the necessary ingredients and temperature of the oven. The chef also needs to understand how to avoid producing non-cakes, e.g., crepes. His action will be directed to making a cake and to not making a non-cake.

In the exercise of practical reason we choose to act[61] and this choosing activates the action and directs the capacity towards the series of actions that will be performed. By contrast, a non-rational capacity is non self-activating, its acts are necessary. If the bee is in good health and there are no obstacles, it will pollinate the foxglove flower. By contrast, rational agents need to *choose or decide* to act to produce a result.

When we say that the medical doctor has the rational capacity to change the unwell patient into a healthy human being, we say that she is the 'origin of change'. She is curing the patient and therefore she is in motion because she actualises her practical reasoning capacities to bring about the result as she understands it. She has an order of reasons that connects a series of actions and knowledge of how to produce changes.

She is the origin of change because her medical knowhow explains why certain changes occur in situations involving that object, e.g., the patient who suffers chickenpox has fewer spots and less fever. For example, when a teacher intends to teach and starts to say some sentences on the topic of 'Jurisprudence' to her pupils, we say that she is teaching. She is the origin of change in the pupils who are the objects of change. Thus, the students begin to understand the topic

59. I follow the interpretation of Aristotle's *Metaphysics*, Book Θ advanced by Frede and Makin. See Aristotle, *Metaphysics*, Book Θ, commentaries and introduction by Makin S (Oxford: Clarendon Press, Clarendon Aristotle Series, 2006). See also M Frede, "Aristotle's Notion of Potentiality in Metaphysics" in T Scaltsas, D Charles & M Gill, eds, *Unity, Identity and Explanation in Aristotle's Metaphysics* (Oxford: Clarendon Press, 1994).

60. Aristotle, *Metaphysics*, *supra* note 59 at 1046b 4-5, 6-7.

61. *Ibid*, Book Θ 5, 1048 a10-11.

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and gain a grasp of the basic concepts.[62] Similarly, when legislators create the law and judges decide cases, they establish rules, directives and principles and these rules, directives and principles can be found in statutes and case reports. Can we say that legislators and judges have reached the end of the process? No, we cannot: statutes and case reports do not represent the end of the process since citizens need to comply with the legal rules and directives and perform the actions as intended by the legislators and judges. We say that legislators and judges are the origin of change because they possess the knowhow and have an order of reasons that enables citizens to comply with legal rules and directives. The order of reasons as good-making characteristics ground the rules, decisions and legal directives. In parallel to the situation of the teacher, I cannot say that I am teaching unless my pupils begin to understand the topic that I am teaching. Thus, the legislator cannot say that she is legislating and the judge cannot say that she is judging, in paradigmatic cases, unless there is some performance of their actions by the addressees as they intend.

The distinction between potentiality/actuality clarifies the structure of practical reason as a capacity that is actualised when we act intentionally. We can now understand that the features of an intentional action identified by Anscombe can be illuminated by the potentiality/actuality distinction. The idea that the former stages of an intentional action are swallowed up by the later stages is explained by the idea that motion is constitutive and not privative. It is not that when I begin to act I do so as an irrational or arational being, and that when I finish acting I am a rational being, or that I go from non-intentional to intentional action, but rather that I go from being a rational being and *potentially* intentional action to being a rational being and *actual* intentional action. Later stages begin to actualise something that was potentially there. My practical reason was always there *potentially* and the intentional action actualises an order of ideas provided by my practical reason. For Anscombe, **i**ntentional action is something *actually* done, something brought about according to the order conceived or imagined by the agent. If practical capacity is understood in the light of the general scheme of actuality/potentiality, then intentional action involves knowledge that is non-observational, but it might be aided by observation. In acting intentionally I am exercising my practical reasoning capacity and this capacity is in motion. This motion is represented at the midpoint; *after* I potentially have an intention to act and *before* I have reached the result of my intentional action. It is not that the forming of an intention from nothing to something is a *magical* process. *It is rather that I potentially have the power to intend which in appropriate circumstances can be exercised*. As being in motion, I am the agent who knows *what* she is doing and *why* she is doing what she is doing, but if I observe myself doing the action, then I have stopped the action.[63] There is no action. There is no more motion and no exercise of my capacities. Finally, Anscombe asserts that in acting intentionally, we exercise our practical knowledge. Because we are the

62. Makin argues that the teacher analogy is intended to show that the teleological perspective is equally appropriate for other-directed and self-directed capacities. See *supra* note 59 at 198.
63. See R Velleman, *Practical Reflection*, *supra* note 35.

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kind of creatures that we are, we can *choose* or *decide to bring about* a state of affairs in the world and we do this according to our order of reasons. Practical knowledge is potentially in all human beings and when we decide to bring about a situation or do certain things, then we actualise this potentiality. We can direct our actions to produce either of two opposing results, e.g., health or illness, ignorance or knowledge, as opposed to non-rational creatures who can only produce one result under normal circumstances and with no impeding conditions e.g., the bee pollinating the foxglove. It should be noted that to have an actual capacity, such as practical reasoning and the capacity to act intentionally, does not mean that A can Φ, nor that A will Φ if there are normal conditions and no impending elements. Instead it means that *A will Φ unless she is stopped or prevented*. Thus, once our practical reasoning capacity begins to be actualised it will strive to produce or do what A has conceived. Once A decides or chooses to act, then a certain state of affairs will be produced unless she is prevented or stopped.

Now that we have grasped the idea of potentiality/actuality as the general scheme for explaining the structure of practical reason,[64] we can turn to the rule-compliance phenomenon which raises a different set of difficulties that will be dealt with in the next section.

3.3 Law and Energeia: Acting and Judging in the Deliberative Mode

So far we have argued that an intentional action is the bringing about of things or states of affairs in the world. We can argue, too, that there are different kinds of bringing about. Human beings can produce houses, clocks, tables, tea cups and so on, but we can also produce rules of etiquette, rules for games, and legal directives, rules, and principles. Legislators create legal rules and directives and judges create decisions according to underlying principles, values and rules. These legal rules, decisions and directives are directed to citizens for them to comply with. They are meant to be used in specific ways. When a legislator creates a rule or a judge reaches a decision that involves rules, values and principles, she creates them exercising her practical capacities with the intention that the citizens comply with them.

But how is this compliance possible? How do legislators and judges create legal rules, values and directives that have the core purpose of directing others' intentional actions and of enabling them to engage in bringing about things and states of affairs in the world? In other words, how do other-directed capacities operate? This is the question that we aim to explore in this section.

In §2 I used Dworkin's example of a particular legal case where a judge decides to give compensation for psychiatric injury in spite of the fact that in past legal decisions compensation was given only for physical injury and not psychiatric injury. According to Dworkin, the judge provides the best possible interpretation of what the law is in a particular case invoking integrity within the limits of an

64. For further discussion of this point see my monograph *Law and Authority Under the Guise of the Good*, *supra* note 22.

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interpretation that fits past legal material. According to previous cases the loss that the victim has suffered should be limited in scope by foreseeability. I have earlier argued that this interpretation, from the point of view of other participants in the legal practice, is not necessarily the best one. For some participants, previous cases[65] support that the scope of the harm should not be limited to foreseeability; for others, ideas about the nature of responsibility in negligence due to moral luck are less satisfactory. These others might therefore argue that the best possible interpretation is not to award compensation for either physical nor psychiatric injury. They might insist that this interpretation better fits the legal material because as in many cases the courts take into consideration the fact that we might not be responsible for acts the consequences of which are beyond our control. Constructive interpretation is not designed to settle the genuine disagreements of the participants of legal practice. On the contrary, it only offers the best possible interpretation according to the judges' creative process of 'imposing' values, purpose and meanings upon legal practice.[66] However, this theoretical-creative process comes at a price. If justification and the consequential compliance with the decisions of the judges entail making the justification *part of the practical reason* of the agent and her action, then it is unclear *how a unified* justification under different constructive interpretations can be reached among the different legal practitioners.

If our account of intentional action is sound, then compliance with legal decisions requires engagement of the will and the performance of a series of actions over a certain period of time. It also requires that the addressee should circumvent any obstacle standing in the way of achieving the result according to what has been ordered. It requires that the addressee exercises her rational capacity in choosing *this* way rather than *that* way of proceeding. While the defendant complies with the judges' decisions, she needs to make judgments about how to do *this or that*. Successful performance as intended entails knowledge about how to proceed at each step in order to perform the series of actions that are constitutive of what has been decided by the judge. This cannot be done unless our practical reasoning and intentional action are involved in the performance. In other words, the successful execution of orders or decisions if they are seen as *justified* by the agent requires the engagement of practical reasoning and therefore of our intentions. Furthermore, it requires an understanding of the *telos* or end as a good-making characteristic of what has been decided by the judge.

Because our practical reasoning capacity is a two-way capacity (§3.2) the agent needs to *decide or choose* to actualise this capacity which, prior to actuality, is mere potentiality. As in our previous example (§3.2) the speaker needs to *decide or choose* to speak in order to actualise her potentiality of speaking English. Then the exercise of her capacity to speak actualises according to a

65. In the English context, see *Re Polemis v Furness, Withy & Co Ltd*, [1921] 3 KB 560; cf *Wagon Mound No 1* (*Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd*), [1961] UKPC 1.

66. Of course, Dworkin admits that creative interpretation has its limits within the genre that is interpreted. Thus, not all values, meanings or purposes will fulfil the standard of sound interpretation. However, there is not much explanation from Dworkin on how these limits and standards are supposed to work.

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certain underlying practical knowledge, e.g., the order of the sentences, grammar, style and so on. It is not the case that as a bee pollinates a foxglove without any decision or choice by the bee, the agent will speak English and actualise her potential capacity to speak. In the case of legal decisions, the question that emerges is how a judge can produce or bring about something that will engage the defendants' intentions so that they see acting as *justified* and are able to *comply* with the decision. The core argument is that judges intend that citizens comply with legal decisions, and this intention is not merely a mental state, as is well-pointed out by Dworkin. Neither is it a mental state that represents a way of cooperating and laying plans to achieve an aim.[67] On the contrary, for judges' intentions, i.e., to engage the citizens' practical reasoning, to be successful, they need to exercise their own practical reasoning.

In other words, once the agents understand the end as a good-making characteristic of the decision, they can follow the judge's order of reasons, i.e., practical reasoning. In our example, let us suppose that the judge establishes that the victim of psychiatric injury is entitled to compensation only when the harm is foreseeable, and compensation can be awarded independently from the fact that the victim has suffered physical injury. The judge might argue that this is so because a) psychiatric harm can be equated with physical harm, and b) when one engages in activities whose resulting harm is foreseeable and one causes harm, then one is at fault and therefore responsible. For the judge, the correction of a wrong is a valuable end that justifies the decision. The agent or addressee of the legal decision has the capacity to understand that correcting a wrong is an end that has value or good-making characteristics and is now able to understand the judge's order of reasons. Let us suppose an imaginary dialogue between a judge and a defendant:

> Defendant: Why should I pay compensation to the victim?
> Judge: Because you need to correct a wrong.
> Defendant: Why do I need to correct a wrong?
> Judge: Because you have caused psychiatric harm to another person and the mental integrity of other people is something that we value. The correction of the wrong is also seen as valuable and the end of the legal decision.

It is not that they interpret or creatively impose a meaning, value or purpose on the raw behavioral data and legal material to construct the best possible interpretation of what the law is in a particular case and what the legal practice is. Nor is it the case that they consider the different *conceptions* of what the law is in order to construct the best possible conception. On the contrary, they look outward to *what* is of value and to *why* certain states of affairs and doings are valuable. Reasons for actions as values and goods that are the grounds of legal rules and legal decisions will engage others' practical reason therefore the citizens' practical reasoning power or capacity become an *actuality*. If, as I have argued, our intentional actions become *actuality* by an order of reasons *in* actions and for actions that are ultimately grounded on good-making characteristics, then judges

67. See Shapiro, *supra* note 34, for an attempt to show that legal systems are created by the collective intentions of planners (legislators and judges).

https://doi.org/10.1017/cjlj.2016.19 Published online by Cambridge University Press

need to conceive the order of reasons as good-making characteristics that will ground their legal rules and decisions. Judges would, hence, take the first-person deliberative stance as the privileged position of practical reasoning to disentangle *what* good is required and *why* it is required.

In other words, if, as a judge, you intend that your decision is *justified and* that it is followed by the addressees then you cannot bring about this state of affairs, i.e., compliance, without thinking and representing to yourself the underlying order of reasons. Let me give a simple example. You are writing an instruction manual on how to operate a coffee machine. You need to represent to yourself a series of actions and the underlying order of reasons to guide the machine's users. If you are a person of certain expertise, e.g., a manufacturer of coffee machines, then the practical knowledge that entails the underlying order of reasons is actualised without much learning and thinking. The required operating instructions are actualised as a native English speaker speaks English, after being in silence. By contrast, if you have only just learned to write instruction manuals for coffee machines, then you need to ask yourself 'Why must the user do it this way?' at each required step to make the machine to function. This process guarantees understanding of the *know how* to operate the machine, and the success of the manual is measured by the fact that future buyers of the coffee machine are able to operate it.

When legislators and judges create legal directives and legal rules they operate like the writers of instruction manuals, though at a more complex level. They need to ensure that the addressees will decide or choose to act intentionally to comply with the legal rules or directives and thereby bring about the intended state of affairs. But they also need to ensure that the order of reasons is the correct one so that the intended state of affairs will be brought about by the addressees. We have learned that the early stages of an intentional action are 'swallowed up' by the later stages and ultimately by the reason as a good-making characteristic that unifies the series of actions. Thus, for addressees with certain rational capacities and in paradigmatic cases, understanding the grounding reasons as good-making characteristics of the legal rules and legal directives will enable them to decide or choose to comply with the rule and will guide them through the different series of actions that are required for compliance with the rules and directives.

We create legal rules and decisions and bring them about by exercising our practical capacity. We are responsive to an order of reasons as good-making characteristics that we, as creators, formulate and understand. Thus, builders create houses that are either majestic or simple, elegant or practical, affordable or luxurious. To achieve the intended features of a house, builders need to select specific materials and designs, hire skilled workers, and so on. Similarly, judges create legal decisions to pursue a variety of goods, e.g., to achieve corrective or distributive justice, safety, the protection of rights and so on. Judges actualise their practical reasoning by creating an order of reasons in actions that will ground rules so that we are able to *understand the justification* that is provided and *comply* with them because we actualise our practical reasoning. Like builders, judges need to choose values, goods and rights that will be fostered or protected by their decisions. Likewise, they need to formulate decisions that will have appropriate

https://doi.org/10.1017/cjlj.2016.19 Published online by Cambridge University Press

sanctions, are clearly phrased and follow procedures for their publicity. In this way they make the addressee of a directive choose or decide to actualise their potential practical reasoning capacity to understand the justification and comply with the legal decision. The addressees of a decision and other legal participants are not like bees who, without decision and given normal conditions and the absence of impediments, will pollinate the foxglove. As addressees of legal decisions and legal participants we need to choose or decide to bring about a state of affairs or things which are intended by the judge.

We now see that the model of constructive interpretation neither shows that the legal participant can activate his practical reasoning capacity nor his understanding of justification for performing the action, i.e., compliance according to the legal decision.

As rational creatures we are responsive to reasons as grounded in good-making characteristics. The potentiality/actuality and capacity/change discussion shows that as intellectual and rational beings, we need to apprehend the 'form' that underlies legal decisions.

Dworkin is correct in arguing that justification is essential to law as a conception of freedom. However, justification is not a theoretical exercise, it is rather a practical exercise that involves grasping *the form of justification*. The 'form' takes the shape of goods and values that are intended to be achieved by legislators, officials and judges. If it were a matter of the best possible interpretation whereby the interpreter imposes her values, meanings and purposes on the action, then we are creating something different from what the action and the agent as practical reasoner is bringing about. Theoretical and practical reason become separated. Furthermore, in constructive interpretation the actualisation of the action, i.e., compliance, becomes utterly mysterious.

The classical model of practical reasoning and intentional action also laid out the view that for an action to be controlled, guided and *justified* by the agent, the reasons need to be *in* the action and therefore *transparent* to the agent. Constructive interpretation, by contrast, is an opaque exercise since *each* legal participant, including the defendant, is invited to 'impose' his own meaning, value or purpose, rather than 'look at' *what is of value and why we should value it*. The answers to the question 'Why?' provide the order of reasons that guarantees successful compliance with decisions as *justified* by the agent. They are the *reasons in action* that the agent has. But if the order of reasons is opaque, how there can be an action as intended by judges as an order of reasons? If values, purpose or meaning of a legal text or social practice needs to be 'imposed' and creatively constructed by the legal participants, then there is no unique order of reasons under which description the legal participant, including defendants, are performing the action. Therefore, creative-theoretical justification plays no role in the process of practical reason of the legal participant and there are merely multiple theoretical understandings of the legal text and practice that cannot necessarily be translated into performance of an action, i.e., compliance. Furthermore, one might assert, the judge is not the origin of change. What or who is then the origin of change? One possibility is to argue that the origin of change is external empirical factors,

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e.g., the fear *mechanism* that acts within the agent, psychological processes in the agent and so on. But this view has already been rejected by Dworkin. The second possibility is to argue that the origin of change is the *belief* that a certain purpose, value or meaning is the best possible interpretation of the legal practice. However, this latter possibility entails the mental state model that has also been rejected by Dworkin. Dworkin has no answer to the compliance question. Thus, within Dworkin's constructive interpretive model, the PUZZLE remains unsolved.

However, I have argued that if we take seriously the structure of practical reason, then the PUZZLE can be solved. Let us recall that the aim of constructive interpretation was to provide a justification for the coercion of the State and the argument is that this justification can only be provided if the legal practitioner, including the defendant, is seen as a practical reasoner herself.

4. Conclusions

My central argument has shown the importance of practical reason in understanding intentional action and justification in the legal context. I have shown the shortcomings of Dworkin's theory of constructive interpretation and argued that it misunderstands what an intentional action is and what a social practice is. It also overlooks the important role that justification plays in the practical reason of the legal participants.

Aquinas[68] tells us that when you command, it is an act of reason for something to be *done*. He also adds that an act of will can be commanded. In the intrapersonal case you are able to command yourself to do ϕ-ing, but you need to command it to yourself, *to will it*. In other words, you need to engage in thinking about *why x-ing* is good or to be pursued. *Why is this not the same for interpersonal cases?* Judges' decisions command the defendant and other legal participants to do ϕ-ing, but they command it to *will it*. Therefore, judges ought to make decisions grounded on good-making characteristics and cannot help but ask themselves what is of value and why. They do not engage in a theoretical exercise of imposing 'value', 'meaning' or 'purpose' on the social practice because the practice itself has a structure that manifests values, meanings and purposes. Consequently, judges need to engage with the activity of deciding what is of value and why we should value it to produce decisions and actions. Other legal participants do not either impose value, purpose or meaning, but rather engage with the structure of the practice and its good-making characteristics, i.e., its values, meanings and purposes.

68. Aquinas, *Summa Theologiæ,* translated by Thomas Gilby, Latin and English text, paperback ed (Cambridge: Cambridge University Press, 2006) at Q17, 5.

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