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The Empire Strikes Back

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BOOK REVIEW: THE EMPIRE STRIKES BACK

*Adeno Addis**

LAW'S EMPIRE. By Ronald Dworkin.¹ Cambridge, Massachusetts and London: Belknap Press of Harvard University Press, 1986. Pp. xiii, 470. One volume, \$20.00.

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"Everyone that is of the truth heareth my voice. Pilate saith unto him, what is truth?" John 18:37-38.

I. INTRODUCTION

The past decade has not been a good one for liberalism.² It has come under serious challenge from various quarters, and seems to have been on the retreat. Politically, the challenge came mainly from

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1. Professor of Jurisprudence, Oxford University; Professor of Law, New York University.
 2. By liberalism, I refer to the intellectual and official tendency in most developed countries, especially in the United States, that self-consciously defines itself as progressive and embraces the welfare state as the instrument of social progress. For an interesting collection of essays on the juridification of the social world in the welfare state, see *DILEMMAS OF LAW IN THE WELFARE STATE* (G. Teubner ed. 1986). See also Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987).

the right. Charging that liberalism was unable to articulate a coherent vision, and that it was out of touch with the problems of the ordinary citizen, the political right managed to rally against it much of its constituency. Four of the seven major industrialized western countries elected conservative governments, and two of those, the United States and the United Kingdom, have the most conservative leaders to have occupied those positions since World War II.³ Many liberal programs are being reversed, or at least having their development checked, and the public philosophy on which they are premised seriously contested.⁴

Legally speaking, liberalism has been pressured from both sides. On the left, a group of scholars calling themselves the Critical Legal Studies Movement (CLS) has challenged the tenets of liberal legal discourse.⁵ While liberals see law as an unqualified good, autonomously and neutrally resolving social conflicts, CLS views the law as an integral part of the social arena in which social conflicts are conducted. While liberals understand law as an instrument through which we articulate, defend, and extend our public values, CLS considers the law as an institution through which private and dominant preferences are given primacy and legitimacy. While liberalism sees a coherent set of principles and policies embodied in the law which, if applied faithfully, will lead to consistent outcomes, CLS sees liberal legality as indeterminate⁶ and defined by contradictory visions, although those contradictions are systematically repressed.⁷ Put simply, CLS challenged liberalism's assertion of the autonomy of the law, its unreflective assumption of the existence of a community in this society, and its belief that law defines and defends that community coherently.

3. Other countries include Canada and West Germany, which elected self-consciously more conservative governments than those they replaced. Italy and Japan retained the status quo, which meant keeping conservative regimes in power. In the United States and the United Kingdom, President Reagan and Prime Minister Thatcher are arguably the most conservative leaders of the post-war era.

4. If the rhetoric of the current United States Presidential election is an indication, then liberalism has become a political philosophy with which no political candidate wants to be saddled.

5. For a psycho-social, intellectual, and institutional history of CLS, see the symposium in 36 STAN. L. REV. 1-674 (1984); see also M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES MOVEMENT (1987).

6. By indeterminacy, members of the movement suggest that legal doctrines do not and cannot compel particular results in concrete cases. Doctrines are infinitely manipulable and conscious use of a particular method of reasoning, say deductive reasoning, cannot insure a certain outcome. See Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 570-72 (1983); see also Tushnet, *Post Realist Legal Scholarship*, 15 J. SOC'Y PUB. TCHRS. L. 20 (1980).

7. See M. KELMAN, *supra* note 5, at 3.

CLS's quarrel with liberalism is not so much with its aspirations, but with its tendency to mistake its aspiration for an accurate description of "our" legal and social existence.

On the right, the attack has come from two groups: the Law and Economics Movement,⁸ and the "historicist school,"⁹ which may also be referred to as originalism or narrow intentionalism. The Law and Economics movement has posed the strongest challenge. Using the University of Chicago Law School as its base of operation and the Yale Law School as its refueling station, the movement has attracted many prominent scholars and has had some of its leading members appointed to senior and influential judicial positions.¹⁰ The writings of some of the leading liberal scholars indicate this is the movement they fear most,¹¹ because it directly threatens the liberals' claim to be the "organic" intellectuals of the mature liberal state, the custodians of liberal legality. While liberals see the law as an instrument through which equality and justice may be achieved, the Law and Economics Movement, at least the efficiency-driven group within it, sees the role of law as one inducing "efficient" aggregate behavior, pareto optimality or wealth maximization, as its adherents refer to it.¹² There are two implications of the positions I have just ascribed to the Law and Economic Movement. First, the notion of community (and objective good) assumed by the liberals is considered necessarily tyrannical and empirically false, and the best thing, it is argued, is to consider the private preferences of individuals and aggregate those preferences. Second, while liberals argue that the contiguity between the legal sphere and other spheres of existence is not tight, the Law and Economics Movement argues, with ironic resemblance to some Marxist

8. The Law and Economics Movement is composed of two groups, *strong* lawyer-economist and *weak* lawyer-economist. See Ackerman, *Law, Economics, and the Problem of Legal Culture*, 1986 DUKE L.J. 929. I shall refer to these two groups as the efficiency-driven and the efficiency-conscious (or the efficiency-trade-offs). The first group has the University of Chicago as its operation base and Richard Posner as its leading spokesman. The latter's base is the Yale Law School and claims Guido Calabresi's work as its inspiration. The former is substantially more conservative politically.

9. See R. BERGER, *GOVERNMENT BY THE JUDICIARY* (1977); see also Berger, *Some Reflections on Interpretation*, 55 GEO. WASH. L. REV. 1 (1987).

10. Both Posner and Easterbrook, former professors at the University of Chicago Law School and leading members in the efficiency-driven faction of the Movement, were appointed by the Reagan Administration to the Seventh Judicial Circuit. Occasionally, Posner has also been named as a possible nominee for a Supreme Court position.

11. See Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1 (1986).

12. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980); Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 119-36 (1979).

legal theorists, especially that of Evgeny B. Pashukanis,¹³ that legality is tied to the economic sphere of existence, and economics in fact provides the best explanation of legal behavior. Adherents contend that economics accurately predicts the usefulness of a particular rule and the impact it will likely have in the social world.

Although it neither dies nor fades away, the historicist challenge has not been that profound intellectually. Nevertheless, since it has adherents in senior government positions¹⁴ and given the importance of appointments to federal judicial positions,¹⁵ it has disturbed liberals. The historicist view insists that adjudication should be bound by the specific historical intention of the framers of a particular piece of legislation. The idea that narrow intentionalism will be a guide to our interpretive enterprise seems incomprehensible. How can a text be understood without any consideration of the intervening history of its interpretation as being partly constitutive of it? If this simple hermeneutical¹⁶ insight is accepted, what does original intent mean in relation to text? It certainly will not mean what the historicist would like it to mean, a magical explication of the original author's intention. The historicist conception of adjudication is as much an intellectual construct as it is a political response to the liberal agenda, which conservatives feel has been judicially sanctioned in the United States without much "public" support for it.

It is within the context of these challenges, namely the jurisprudential challenge from both the CLS and Law and Economics Movement, and the administrative threat from the historicist school, that one must understand and examine the current attempts by liberal legal scholars to construct elaborate intellectual models to revitalize liberalism. Owen Fiss sees the task as one of saving "the proudest and noblest ambitions of the law"¹⁷ from the danger posed by these

13. E. PASHUKANIS, *LAW AND MARXISM: A GENERAL THEORY* (1978). The commodity theory of Marxist legal scholarship, which was inspired by the work of Pashukanis, and the efficiency-driven group of the Law and Economic Movement may be remarkably similar in their assumptions.

14. The former United States Attorney-General, Edwin Meese, was one of its spokesmen. See, e.g., Meese, *The Law of the Constitution*, 61 *TUL. L. REV.* 979 (1987). For a thorough critique of originalism, see Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U.L. REV.* 204 (1980).

15. The Reagan administration has appointed three United States Supreme Court Justices and numerous other federal judges.

16. See F. JAMESON, *THE POLITICAL UNCONSCIOUS: NARRATIVE AS A SOCIALLY SYMBOLIC ACT* (1981); Eagleton, *The Text in Itself*, 17 *S. REV.* 115 (1984); Gadamer, *Hermeneutics and Social Science*, 2 *CULTURAL HERMENEUTICS* 307 (1975).

17. Fiss, *supra* note 11, at 1.

challenges. In that endeavor Dworkin has been perhaps the most elegant and sophisticated. One conservative scholar, who self-consciously describes himself as a historicist, has recently referred to him as "the high priest of activism."¹⁸

Dworkin's attempt highlights both the nature of the challenge and the strategy of the liberals. The challenge seeks to link the alleged failure of liberal legality to what the challengers see as the general incoherence or defect of liberal political theory. This link is made by both the left and the right.

Tushnet, for example, considers the challenge to liberal legality to necessarily involve a challenge to liberal political theory. "Critical legal studies," he says, "is also directed toward liberal political theory because some version of formalism is essential to the coherence of liberal political theory."¹⁹ Dworkin's response to this challenge is the increasingly favored tactic of liberal theorists: to accept the challenge and link the fate of law with other enterprises of the polity, such as politics and literature, and to cast the defense of legality widely in order to defend the general institutional arrangement within which liberal legality is to function. For Dworkin, a secure defense of liberal legality must give an account of the unifying constitutive morality of liberalism,²⁰ a background theory of political morality. As he wrote: "integrity . . . fuses citizens' moral and political lives."²¹

II. THE BEGINNING: WHERE WE HAVE BEEN

In 1977, Dworkin announced in his first book that he was setting for himself the task of "defin[ing] and defend[ing] a liberal theory of law."²² Since then he has published numerous articles, many of which are collected in a 1985 book entitled *A Matter of Principle*. The book under review, *Law's Empire*, continues what he sees to be the task he set for himself in 1977. *Law's Empire* is the first book that Dworkin has written as a single, self-contained whole.

The task has remained the same: to define and defend liberal legality. Yet, Dworkin has expanded his target, against whom he defines and defends liberal legality. In *Taking Rights Seriously*, the dispute seems to have been a family one, and the contest was for the soul of

18. Berger, *supra* note 9, at 6.

19. Tushnet, *Perspectives on Critical Legal Studies*, 52 GEO. WASH. L. REV. 239 (1984); see also Unger, *supra* note 6, at 563.

20. R. DWORKIN, *A MATTER OF PRINCIPLE* 4 (1985).

21. R. DWORKIN, *LAW'S EMPIRE* 189 (1986) [hereinafter *LAW'S EMPIRE*].

22. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* vii (1977).

liberalism. Labelling it the "ruling theory of law," Dworkin challenged the then dominant liberal legal theory articulated by H.L.A. Hart in his book *The Concept of Law*.²³ The task was not to defend liberalism from its enemies, but to save it from its friends whom he saw as unable to give it a secure foundation with their rigid positivist outlook and undesirable utilitarian ethic. A secure foundation, Dworkin argued, requires that we conceive of law not just as a collection of rules ultimately justified by a meta rule ("rule of recognition," as Hart called it) but as a set of principles. The generality of these principles, he argues, would save us the embarrassment of having to admit, as the ruling theory must, that in cases where there are no rules to guide judicial behavior, we enter the realm of judicial law making.²⁴ According to Dworkin, in hard cases as in easy ones, judges do not exercise discretion, or act as deputy legislators, entitled to arrive at decisions on the basis of non-legal and non-authoritative standards. Rather, they simply refer to principles which are legally binding.²⁵ In short, Dworkin's scheme always has a correct answer in every controversy. This might be referred to as the coherence dimension of his theory.

There was also a substantive aspect to the theory, generally referred to as the Right Thesis. That is, the principles that give coherence and flexibility in adjudication were to be informed by the content of individual rights. Or as Dworkin wrote, "Arguments of principle are arguments intended to establish an individual right . . . Principles are propositions that describe rights."²⁶ Following Rawls, Dworkin insisted that a true liberal theory of law must put the notion of right rather than a utilitarian calculus or some collective goal at the center of its discourse. Judicial decisions were to enforce the rights of individuals, not to define or defend a collective goal, which he calls a "non-individuated political aim."²⁷

In *Taking Rights Seriously*, therefore, Dworkin's aim was to establish principles instead of rules. Individual rights, which Bentham had disparagingly dismissed as "nonsense on stilts,"²⁸ replace policies as the constitutive aspects of legal discourse. Rights have a positive and negative dimension. In their negative dimension they serve as "trump

23. H. HART, *THE CONCEPT OF LAW* (1961).

24. For an account of judicial discretion in the positivist paradigm, see *id.*

25. R. DWORKIN, *supra* note 22; see also Dworkin, *Judicial Discretion*, 60 J. PHIL 624 (1963).

26. R. DWORKIN, *supra* note 22, at 90.

27. *Id.* at 91.

28. J. BENTHAM, *Anarchical Fallacies*, in *THE WORKS OF JEREMY BENTHAM* 494 (Bowring ed. 1843).

cards"²⁹ individuals have against the pursuit of a collective, utilitarian goal. In the positive dimension, they serve as ends in themselves, to be enjoyed even if there were no other goals to be served.

In *A Matter of Principle*, Dworkin develops and defends his version of liberalism by considering a variety of current and controversial issues, ranging from affirmative action to the consumption of pornography, but without any major departure from his earlier theoretical insight. Dworkin still claims that principles simultaneously constrain and justify determinate and correct outcomes in all controversies, and that adjudication must put the protection of individual right at the center of its enterprise. As before, his political concern revolves around adjudication, confirming the fact that legal theory in Anglo-American jurisprudence revolves primarily around the judiciary and adjudication. This limited concern has its cost: it becomes an incomplete story of the enterprise. In some curious way Dworkin acknowledges this but disregards it.³⁰

III. WHERE WE ARE: LAWS EMPIRE

If *Taking Rights Seriously* was meant to dislodge the ruler, and *A Matter of Principle* was meant to specify the constitutive parts of the domain from which the ruler has been dislodged, then *Law's Empire* is about fortifying the empire, to make it invincible to the sharp spears of not only the dislodged rulers, but also the threatening rival, the Law and Economics Movement, and the militant guerilla campaigner, CLS.

A. *The Argument*

In *Law's Empire*, Dworkin tells us that this book "is about theoretical disagreement in law." And its purpose is "to understand what kind of disagreement this is and then to construct and defend a particular theory about the proper grounds of law."³¹ Theoretical disagreements arise when people "disagree about the grounds of law, about which other kinds of propositions, when true, make a particular proposition of law true."³²

When we say there is a theoretical disagreement about issues of law, what could we possibly mean? As always, Dworkin starts with

29. R. DWORKIN, *Liberalism*, in PUBLIC AND PRIVATE MORALITY 136 (S. Hampshire ed. 1978) [hereinafter *Liberalism*]; see also R. DWORKIN, *supra* note 22, at 90-94 & 188-92.

30. *LAW'S EMPIRE*, *supra* note 21, at 12.

31. *Id.* at 11.

32. *Id.* at 5.

what we misguidedly might believe before we encounter Hercules, his larger-than-life judge, who now appears as a "prince,"³³ and is occasionally assisted by judges Siegfried and Hermes. We might mean, Dworkin says, that such disputes are "really over issues of morality and fidelity"³⁴ rather than law. This conviction is informed by what Dworkin calls the "plain-fact view" of law. This view, according to Dworkin, holds that "[t]he law is only a matter of what legal institutions, like legislatures and city councils and courts decided in the past."³⁵ It is a matter of historical fact. To find what the law is in a given circumstance, one needs the special training to look up and understand the records and institutional decisions. Any theoretical disagreement among professionals could, therefore, only be about what the law should be, a "disguised politics"³⁶ rather than a genuine dispute about law. Of course, there could be empirical disagreements about what institution has decided what. But those will be resolved when the required data is adduced. They are issues of fact.

Having defined his intellectual opponents in such a vulnerable way, he then proceeds to show how their view is untenable. Choosing his cases well so as to cover all three areas of judicial practice — *Riggs v. Palmer*³⁷ and *Tennessee Valley Authority v. Hill*³⁸ representing statutory interpretation; *Mclaughlin v. O'Brian*³⁹ dealing with common law adjudication; and *Brown v. Board of Education*⁴⁰ dealing with constitutional construction — he shows that judicial practice is deeply inconsistent with the plain-fact view. The dissent in those cases, Dworkin argues, tries as much as the majority to state and defend what the law is rather than what the law should be. Why then, Dworkin asks, does the plain-fact view insist that the appearance of disagreement about law is an illusion? From the above intuitive observation, Dworkin proceeds to the possible theoretical justification of the plain-fact view. He argues that this view is given theoretical support by semantic theories of law. Here Dworkin's main concern is legal positivism. Dworkin argues that legal positivism, at least the Hartian version of it, lends support to the plain-fact view because it asserts

33. *Id.* at 407 ("courts are the capitals and judges are its princes") (Note that there are no princesses.).

34. *Id.* at 7.

35. *Id.*

36. *Id.* at 10.

37. 115 N.Y. 506, 22 N.E. 188 (1889).

38. 437 U.S. 153 (1978).

39. 1 App. Cas. 410 (1983).

40. 347 U.S. 483 (1954).

that the concept of law is constituted by certain specific criteria that we all employ, implicitly or explicitly, in "accepting, and rejecting statements about what the law is."⁴¹ For Hart the major identifying criterion of the ground of law is the meta rule, the rule of recognition. Therefore, Dworkin contends, any difference about the law for the Hartian positivist will be resolved not theoretically, but empirically, by investigating whether a particular law has passed the test of the rule of recognition. "If positivism is right, then the appearance of theoretical disagreement about the grounds of law . . . is in some way misleading."⁴²

Dworkin argues that the problem with semantic theories and their inconsistency with legal practice results precisely from their misunderstanding of the nature of legality and legal practice. Legality, he tells us, must be understood essentially as an interpretive enterprise, not just as a "linguistic analysis."⁴³ Law is an interpretive concept and interpretation (be it works of art, social practice, or law) "strives to make an object the best it can be."⁴⁴

In relation to legality, this means interpretation will seek to make the law "the best it can be from the point of view of political morality."⁴⁵ Does this make any interpretation that claims to have made the object the best it can be valid? Dworkin's answer is "no." Interpretation is structurally limited. First, it "must *apply* an intention,"⁴⁶ which might be referred to as the author's purpose. But application of the intention is never mechanical, for the interpreter must bring the author's intention into another historical and cultural period and make it meaningful. That act "is not conversational but *constructive*,"⁴⁷ in that it tries "to show legal practice as a whole in its best light."⁴⁸ But nevertheless, the author's intention acts as a structural constraint on the interpretive enterprise, in the same way the first chapter of a chain novel would constrain the successive chapters written by different writers. Second, the application must enter the history of an interpretive stage with a pre-interpretive agreement about what practices are legal. A consensus must exist among the participants in the interpretive enterprise

41. LAWS EMPIRE, *supra* note 21, at 32.

42. *Id.* at 37.

43. *Id.* at 109.

44. *Id.* at 53; see also *id.* at 90.

45. See R. DWORKIN, *Legal Theory and the Problem of Sense*, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY 14 (R. Gavison ed. 1987).

46. LAWS EMPIRE, *supra* note 21, at 55.

47. *Id.* at 52.

48. *Id.* at 90.

regarding the boundaries of the practice, the object of interpretation. So, for example, any dispute about constitutional adjudication in the United States must start with the Constitution as the point of departure for the dialogue.

How does one decide whether a particular interpretation has made the enterprise the best it can be? Dworkin's answer is that an interpretation has made the enterprise the best it can be when it has achieved "equilibrium between legal practice [as it exists] and the best justification of that practice."⁴⁹ He then offers three rival interpretations of legal practice: conventionalism, legal pragmatism, and law as integrity, and leads us methodically through each to show why we have no choice but to embrace law as integrity as the best justification of our legal practice.

"Conventionalism holds that legal practice, properly understood, is a matter of respecting and enforcing [legal] conventions,"⁵⁰ even when the interpreter thinks "a different one would have been fairer or wiser."⁵¹ Conventionalism, therefore, understands legality in terms of the explicit consistency of decisions with the legal tradition. Dworkin argues that conventionalism neither fits nor justifies our legal practice.

Pragmatism, according to Dworkin, is skeptical about the inherent value of past decisions in providing justification for current decisions. Pragmatism may of course rely on past decisions, not because they are intrinsically valuable, but rather as part of a larger strategy to achieve certain values, such as efficiency and justice. "Use what will work best," pragmatism seems to say. Dworkin is more charitable to it. It is, he says, "more powerful and persuasive . . . than conventionalism and a stronger challenge to law as integrity."⁵² But apparently it still falls short of fitting our legal practice. It fails to explain "judicial practice — the attitudes judges take toward statutes and precedents in hard cases,"⁵³ and furthermore it falsely assumes "that the community believes and accepts the pragmatist explanation of how judges decide cases."⁵⁴

"Law as integrity" is, alas, our only hope. It miraculously combines pragmatism and conventionalism. "Law as integrity,"⁵⁵ he tells us,

49. *Id.*

50. *Id.* at 115.

51. *Id.* at 117.

52. *Id.* at 153.

53. *Id.* at 161.

54. *Id.* Ironically, the same criticism applies to Dworkin's endeavors. Perhaps he falsely assumes that the community accepts the "integrity" explanation of how judges decide cases.

55. For a recent and interesting article on integrity, see McFall, *Integrity*, 98 *ETHICS* 5 (1987).

“denies that statements of law are either the backward-looking factual reports of conventionalism or the forward-looking instrumental programs of legal pragmatism. It insists that legal claims are interpretive judgments and therefore combine backward and forward-looking elements.”⁵⁶ Two criteria guide Hercules, the super-human judge who accepts law as integrity in his enterprise: He must worry about fit, that is what readings would be consistent with the “community’s” legal tradition, and if more than one reading fits the tradition, he must decide which places the “tradition in progress” in the best possible light. Put simply, in law as integrity there must be fit and justification. The former, which is the virtue of conventionalism, provides the essential point of departure, and the latter, the major identifying feature of pragmatism, enables us to invoke and articulate “the principles of personal and political morality”⁵⁷ those decisions presuppose.

Dworkin, therefore, claims two accomplishments. First, to have brought together the virtues of the two most significant Anglo-American theories of law, legal positivism and legal realism. Second, in doing so he claims to have permanently shattered the dichotomy between consistency and the invocation of political morality, for law as integrity does not only worry about consistency and predictability but also endeavors to create “equality among citizens that makes their community more genuine and improves its moral justification for exercising the political power it does.”⁵⁸ Law as integrity thus offers *moral* coherence of the total set of laws in the community, “expressing a coherent conception of justice and fairness.”⁵⁹ With the able assistance of Hercules, Dworkin takes us through the common law, statutes, and the Constitution to show how law as integrity is the best interpretive concept possible.

For Dworkin, the legal empire is not accurately described through legal positivism’s process of discovery, or legal realism’s endeavor of invention. Only if we conceive of our legal culture as a continuous and complex process of interpretation will we understand it fully.⁶⁰

56. LAWS EMPIRE, *supra* note 21, at 225.

57. *Id.* at 96.

58. *Id.*

59. *Id.* at 225.

60. Just to digress here, it is interesting to me that many major western thinkers are fond of talking and thinking in threes. Dworkin talks about the three ways of understanding legal culture. Habermas talks about three levels of rationality relevant to social analysis, and Michael Walzer has lately started talking in terms of “three ways of doing moral philosophy.” M. WALZER, INTERPRETATION AND SOCIAL CRITICISM (1987). Could it be that these highly secularized social thinkers have not yet freed themselves from thinking and talking in religious symbolism — The Trinity? David Sholle has recently called this phenomenon “sedimentation,”

IV. BACK TO REALITY: HAS THE EMPIRE REALLY BEEN FORTIFIED?

A. "Internal" Critique

That Dworkin believes we are "subjects of law's empire" is not the problem. In fact, he is right that legality has permeated all aspects of the life world, subordinating the life world to the system imperatives.⁶¹ In that regard, Dworkin's imagery of an empire is an apt one. But the problem arises when Dworkin gives a detailed account of how the empire conducts its business and how it treats its various inhabitants; whether one should see its functions as imperialistic, as violent and deconstitutive as Bob Cover saw it,⁶² or, as Dworkin sees it, as "the best route to a better future, . . . an expression of how we are united in community . . . [and how] we want to be and the community we aim to have."⁶³

1. Integrity and Community

The notion of community is crucial to Dworkin's whole thesis. For law as integrity to work, the judge and any legal actor must assume that all rights and duties were created "by a single author — the community personified."⁶⁴ Only with such an assumption can one use the two stages of analysis, fit and justification, and make plausible Dworkin's now familiar argument that there is quite often a right answer to complex questions of law and political morality.⁶⁵

The concept of community simultaneously becomes the point of departure and the telos of law as integrity, or as Dworkin puts it, "integrity demands that the public standards of the community be both made and seen."⁶⁶ Thus, if Dworkin's construction of a community is

which means that "the sacred" settles to the bottom, depositing itself "as an embedded ideology," and can be reactivated in an invented secular form. Scholle quotes Stuart Hall as having observed: "[c]ommon sense thinking contains what Gramsci called the traces of ideology 'without an inventory'. Consider, for example, the traces of religious thinking in a world which believes itself to be secular and which, therefore, invents the 'sacred' in secular ideas." Scholle, *Critical Studies*, 5 CRITICAL STUDIES IN MASS COMMUNICATION 16, 31 (1988).

61. See Habermas, *Law as Medium and Law as Institution*, DILEMMAS OF THE LAW IN THE WELFARE STATE (G. Teubner ed. 1986).

62. Cover, *Violence and the World*, 95 YALE L.J. 1601 (1986) ("Legal interpretive acts signal and occasion the imposition of violence upon others."); see also Cover, *Forward; Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

63. LAW'S EMPIRE, *supra* note 21, at 413.

64. *Id.* at 225.

65. R. DWORKIN, *supra* note 22, at 81-130, 279-90; see also Dworkin, *No Right Answer*, 53 N.Y.U. L. REV. 1 (1978).

66. LAW'S EMPIRE, *supra* note 21, at 219.

defective, both as a description of our current existence — after all he sees his task partly to provide a plausible account of the practice and shared understandings in this legal culture — and as a construction of the better, alternative world, then there is little value to the conception of law as integrity. “The best constructive interpretation of the community’s legal practice” will then be either a misreading, or an exercise in futility, for the best constructive reading might not in any way improve the unacceptable features of a society.

Law as integrity is premised on an implausible reading of this society’s history and a contestable construction of its destiny, both of which are based on a defective conception of community. Consider the question of fit, for example. Dworkin tells us that “history matters in law as integrity.”⁶⁷ In what sense? Dworkin’s answer is that we have to deal with the dimension of fit. The problem is that to talk about fit is to have already assumed that there is a “community” whose story is capable of being told by judges as one coherent story. Does that describe our current existence? I think not.

There are two challenges to Dworkin’s assumption here. The first is to argue that it is more accurate to describe this society as one in which interests compete and where legality is one domain in which these competitions take place. I think Tushnet was right when he said: “[w]e cannot assume that people who talk to each other [and happen to inhabit the same physical space] are part of . . . a community merely because they seem to be speaking the same language [both political and ordinary].”⁶⁸ It is ironic that while Dworkin’s purpose is to avoid metaphysical and abstract conceptions of legality, his conception of community is very abstract. It is derived from a contestable assumption of a general consensus of values. If this observation is true, then the telling of a “coherent” story would necessarily be the utterance of fragments of an episode, necessarily privileging one fragment over another.

The second challenge would accept, for the purpose of argument, Dworkin’s assertion that one can in fact talk about “the community personified,” but then challenge the implicit assumption that it does not matter who tells the story, for it will be the same story. In a world of winners and losers, dominators and dominated, the story told by each is likely to be different. Alan Freeman refers to these perspectives as those of the “perpetrator” and the “victim.”⁶⁹ Although a

67. *Id.* at 227.

68. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 826 (1983).

69. Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Laws: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

coherent story might be told about the "community," it will make a difference whether it is the "victim" or the "perpetrator" that tells it. Which "view of the cathedral"⁷⁰ we see depends on who gets to speak. This becomes clearer when one examines integrity as applied to the legislature, for in many ways, what animates legislative endeavors is not a grand notion of a community, but rather the reality of pragmatic interest politics.

2. Integrity and Legislation

For adjudicative integrity, even on a horizontal level, to be of a serious value there has to be a discernable and consistent legislative integrity. Judges cannot discern and utilize a background theory of political morality, one that fuses citizen's moral and political lives, if the legislature simply acts in an *ad hoc* manner. If statutes show an unprincipled journey by the legislature, then it seems rather difficult to require the judiciary to show integrity in interpretation.

Dworkin, of course, claims that there is legislative integrity and that it is part of our political practice.⁷¹ But Dworkin may in fact be collapsing the ideal with the real because of his desire to see legislative integrity when very little of it exists. How could Dworkin claim that integrity is part of our legislative practice? He might argue, as he seems to do, that we and the legislature generally agree that each citizen must be treated equally, and that governmental decisions and institutional arrangements "display equal concern for the fate of all."⁷²

Two serious problems emerge from Dworkin's conception of legislative integrity. First, the rhetoric of "equal concern," although pervasive in the political culture, seems always to give way to pragmatic pluralist interest politics. It is not the principle of equal concern but the power of interest politics that animates United States political developments. Second, even if equality of concern underlies the legislative endeavors of representatives, that principle is so general that its practical controlling power become questionable. Treating people with "respect and equal concern" means different things to Attorney General Edwin Meese and Representative Ron Dellums, or Solicitor General Charles Fried and Benjamin Hooks of the NAACP. The point is that the more specific the general concept becomes the less obvious its controlling power is, because it had to accommodate divergent con-

70. This phrase is taken from Calabresi & Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

71. LAWS EMPIRE, *supra* note 21, at 176.

72. *Id.* at 381.

ceptions of human relationships and associations.⁷³ When there is disagreement about the background political morality at its most practical level, then the notion of integrity, like community itself, becomes a misdescription of current social existence. To be sure, Dworkin has offered a particular notion of equality as the one that should constitute our political culture. In three previously published articles⁷⁴ which he endorses in this book, Dworkin argues that equality should mean equality of resources. However, whatever one thinks of his version of equality as ideal, it is obvious that it does not inform current ordinary politics. Dworkin's integrity thus fails to do what it set out to do, to be the best describer of our legal existence.

His concept of integrity is even less appealing, and in some ways frightening. The idea that legislative endeavors must be "chosen, changed, developed, and interpreted"⁷⁵ to create a coherent conception of fairness and justice is, contrary to what it initially appears to be, a formula that could exclude minorities. Given the serious and profound disagreement over conceptions of justice and fairness, the idea of integrity based on a particular conception of those concepts is likely to deprive minority positions, which might have some chance in the ordinary politics of compromise, any place in the political "landscape." Dworkin's abstract community will be exclusionary rather than inclusive. It assumes the very points of controversy; namely, the existence of an organic community, and then uses it to argue for the legitimacy of many of its claims. Conceived in this manner, Dworkin's endeavor is a negation rather than the necessary condition of individual and communal self-determination.

3. Integrity and Self-Determination

Dworkin's endeavor initially seems democratic and rooted in the notion of self-determination. Under law as integrity, the individual member of the community sees the legal culture replicate the personal integrity with which the individual concerns himself daily. The moral life of the individual becomes constitutive of the legal culture; legislation or interpretation becomes an act of procedural and substantive self-affirmation by the individual or group. Herein lies Dworkin's justification for legitimacy for the legal culture he defends. But this

73. For an example of divergence in the process of concretization, see Fish, *Consequences*, 11 *CRITICAL INQUIRY* 435, 444 (1985).

74. Dworkin, *What is Equality?*, 10 *PHIL. & PUB. AFF.* 185 (1981) (pts. 1 & 2); see also Dworkin, *In Defense of Equality*, 1 *SOC. PHIL. & POL'Y* 24 (1983).

75. *LAW'S EMPIRE*, *supra* note 21, at 214.

apparent democratic inclination is misleading, and the account of legitimacy unpersuasive since individuals and communities are a few steps removed from the self-affirmation in which they are meant to engage. Self-affirmation, Dworkin concedes, is carried on indirectly, for citizens must assume that they are "the authors of the political decisions made by [their] governors"⁷⁶ But how could citizens test the rightness and practicability of this assumption? One way would be to accept Dworkin's integrity as expressing determinate and externally validated communal features or characteristics. But under Dworkin's scheme citizens cannot do that, for integrity is neither determinate nor externally assessable. Dworkin is ambiguous about the right answer thesis, and integrity could be judge or case-specific, thus denying the citizens or other external observers from making a larger assessment of whether they have been corporately represented. Ultimately, integrity can only reveal whether the judge from his own internal point of view has been behaving with integrity. If this interpretation is correct, then integrity becomes the ultimate denial of self determination because it substitutes the judge's integrity for the community's integrity.

Judicial integrity may be said to represent communal integrity when judges disagree about and debate a particular case before they finally announce an opinion of the court. In that judicial disagreement, the communal disagreement, dialogue and conversation might be said to be embodied. But even this concept will not answer the question of legitimacy. Dworkin never even considered the dialogue and conversational aspect of adjudication, at least at the appellate level. His model is Hercules, the all-knowing, deliberative and intensely lonely judge, who never has to confront other judges or worry about dissent or compromise. In this sense Hercules' integrity is not part of the communal project, and does not even describe accurately the process of adjudication in the society Dworkin takes to vindicate law as integrity, the United States. Appellate decisions are usually informed by compromises, and often differ from the decision each judge would have reached had he been writing it free from the "dialogic" demand of appellate adjudication. As Dworkin himself acknowledged, even *Brown* was, in many ways, a compromise.⁷⁷ What is paradoxical about Dworkin's superjudge is that the more super he is made by Dworkin, in terms of skills, learning, and patience, the more he is removed from

76. *Id.* at 189.

77. *Id.* at 29.

what really makes him a judge in the first place — his humanity. Hercules and his judicial projects are unrecognizably removed from our daily experience.

The above observations seem to cast doubt on Dworkin's claim that law as integrity is superior to other theories of law partly because it describes our legal existence more accurately and comprehensively. To be sure, Dworkin does not think of the compromising process in appellate adjudication as extra-legal. He accepts it as appropriate; "no doubt," Dworkin says, "real judges decide most cases in a much less methodical way."⁷⁸ But he admits, as he must, it is not consistent with what law as integrity requires. Without an adequate description and explanation of why such central features of our legal practice cannot be comprehended by a theory of law that claims to describe our legal existence better than other theories, and in fact recommends itself to us partly on this basis, we must conclude that the enterprise is not as useful as it is novel. In addition, given the fact that Dworkin accepts pragmatic judicial compromises as being within the realm of legal discourse, although not consistent with what law as integrity requires, then he must tell us why is it impermissible, and not part of legal discourse, for justices to take into consideration other pragmatic concerns.

B. "External" Critique

1. The Nature of Social Explanation and Criticism

One of the virtues of Dworkin's interpretive theory of law, as he sees it, is that it avoids the universalistic tendency of many current theories. He sees legal positivism to be of such persuasion. Dworkin's point is that universalistic conceptualization of legality might neither be possible nor desirable. Therefore, a useful theory of law must be "interpretive of a particular stage of an historically developing practice . . . addressed to a particular legal culture, generally the culture to which their authors belong."⁷⁹ It is therefore simply a way of making one's legal culture and social life understandable and coherent. "General theories of law, for us," he proclaims, "are general interpretations of our own judicial practice."⁸⁰ Rather than the meta narrative of the Enlightenment, Dworkin appears to embrace local narratives that characterize post-modernism and that resist recourse to an extra-discursive principle.

78. *Id.* at 265.

79. R. DWORKIN, *supra* note 45, at 16.

80. LAWS EMPIRE, *supra* note 21, at 410; *see also* Fiss, *supra* note 11, at 12.

There is merit in Dworkin's going "local." Universalization of social description and social criticism may be undesirable. As Foucault⁸¹ and others have ably taught us, universalization has often been the curse of the dominant group, privileging a particular form of life and cognition as the indispensable truth, and viewing alternative forms of understanding either as poor imitations or abnormal cognitions.

However, Dworkin's hermeneutical localism⁸² is unpersuasive. First, he seems to display false modesty. While he insists on hermeneutical localism on one hand, he is engaged in some form of universalization on the other. Indeed his preference for law as integrity is premised on the central teaching of the Enlightenment, the universal nature of rationality. It seems more than a coincidence that he chose the concept of law as integrity "to show its connection to a parallel idea of personal morality [integrity],"⁸³ a concept that he argues is an indispensable first step to understanding obligation and responsibility. Integrity and rationality are thus assumed to be part of our personhood, or at least we would like them to be. Dworkin says: "We want our neighbors to . . . act in important matters with integrity . . . rather than capriciously or whimsically," and "we assume that . . . other people's act [expresses] a conception of fairness or justice or decency."⁸⁴ This ability for Dworkin is "an important part of our more general ability to treat others with respect, and it is therefore a prerequisite of civilization."⁸⁵ When Dworkin uses the concept of personal integrity as a point of departure for his theory, he cannot escape the fact that his theory aspires to some notion of universality, a theory that claims to have captured aspects of our personhood.

Dworkin could reply that the "person" he is dealing with is a specific social and cultural self, and thus his use of "personal integrity" as an analogy does not violate his commitment to hermeneutical localism. In fact he seems to make this point when he protested Tushnet's characterization of liberalism as a world of "isolated islands

81. See M. FOUCAULT, *THE ARCHEOLOGY OF KNOWLEDGE* (A. Smith trans. 1972). Foucault's work is based, in his own words, on questioning "teleologies and totalizations." *Id.* at 16.

82. Hermeneutical localism, with "interpretation" at the center of its philosophical claim, is becoming widely influential. See, e.g., C. GEERTZ, *THE INTERPRETATION OF CULTURES* (1973); C. GEERTZ, *LOCAL KNOWLEDGE* (1983); see also, M. WALZER, *supra* note 60, at 20 ("Moral argument . . . is interpretive in character, closely resembling the work of a lawyer or judge who struggles to find meaning in a morass of conflicting laws and procedures.").

83. *LAW'S EMPIRE*, *supra* note 21, at 166.

84. *Id.*

85. *Id.*

of individuality," by accusing him of "forgery."⁸⁶ In an earlier article entitled *Liberalism*, Dworkin repeated his contention that "liberalism does not rest on any special theory of personality."⁸⁷ But there are two problems with this line of argument. First, the self so conceived is deeply inconsistent with Dworkin's whole argument of using rights as "trump cards," of seeing right as prior to the good. The Right Thesis is based on the assumption that there are certain characteristics that constitute our personhood, one of which is the capacity to choose rationally. Only then could the argument of skepticism about the good and of the primacy of the right make sense. It appears that Dworkin's conception of "personal integrity" is built on a general conception of personhood similar to the independently choosing individual implied by the Right Thesis. In addition, his ambivalence about the level of abstraction to use in the conception of "justice," one of the four values⁸⁸ that constitute political morality, reflects his indecision about whether to go totally local or have some global criteria. For example, Dworkin refers to "justice" as a concept with "latent global reach" through which we assess and criticize the institutions and practices of others. He then qualifies this observation by stating that the concept is developed "as an interpretation of practices."⁸⁹

A second problem with Dworkin's concept of the social self, if I have gotten his anticipated response correct, is that it raises questions about the possibility of constructing a legal theory analogized to it that is both descriptive and critical or aspirational. Without a notion of the "ideal type" of person and legal theory, knowledge about our institutions could simply be a semblance of our experiences, telling us nothing more than what we already know and not providing a position from which we can be self-reflective about our institutional arrangements. The absence of "ideal types," that is, the reduction of legality to adjudication, has another practical, negative effect on legal analysis: it robs it of important comparative insights. In many ways, our critical capacity in relation to our institutions is helped immeasurably by our ability to compare our institutions to institutions of others. Comparisons are only possible when there are some shared criteria, *albeit* on a general level.

Another disadvantage to Dworkin's hermeneutical localism is its failure to help us to understand a particular legal system in which all

86. *Id.* at 440.

87. *Liberalism*, *supra* note 29, at 142.

88. The other three values are "fairness," "procedural due process," and "integrity."

89. *LAW'S EMPIRE*, *supra* note 21, at 424.

of us have a stake: international law. How should one, who thinks law as integrity is the preferable way of conceptualizing law, understand international law? Only with a great deal of difficulty. H.L.A. Hart, against whom Dworkin initially defined his jurisprudential position, considered international law in relation to his theory. In *The Concept of Law*, Hart argued that although no analogy exists between international and municipal law in terms of form, because the former "lacks the secondary rules of change and adjudication which provide for legislature and courts, [and] also a unifying rule of recognition specifying 'sources' of law and providing general criteria for the identification of its rules,"⁹⁰ there are distinct analogies between the two in terms of function and content. In relation to function, international law differs from morality as does municipal law, and in relation to content one sees a "range of principles, concepts and methods" that are "freely transferable from one to another."⁹¹ Although Hart was not prepared to pronounce "international law" to be law within his scheme of analysis, for, in his view, it was at least ambiguous whether it possessed secondary rules, especially the rule of recognition, he gave us some tools by which we could conceive of legal existence on the international level. Dworkin's "law as integrity" does not, and cannot, give any guidance as to how to conceive of our legal life on the international plane. Dworkin's "community personified," which is the basis of his interpretive enterprise, is too narrow and abstract to be of much use. A community with a shared, consistent, and coherent tradition does not characterize international society. Indeed, one could even say the same about the national societies he deals with, for the "community" he constructs to justify law as integrity is in many ways nothing more than an abstract assumption.

Dworkin's localism is actually paradoxical. While he declines to engage in an exercise of formulating general criteria on a transnational and transhistorical level, he does engage in that exercise on a national level. He is rightly quite suspicious of using the word "us" on a transnational level, but his entire project is dependent on "us" on a national level. And what he fails to recognize is that the "us," even on the local level, is imperialistic and totalizing. It neglects what William James called the "infinitely numerous lot of eaches,"⁹² and thus eliminates, or rather suppresses, heterogeneous plurality. Like the empire he uses to characterize it, Dworkin's legality has that imperialistic impulse; it tries to cure the world of diversity and contradiction.

90. H. HART, *supra* note 23, at 209.

91. *Id.* at 231.

92. W. JAMES, PRAGMATISM 126 (Harvard 1975).

A more troubling aspect of hermeneutical localism is the possibility of critique within its scheme of social construction. If critical interpretation of the existing moral and legal world requires as a precondition that the critic be socially connected, like the member in Fiss' "interpretive community,"⁹³ and if the enterprise of the critique becomes a mere reinvention of the institutional arrangements and practices implied by those institutions, how could it ensure that social critique and theory itself do not become mere semblances of aspects of the social life at a given moment of historical existence? If the critique is so totally dependent and parasitic on a given social or legal practice, how could it prove to be an adequate criticism of that practice? Such understanding might simply give the bureaucratic baptism of legitimacy to a particular social practice, becoming mere cultural and social affirmation. Bernard Williams' question, although intended to convey the opposite message, seems pertinent here: how can we "think the past unjust while knowing that we owe it almost everything we prize?"⁹⁴

Related to the unsatisfactory nature of Dworkin's hermeneutical localism is the distinction he draws between the internal and external perspectives of legal critique. The external critic is the apparently socially unconnected⁹⁵ critic, such as the historian or sociologist, who asks meta questions like the possible influence of judges' class position on the development of doctrines. Or, one might ask an even more meta question: What is the role of the law in the development of the particular social and economic system, like capitalism? Dworkin finds this perspective unhelpful because it is oblivious to the special feature of the law, such as its *argumentative* nature. Questions based on the external perspective, Dworkin claims, will not enable us to dwell on the important question of "why propositions of law can be controversial."⁹⁶

The second perspective, the internal perspective, is concerned with legal practice, the view of those who make claims about the truth of certain propositions. Although Dworkin claims that both perspectives are essential and "each must embrace or take account of the other,"⁹⁷ he chooses the internal perspective, the judge's point of view, in his book.

93. Fiss, *supra* note 11, at 11; see also Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

94. B. WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 221 n.12 (1985).

95. LAWS EMPIRE, *supra* note 21, at 13.

96. *Id.*

97. *Id.* at 13-14.

Given the traditionally central role adjudication is assigned in the development of legality in Anglo-American jurisprudence, it is not surprising that Dworkin chose to adopt the internal, the judge's point of view, in his analysis. In some sense, the adoption of the internal perspective is consistent with Dworkin's argument that useful social criticism must take the social practice it analyzes seriously, and the critic must be an insider. A theory, the argument goes, that attempts to make sense of a particular tradition, must take that tradition seriously. This means that the perspective of the participants of that tradition will have to be its point of departure. Thus for Dworkin, useful interpretation of a tradition must necessarily be based on a participant-priority assumption.

That there is a need to take the claim of a tradition seriously if critique is to accomplish its purpose is uncontroversial. But Dworkin's claim is questionable insofar as it suggests that one can in fact make a valid distinction between external and internal perspectives with the logical possibility of holding one perspective consistently and coherently.

I think the distinction is illusive and that one in fact moves from one perspective to another when one analyzes a particular tradition. It might be that at a given moment one perspective is simply assumed while the other is explicitly made. But to argue that the explicitness or the implicitness of the enterprise is determinative of whether one or the other perspective employed is misleading.

Consider *Regents of the University of California v. Bakke*,⁹⁸ a case on which Dworkin spends some time both in this and his earlier book, *A Matter of Principle*. Taking the internal perspective, Dworkin states that the justices were struggling with whether the fourteenth amendment prohibited discrimination against suspect classifications, or whether it was a general ban on some categories like race, or whether it simply banned *sources* rather than categories. This last theoretical perspective will not prohibit automatic classification based on race, but it will do so when that classification is "rooted in some form of prejudice against one group."⁹⁹ After labeling the decision of the court "some what confused,"¹⁰⁰ Dworkin calls on Hercules to choose which theoretical perspective would be the soundest for the instant case. Hercules chooses the banned source perspective, which would have justified the constitutionality of the Davis program. The question I

98. 438 U.S. 265 (1978).

99. *LAW'S EMPIRE*, *supra* note 21, at 384.

100. *Id.* at 393.

want to explore here is not whether the result of the divided court or the banned source result recommended by Hercules is correct or desirable, although the outcome advocated by Dworkin is preferable. Rather, the question is whether Dworkin is employing only the internal perspective when he analyzes the Court's decision in *Bakke*.

In *Bakke*, as in all other cases, Dworkin, I shall argue, engages in both internal and external perspectives, but the latter is simply assumed as a necessary and unexamined background framework. This unexamined, yet questionable, liberal framework suggests that the role of legality in this country has been to improve, although slowly, the civil rights of blacks; and given the commitment of this country and its institutions to equality and liberty, the road of legality will eventually lead to "the enjoyment by blacks of all rights and privileges of citizenship enjoyed by whites;"¹⁰¹ and that apart from some individual and isolated actors, the society generally is making progress. Indeed, the three alternative forms of interpretation, or domains of discourse, suggested by Dworkin's internal perspective, could only be plausible in a universe that views the role of law and the judiciary as slowly ushering in the rights of the disenfranchised.

An alternative, "external" perspective observes the "progress" since *Brown* and concludes that antidiscrimination law, including adjudication, "has served more to rationalize the continued presence of racial discrimination in our society than it has to solve the problem."¹⁰² Within this perspective, *Bakke* is just another judicial endeavor, as was *Washington v. Davis*,¹⁰³ to rationalize collective racial oppression by denying its very nature, its collective and dispersed aspect. By claiming there is no perpetrator unless individually identified, and by making result largely irrelevant, the Court basically denies the structural dimension of discrimination and consequently rationalizes it as the result of factors other than discrimination.

Now, there is no reason why a legal scholar who takes the "external" perspective will not have simultaneously engaged in an internal perspective. In fact, he necessarily does. The scholar takes a judge's pronouncements and arguments seriously, but then might find the reasoning of less explanatory value given the social condition and

101. See D. BELL, *RACE, RACISM AND AMERICAN LAW* 7-8 (2d ed. 1980).

102. A. Freeman, *Anti-Discrimination Law: A Critical Review*, in *POLITICS OF LAW* 97 (Kairys ed. 1982); see also D. BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987) (Bell movingly narrates the continued problem of racism in this country and how little things seem to have changed since the beginning of the Civil Rights Movement.).

103. 426 U.S. 279 (1976).

dynamic that led to the judicial determinations at issue. Indeed, the distinction between internal and external perspective, while beautiful in its simplicity, and seemingly useful in its analytical value, is misleading. People do employ both perspectives.

The difference between Dworkin and those he accuses of only employing the external perspective is not the lack of internal perspective in the latter's endeavor, but rather because the latter makes their external perspective explicit and Dworkin does not. His external perspective remains background framework, influencing the nature of the internal perspective, but removed from scrutiny.

Even if it were possible to distinguish between the external and internal perspective, it would still be of questionable analytical value. For the very point where the line is drawn that establishes who is "a socially connected critic" is itself a question of politics, and consequently the answer will be a political,¹⁰⁴ not a logical one. But this is the sort of "low politics"¹⁰⁵ Dworkin's integrity was meant to avoid.

2. Integrity and Legitimacy

The emphasis on the internal perspective as the preferable mode of inquiry, and the assertion that proper legal theorizing inevitably leads to the conclusion that law as integrity best describes and justifies our legal existence, are, as I have argued, contestable. But both claims must be seen to attempt to do one thing: they seek to legitimize certain institutional structures as the embodiment of coherence and capable of imposing moral obligation on members of a "community" to abide by and respect the social practices of that "community."

Dworkin is acutely aware that the ultimate value of a legal theory is its ability to justify the exercise of coercive power by the state. He is also aware that traditional liberal justifications are being challenged with increasing intensity and effectiveness. The Lockean social contract model becomes utterly implausible when we realize how consent or voluntarism becomes little more than the absence of migration or staging a *coup d'e tat*. The Rawlsian version of social contract,¹⁰⁶ with its emphasis on abstract universal justice, becomes too thin to support the structure of specific institutions in question, even if one accepts

104. See Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 773 (1982) (similar argument distinguishing law and politics).

105. For a distinction between high and low politics, see Ackerman, *Discovering the Constitution*, 93 YALE L.J. 1013, 1023 & 1049 (1984).

106. J. RAWLS, *A THEORY OF JUSTICE* (1971).

the dubious epistemological and methodological assumptions of the original position under the veil of ignorance.¹⁰⁷

Dworkin wants to ground the legitimacy of liberal institutions on what he sees to be a firmer, less vulnerable ground: the true community. The best defense of political legitimacy, he argues, "is to be found not in the hard terrain of contracts or duties of justice or obligations of fair play that might hold among strangers, where philosophers have hoped to find it, but in the more fertile ground of fraternity, community, and their attendant obligations."¹⁰⁸ This community is one defined by principles, and accepts integrity both in its legal and political dimensions.

At first glance, Dworkin seems to have found a more defensible scheme supplying the necessary legitimacy for the institutions and institutional actions of a group, community, or state. He seems to have removed, or at least tamed, "the antecedent individuation of the subject of cooperation"¹⁰⁹ that has always given liberals some problem in relation to the legitimation of institutions and institutional structures. The question has always been how collective action could be justified within a conceptual framework that views individuals as subjects with varying interests and motivations, and not constituted by a common goal (the good). Dworkin's answer seems to suggest a scheme in which the individual is not radically situated, and is at least partly constituted by the community. If the individual sees his identity, at least partly, to be defined by the community within which he is socially located, then the institutional demand of obligation does not lack legitimacy. Dworkin appears to entertain such individuation when he refers to the community as an association in which there is "shared understanding,"¹¹⁰ where members feel "their fate[s] are linked," there is "fraternal" feeling,¹¹¹ and all feel they are "all in politics together for better or worse."¹¹²

But the above "intersubjective sounding"¹¹³ phrases actually hide the fact that Dworkin's community of principles is not a community

107. For a critique of Rawl's epistemology & methodology, see M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982). See also R. WOLFF, *UNDERSTANDING RAWLS* 129 (1977). For a recent defense of Rawls, see Baker, *Sandel on Rawls*, 133 U. PA. L. REV. 895 (1985).

108. *LAW'S EMPIRE*, *supra* note 21, at 206.

109. M. SANDEL, *supra* note 107, at 149.

110. *LAW'S EMPIRE*, *supra* note 21, at 211.

111. *Id.* at 200.

112. *Id.* at 213.

113. M. SANDEL, *supra* note 107, at 151.

in the strong sense, in which individuals see the association not just as an instrument of a particular goal, but as part of their own identity. Dworkin's community is an intensely individualistic association. The only communal aspect is members' *attitude* of equal concern toward each other, and they suppose that "the group's practice show[s] not only concern but *equal* concern for all members."¹¹⁴ But nothing in the structure within which they interact, or the goals and objectives they define, explains why such an attitude will be fostered and sustained among them. Dworkin's community, despite his protestation, is a psychology of cognition rather than one of being. There is pathology to that cognition, for it denies the role of structure in the development of the cognition.

In addition, because the question of "equal concern" is a matter of the group interpreting its social practice in good faith, and seeing to what extent the practice conforms to that attitude, there is no institutional guarantee to insure that such an honestly held interpretative attitude is not in fact a justification for exclusionary and discriminatory practices against certain members. Relying on an interpretive attitude to ensure a coherent social practice of equal concern, when members of the group have nothing else but a bare community to tie them together, is nothing but an expression of faith for a particular human personality. But Dworkin's liberalism, as he is always eager to tell us, "does not rest on any special theory of personality" or on vulnerable hope. And in any case, any theory of community that leaves some of its associative members, perhaps its majority, institutionally capable of interpreting oppressive practices as equal concern, has no more legitimacy than the abstract and fictitious consent theory Dworkin rightly rejects. Dworkin's interpretive community is not only imperialist domestically, it is frighteningly so internationally. United States intervention in other countries, especially Central America, is always predicated on the assumption that this is a logical extension of American social practice of equal concern "instinct in the standing political arrangement"¹¹⁵ of the community. Dworkin's theory, regardless of his anti-imperialistic intention, will give credence to those in this country who would like to make others conform to this country's story.

True, Dworkin's community insists that "each person is as worthy as any other,"¹¹⁶ but the point is that there is no institutional framework that we can employ as counterfactual to tell us that the

114. *LAW'S EMPIRE*, *supra* note 21, at 200.

115. *Id.* at 213.

116. *Id.*

practice is just, because even justice is local and interpretive in character.¹¹⁷ A community of principle that accepts integrity as its constitutive dimension reveals little more than the apparent interpretive coherence of a certain social practice, and is thus no more legitimate in relation to the losers than the other theories of legitimacy Dworkin rejected.

A just society is not merely one born of the attitude of its members to be just and to treat others equally, nor is it one in which associative practices are principled and coherent. A just society is structured and ordered in a certain way such that justice is a reflection of that structure. As Sandel rightly noted, for a community to be just, and thus legitimately obligating its members to respect its institutions, "justice must be constitutive of its framework," and not simply an attitude of its members. Similarly, for an association to be a community, community must be constitutive of "the shared self-understandings of the participants and embodied in their institutional arrangements,"¹¹⁸ not simply an attitude of its members.

With his assumption of an individual personality and autonomy existing and knowable independent of and prior to the community in which the individual is located,¹¹⁹ Dworkin had no choice but to be agnostic about the common good, which will, in his view, "leave people too little room for leading their own lives."¹²⁰ But the question is how radically situated individuals "leading their lives" constitute a community. Even more importantly, in what sense are those priorly constituted individuals actually free and autonomous, that is, not implicated by the institutions and structures established to pursue certain priorly defined social goals that might or might not converge with the individual's goals? Dworkin's community of principle constituted by integrity neither ensures an autonomous individual nor a genuine community. All it ensures is an interpretive coherence of social life. But not much value should be put on that. In fact, we should be apprehensive about it.

C. *Dworkin and Metaphors*

In this book, Dworkin liberally employs metaphors to describe our relationship with the law.¹²¹ The book starts with the observation that:

117. *Id.* at 73-76, 213, 424 n.20.

118. M. SANDEL, *supra* note 107, at 173.

119. LAWS EMPIRE, *supra* note 21, at 215.

120. *Id.*

121. The concept of metaphor and its appropriation are not new. In the *Poetic's*, Aristotle defined the concept as "giving the thing a name that belongs to something else." THE BASIC

"We live in and by the law."¹²² It proceeds with the following metaphors: "We are subjects of law's empire,"¹²³ and that the "courts are the capitals of law's empire,"¹²⁴ and "the judges are its princes, but not its seers and prophets."¹²⁵ One's initial reaction to the use of metaphors is to think that there is a degree of imprecision in the author's mind, and that imprecision is being solved by the use of metaphors. Metaphors save one from having to offer precise and persuasive explanations.¹²⁶

But that conclusion seems unfair to Dworkin. He has given quite a detailed account of our relationship to legality and how that relationship is transformed. These metaphors may however suggest something important about not only Dworkin's work, but also about most liberal conceptions of legality and our relationship to it. These conceptions reverse the role of the subject and object. When Dworkin proclaims the law "makes us what we are,"¹²⁷ he is simply following a long intellectual tradition in which legality, an object of our creation, assumes the role of the subject. We become legality's objects and products of its deliberation, occupying our social position in virtue of it. This is an ironic inversion of what liberals publicly proclaim to be their point of departure: the active and ever-transforming subject.

Metaphors serve another function in Dworkin's conceptualization of legality, as is the case in all liberal conceptions of legality. The law is seen as if it existed in two or three dimensional form, as an empire rather than as an account of our day-to-day relationships. This conceptualization reifies the law, tells us that the law exists "'out there' in

WORKS OF ARISTOTLE 145b, 7-8 (R. McKeon ed. 1941). Since then, metaphors have been frequently appropriated by various people in various settings, including the legal domain. See Bontekoe, *The Functions of Metaphors*, 20 PHIL. & RHETORIC 200 (1987); Henley, *'Penumbra': The Roots of a Legal Metaphor*, 15 HASTINGS CONST. L.Q. 81 (1987).

122. LAW'S EMPIRE, *supra* note 21, at vii.

123. *Id.*

124. *Id.* at 407.

125. *Id.*

126. Consider, for example, Calabresi's metaphor of a legal "landscape," in G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 99, 160-61 (1982). Calabresi uses the metaphor to describe the contours of legality. The metaphor becomes a substitute for a clear account of what legality actually comprehends. It simultaneously becomes all-encompassing, including statutes, scholarly criticisms, and jury actions, and is unable to guide us as to why we should think that legality comprehends all those activities (e.g., scholarly criticisms and jury actions). *Id.* at 99. Calabresi actually anticipates this criticism, and acknowledges the limit of the metaphor, but his answer ironically gives us more metaphors; he refers to his landscape as "a ragged map." *Id.*

127. LAW'S EMPIRE, *supra* note 21, at vii.

the world of objects,"¹²⁸ and can be thought of and treated as such. Reification of law ultimately becomes reification of our daily relationships.

The metaphor of an empire is also suggestive of the highly centralized and anti-democratic nature of Dworkin's adjudicative enterprise. Like an empire, perhaps a benevolent one, meaning and virtue are imposed from above. As subjects in an empire, citizens in the law's empire must ultimately rest their faith in the integrity and benevolence of judges and philosopher kings. In this regard, Judge Cardozo's observation might be helpful to keep in mind: "Metaphors in law are to be narrowly watched, for starting out as devices to liberate thought, they end often by enslaving it."¹²⁹

V. CONCLUSION

The exchange between Jesus and Pilate, quoted at the beginning of this essay, seems to capture the dialogue a reader of *Law's Empire* would have with its author. Dworkin, in his all-or-nothing devotion to law as integrity, suggests that those that hear his voice, and his alone, know the truth. For Dworkin we have a universe, to use William James' expression, "in many editions, one real one, the infinite folio, or *edition de luxe*, eternally complete, and then the various finite editions, full of false readings, distorted and mutilated in its own way."¹³⁰ The skeptical reader is entitled to paraphrase Pilate and ask: "Do I know the truth apart from your voice?"

Although immensely sophisticated and very elegant, Dworkin's new venture does not carry a new message. Instead, it attempts to give coherence to the liberal message of the last decade, that even though the judicial power is being challenged by the historicist for being insufficiently deferential to the legislature, and by CLS for using wide power to give a degree of institutional and historical inevitability to what are basically a set of preferences, the liberal judge is doing nothing more than *interpreting* a variety of texts. To fend off challenges from both sides and enhance and justify judicial power, liberal scholars in the last decade have borrowed and appropriated the notion of "interpretation" from literary scholars and cultural anthropologists.

With the concept of "text" broadened to encompass a variety of things, and the judge's competence and intellectual subtlety to read

128. See Henley, *supra* note 121, at 82.

129. *Berkey v. Third Ave. Ry.*, 224 N.Y. 84, 94, 155 N.E. 58, 61 (1926), *quoted in* Henley, 'Penumbra': *The Roots of a Legal Metaphor*, 15 HASTINGS CONST. L.Q. 81 (1987).

130. W. JAMES, *supra* note 92, at 124.

and interpret such a text asserted, the liberal seems to have found the proper defense against challenges to judicial power. Adjudication, even when less deferential to the legislature, we are told, is not the imposition of values by judges, but the creation of meaning to our public values embodied in that all-encompassing text. The judge, when engaging in that enterprise, is not acting as an unaccountable autocrat, but as an individual with unique ability and moral sensitivity to define and defend those values.¹³¹

In invoking the concept of interpretation as the soundest method of legal theorizing, and in putting the judge at the center of the enterprise, Dworkin merely does what all liberals, including himself, have been attempting to do in the last decade. They attempt to cast the normative and substantive issues of adjudication into issues of process, and to reassure the uneasy observer that the universe of authority exists for, and indeed mandates, generating certain values, and that our social and political lives are conducted within the domain of coherent principles. The reassurance is unconvincing.

Not only is the reassurance unconvincing in relation to the role and mandate of the judiciary, but also with regard to the coherence and unity of "our" social life. William James' observation of traditional philosophy might be an apt description of Dworkin's endeavor to describe the realities of social life. In *Pragmatism* James wrote: "The world of concrete personal experiences to which the street belongs is multitudinous beyond imagination, tangled, muddy, painful, and perplexed. The world to which your philosophy professor introduces you is simple, clean, and noble. The contradictions in real life [i.e., splintering everyday between blacks and whites, men and women, poor and rich, etc.] are absent from it It is a kind of marble temple shining on a hill."¹³² Despite the claim, Dworkin's attempt is not an account of the actual world. It is, to invoke James again, an "addition built upon it," a "monument of artificiality."¹³³ It is an attempt, to use Dworkin's own words, "to impose order over doctrine, not to discover order in the forces that created it."¹³⁴ The question is, "whose order?"

131. See Fiss, *The Supreme Court, 1978 Term — Forward: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); see also M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* (1982).

132. W. JAMES, *supra* note 92, at 17-18.

133. *Id.* at 18.

134. LAW'S EMPIRE, *supra* note 21, at 273.

If legal theory is to be less imperialistic and status quo-preserving, it should not follow Dworkin's conventional monoism, in which real social contradictions are textually and methodologically cured; rather, it should embrace radical pluralism,¹³⁵ which will acknowledge and encourage simultaneously the provisionality of contexts and the multiple ways through which they can be transformed and arranged.

135. I am developing the notion of radical pluralism in a forthcoming article.

