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Feminist Jurisprudence in a Conventional Context: Is There Room for Feminism in Dworkin's Theory of Interpretive Concepts?

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Abstract

This paper examines Dworkin's interpretive theory of law from a feminist perspective, and asks whether his attempts to accommodate competing political opinions within an interpretive community can successfully encompass feminist concerns as well. It is argued that Dworkin repeatedly underestimates the extent of disagreement regarding the practice of law as a whole, while his requirements of fit, coherence and integrity impose a political agenda on the interpreter. As a consequence, Dworkin's theory is ultimately unable to adequately respond to a feminist critique of law, so that feminist jurisprudence must be seen as falling outside the scope of his interpretive community.

Keywords

Feminist jurisprudence; Law--Interpretation and construction

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FEMINIST JURISPRUDENCE IN A CONVENTIONAL CONTEXT: IS THERE ROOM FOR FEMINISM IN DWORKIN'S THEORY OF INTERPRETIVE CONCEPTS?©

BY LYNNE HANSON*

This paper examines Dworkin's interpretive theory of law from a feminist perspective, and asks whether his attempts to accommodate competing political opinions within an interpretive community can successfully encompass feminist concerns as well. It is argued that Dworkin repeatedly underestimates the extent of disagreement regarding the practice of law as a whole, while his requirements of fit, coherence and integrity impose a political agenda on the interpreter. As a consequence, Dworkin's theory is ultimately unable to adequately respond to a feminist critique of law, so that feminist jurisprudence must be seen as falling outside the scope of his interpretive community.

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I. INTRODUCTION

Ronald Dworkin, one of the most prominent figures in contemporary jurisprudence, is representative of a conventional school of thought grounded in a strong liberal tradition. In his most recent writings, Dworkin has attempted to accommodate the newer, more critical directions of contemporary jurisprudence.¹ Specifically, he makes claims about the ability of the common law to accommodate a wide range of competing political interests and various groups in society. In this paper, I assess Dworkin's success in this endeavour in relation to the demands of feminist jurisprudence. Some feminists argue that the North American legal tradition, by its very nature and in the ordinary course of operation, effects the systematic oppression of women. At issue here is whether Dworkin's theory of an interpretive community can adequately satisfy this kind of feminist critique of the law.

Dworkin's claim to accommodate such controversy is important because, if true, it calls into question the necessity for any separate feminist jurisprudence beyond the bounds of traditional legal theory. If the interests of women are already adequately served within Dworkin's legal theory, then the need for distinctly feminist argument evaporates. The alternative put forward in this paper is that Dworkin's interpretive community cannot encompass feminist concerns because the two are premised on different assumptions regarding the extent of consensus within society. Feminists simply do not share Dworkin's perception of a fundamental agreement in society at some level regarding the validity of law as a practice. As a consequence, feminist theorists have been forced to step outside the interpretive community of law that Dworkin describes, and have chosen instead to formulate their own radical reconceptions of what law ought to be.

It is impossible to point to one particular theory or set of ideas which might be said to be representative of feminist jurisprudence. Feminist legal theory encompasses a broad range of theoretical perspectives, from liberal theories which emphasize women's sameness and equal entitlement in a rights-based system,² to postmodernist

¹ R. Dworkin, "Law as Interpretation" (1982) 60 *Tex. L. Rev.* 527 and R. Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986).

² For example, see H. Lessard, "Relationship, Particularity, and Change: Reflections on *R. v. Morgentaler* and Feminist Approaches to Liberty" (1991) 36 *McGill L.J.* 263.

accounts of law that deny the possibility of any objective criteria or neutral decision making whatsoever.³ As a consequence, I have selected two tenets of feminist jurisprudence which are common denominators in most, if not all, feminist legal theories: that our society systematically oppresses women through the institution of law; and that the methodology of law operates to disguise this inherent gender bias through its reliance on supposedly objective rules and neutral decision making.

One of the most compelling critical accounts of the legal system's inherent bias comes from Catharine MacKinnon, who writes about the inevitable tendency of the law to reinforce a pattern of male dominance in society.⁴ She puts forward an eloquent and persuasive explanation of a legal system which systematically oppresses women by embodying a male norm of behaviour in its laws, procedures and institutional structures. Many of MacKinnon's ideas (sometimes identified as *radical feminism*) are reiterated in the works of legal theorist Ann Scales,⁵ who writes about the ways in which legal institutions effectively exclude women's perspectives. Together, these theories provide a good basis for comparison with Dworkin's ideas, because they present a sweeping radical critique of the same legal community that Dworkin looks to as a means of accommodating such differences of opinion. As such, the works of Scales and MacKinnon indicate why most feminists have chosen to step outside of the interpretive community that Dworkin describes. These feminist authors perceive an underlying dynamic that is so pervasive and inimical to women's interests that attempts such as Dworkin's to accommodate critical accounts of law are not only

³ See generally, Z.R. Eisenstein, *The Female Body and the Law* (Berkeley: University of California Press, 1988), and L.J. Nicholson, ed., *Feminism/Postmodernism* (New York: Routledge, 1990). There are also many important theories of age, race, class and gender within feminist theory. See, for example, A. Lorde, *Sister Outsider* (Trumansburg, N.Y.: The Crossing Press, 1984) and P.J. Williams, *The Alchemy of Race and Rights* (Cambridge, Mass.: Harvard University Press, 1991).

⁴ C.A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987) and C.A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, Mass.: Harvard University Press, 1989).

⁵ A. Scales, "The Emergence of Feminist Jurisprudence: An Essay" (1986) 95 Yale L.J. 1373 [hereinafter "The Emergence of Feminist Jurisprudence"] and A. Scales, "Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?" (1989) 12 Harv. Women's L.J. 25.

ultimately futile, but may also create a dangerous sense of security regarding the law's ability to serve women's interests.⁶

The purpose of this paper then, is to examine Dworkin's thesis of the interpretive community from a feminist perspective, in an effort to determine the ways in which these two theoretical perspectives diverge. This exercise is intended to indicate some points of departure of feminist jurisprudence from conventional legal thought, and also seeks to explain the disagreement which arises about whether Dworkin's theory is capable of accommodating feminist concerns. It is hoped that this discussion of the points of conflict between Dworkin's account of the law and feminist concerns about gender oppression will reveal the fundamental disjunction between the two. My thesis is that Dworkin's theory of "fit" in an interpretive community is simply incapable of representing the sweeping concerns of feminist jurisprudence, as Dworkin fails to grasp the magnitude and implications of a feminist critique of law.

II. DWORKIN'S INTERPRETIVE CONCEPTS

Dworkin develops his theory around the existence of an interpretive community wherein a practice takes on a significant meaning for society. In this community, an "interpretive attitude" may be discerned which assumes that this practice has a value: "that it serves some interest or purpose or enforces some principle—in short, that it has some point—that can be stated independently of just describing the rules that make up the practice."⁷ This interpretive attitude also includes the assumption that the requirements of the practice will change insofar as it is "sensitive to its point."⁸ In other words, certain practices may be distinguished by the special meaning they hold for a society. This meaning is not self-evident but must be constantly interpreted, and it is consequently changing all the time in light of those interpretations: "People now try to impose meaning on the institution

⁶ For more recent discussions of feminism and law, see M.A. Fineman & N.S. Thomadsen, eds, *At the Boundaries of Law: Feminism and Legal Theory* (New York: Routledge, 1991).

⁷ *Law's Empire*, *supra*, note 1 at 47.

⁸ *Ibid.*

—to see it in its best light—and then to restructure it in the light of that meaning.”⁹

Dworkin depicts the decision-making process in law as an interpretive practice wherein judges as interpreters construct the objects of interpretation in accordance with their own views of the law. “Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong.”¹⁰ One important element of this depiction is that the choice of purpose resides with the interpreter; it is not dictated by the text or elicited from the author’s intention. This interpretive approach ostensibly allows for the emergence of different interpretations of the same legal situation.

Dworkin then argues that as an interpretive practice, law can, and in fact does, give rise to substantively different theoretical positions. Judicial decisions are political in the sense that judges will interpret certain practices in light of their own normative or ideological convictions. These differing versions of law are not relativistic in at least two important senses. First, the interpretation will be constrained by the requirement that it fits with the practice as a whole. Second, the search for the best reading of a text demands that the interpreter take account of the actual words and strive to make that text serve the coherence and integrity of the object of interpretation. Interpreters cannot make of texts whatever they want, but rather, must choose an interpretation which in their view makes of the practice “the best that it can be.”

This brief introduction to Dworkin’s interpretive concept gives us an idea of its project. Dworkin acknowledges the active role that judges play in interpreting or creating the law, and then describes how this act of interpretation is constrained in a manner which preserves and enhances the integrity of the law. In this endeavour, Dworkin seeks a middle ground between a strict positivist approach and the hopeless relativism of legal realism. The question then becomes how does the law simultaneously assist us in finding one best interpretation while permitting the interplay of conflicting normative positions?

Dworkin addresses this problem in an empirical fashion by tracing the stages of development in an interpretive community:

⁹ *Ibid.*

¹⁰ *Ibid.* at 52.

We should first study a variety of activities in which people assume that they have good reasons for what they say, which they assume hold generally and not just from one or another individual point of view. We can then judge what standards people accept in practice for thinking that they have reasons of that kind.¹¹

Dworkin thus argues backwards in time from the fact of the current existence of an interpretive community to the presupposition of some prior consensus upon which that community was able to develop. He calls this initial stage the “preinterpretive” stage. This is the point at which “the rules and standards taken to provide the tentative content of the practice are identified.”¹² It provides the interpreter with basic assumptions which are necessary to determine what counts as part of the practice. Dworkin concedes that the necessary level of prior agreement may be quite high:

But a very great degree of consensus is needed—perhaps an interpretive community is usefully defined as requiring consensus at this stage—if the interpretive attitude is to be fruitful, and we may therefore abstract from this stage in our analysis by presupposing that the classifications it yields are treated as given in day-to-day reflection and argument.¹³

Dworkin assumes that there must be some prior consensus about what the law is before an interpretive community can develop. If we have an interpretive community, then we must have agreed at some stage about what the practice to be interpreted is about.

The preinterpretive stage is followed by the interpretive stage wherein the interpreter settles on a general justification as to why the practice is worth pursuing. This justification will vary according to the interpreter’s normative beliefs, but it must fit the practice well enough that it does not demand a new practice; rather, it should seek to make the current practice the best that it can be.

The third and final stage is a postinterpretive one which is characterized by reform. It involves adjusting the requirements of a practice according to the demands of the justification established at the prior interpretive stage. The process is self-referential insofar as the justification emerges out of a practice and in turn informs and constrains the development of that same practice. In sum, Dworkin characterizes

¹¹ “Law as Interpretation,” *supra*, note 1 at 535.

¹² *Law’s Empire*, *supra*, note 1 at 65-66.

¹³ *Ibid.* at 66.

the law as an interpretive practice which is built on very general agreement as to what that practice is about. Both empirical and theoretical disagreement may then occur as part of that practice without disrupting the institution as a whole.

III. FEMINISM WITHIN THE INTERPRETIVE COMMUNITY

What are the implications of Dworkin's thesis for feminism? At first glance, he appears to accommodate feminist interests via the acceptance of political opinions as a legitimate part of interpretation. By writing politics into the script at a later point in the analysis, Dworkin pre-empts numerous substantive objections to his prior theory of an interpretive community. In this reading of Dworkin, feminism may be viewed as a political theory which will inform any interpretation of the law. As such, feminism will inevitably give rise to interpretations which differ substantively from conservative or utilitarian versions of law. The choice among these interpretations should then be determined according to which interpretation makes of law the best that it can be.

In order for a feminist critique to fit into Dworkin's analysis in this way, certain assumptions must be made about the character of that critique. First, it must be assumed that feminists share the interpretive attitude which requires that they view the practice of law as having value. A corollary of this assumption would be that any feminist interpretation must have a general justification as to why that practice is worth pursuing. Second, it must be assumed that the feminist viewpoint is included in the consensus at the preinterpretive stage. A third assumption is that this feminist interpretation has a purpose which will seek to show the practice of law in its best light. Finally, we must assume that the resulting interpretation of the law will not be so controversial that it disrupts the practice of law as it now stands.

A. The Systematic Oppression of Women

How well do these assumptions accord with feminist theories of law? The task is to ascertain where our selected tenets of feminist jurisprudence fit into Dworkin's scheme, if at all, and the kinds of challenges they present for his thesis. Right from the outset, feminist

claims regarding the law's systematic oppression of women present problems for the inclusion of feminist politics in Dworkin's interpretive community. Their claims appear to be a fundamental criticism of the practice of law as a whole which may not accord with the proper interpretive attitude as outlined by Dworkin. Specifically, it is debatable whether a feminist who challenges the *maleness* of law may be said to be presenting a general justification as to why the law is a practice worth pursuing. Are feminist efforts in fact directed towards making of law the best that it can be? Alternatively, is theirs a more revolutionary project of replacing the existing legal edifice with something better?

Catharine MacKinnon's critique arguably does not leave much room for justification of the law as an interpretive practice. An important theme in her work is that a central underlying purpose of the law is the oppression of women. Not only is the law instrumental in reinforcing male values, it also has its own interest in perpetuating discrimination on the basis of gender. If this is true, then feminism departs from a Dworkinian analysis at the very first step. Feminist theory does not assume that the law has value, nor does it try to justify the law, but rather is in necessary and perpetual conflict with the practice of law.

Dworkin characterizes this kind of revolutionary critique of the law as "global internal scepticism." In the realm of courtesy, for example, a global internal sceptic would conclude that "the practices of courtesy, root and branch, serve no good purpose, or, even worse, that they serve a malign one."¹⁴ Dworkin acknowledges that this view, if true, threatens his own enterprise. His only response to the claim that all conventional interpretations of law are morally wrong is that this argument seems implausible. It seems that Dworkin cannot comprehend how any sceptic could actually conclude that law serves some malign purpose such as the systematic oppression of women. Yet many feminists do make that claim. This lack of understanding between the two schools of thought suggests a fundamental rift not anticipated by Dworkin. To the extent that such a rift exists, feminist jurisprudence stands outside of Dworkin's theory of interpretive concepts and cannot be included in his analysis at a later stage as a competing political opinion.

¹⁴ *Ibid.* at 79.

A more moderate feminist position on this issue stops short of concluding that the actual purpose of the law is the oppression of women. These theorists instead confine themselves to observing the ways in which the law in fact continues to discriminate against women in a systematic fashion. This view leaves open the possibility that the practice of law is retrievable or extricable from its historical role in preserving patriarchy. As such, it more closely resembles an interpretation of law which seeks to make that practice the best that it can be.

Ann Scales builds her theory on many of MacKinnon's observations of gender bias in the law, but she goes on to argue that the practice of law should be rehabilitated rather than abandoned. To do so, Scales presents a radically different conception of the law as a practice which ought to promote societal values rather than attempt to develop a discrete, abstract, immutable body of rules: "Law is, after all, a social tool. It is only extrinsically important. Its actual value depends upon its success in promoting that which is intrinsically valuable."¹⁵ Scales argues that the law has been diverted from this true purpose by a misguided commitment to objectivity. She then concludes that feminism provides the law with a much-needed theory of differentiation: "Feminism brings law back to its purpose—to decide the moral crux of the matter in real human situations."¹⁶

It is interesting to note how well Dworkin's interpretive attitude fits with the language used by Scales. She repeatedly refers to the purpose of law and those factors which she regards as important to the practice of law. One could view Scales' theory as an interpretation of the law with its own particular justification for that practice. This interpretation shares the interpretive attitude but diverges from traditional jurisprudence in its radically different conception of law. Dworkin anticipates such differences in his theory by acknowledging that interpretation in law is essentially political and that "there will be inevitable controversy, even among contemporaries, over the exact dimensions of the practice they all interpret, and still more controversy about the best justification of that practice."¹⁷

¹⁵ "The Emergence of Feminist Jurisprudence," *supra*, note 5 at 1380.

¹⁶ *Ibid.* at 1387.

¹⁷ *Law's Empire*, *supra*, note 1 at 67.

However, these parallels between Dworkin and Scales are misleading, for it is doubtful that Scales herself would accept the place accorded to feminism within Dworkin's interpretive community. Is this feminist critique a political opinion within the interpretive community, or does it stand outside of Dworkin's theory as a different kind of jurisprudence? Dworkin does seem to capture some superficial sense of the ways in which these critics or interpreters disagree about the law. Our inquiry must then turn to the sorts of disagreements contemplated by Dworkin, to see whether his theory can incorporate the disagreement expressed in feminist jurisprudence. It will be argued here that the interpretive community does not encompass those disagreements because it is based on an assumption that feminists do not share—that is, the assumed existence of some general agreement in society about the nature of abstract concepts of law.

B. *Preinterpretive Consensus*

The fact that consensus is a necessary precondition for the existence of an interpretive community should effectively limit the kinds of disagreement which might arise. That is, the assumption is that feminist criticisms will not present a truly radical challenge to the law if they are framed within a community based on consensus. Dworkin acknowledges that there must be this kind of agreement at the preinterpretive stage.

Is this consensus a reality for feminist legal theorists? Dworkin might argue that it is, insofar as feminist and other legal theorists all share some broad understanding as to what the law is—for example, he holds that everybody agrees that *justice* is not a theory of art. It is indeed hard to refute Dworkin's proposition at the most general level, but not so impossible as one might think. To begin with, a feminist theory might successfully argue that, by definition, the interpretive community excludes the interests of women, because it is based on a notion of consensus which is strictly male. In other words, Dworkin's assumption of a consensus at some prior preinterpretive stage does not guarantee that we have a true consensus now, because women have only recently gained entry to the interpretive community of law. Dworkin states: "For example, at a certain stage in the development of the practice, everyone agrees that courtesy, described most abstractly, is a matter of

respect.”¹⁸ Who “everyone” is makes a difference here, especially if it excludes those who might have a different understanding of courtesy.

Ann Scales’s understanding of what law is may well diverge in important respects from just the sort of consensus that Dworkin envisages. She regards the law in an instrumental fashion, as a practice which does not have meaning in itself, but must instead justify its own existence by serving concrete social goals. For Scales then, the law is only a vehicle for politics, and the latter must take primacy over the former. If this view of what the law is differs sufficiently from the basic agreement necessary for an interpretive community to exist, then this feminist theory presents a kind of disagreement which cannot be incorporated into Dworkin’s analysis. Even to the extent that there is *de facto* agreement, feminists must reject the notion of some prior consensus if that consensus did not actually include the views of women.

C. *Concept and Conception*

Dworkin defends his theory of preinterpretive consensus by stressing that it only exists at the most general, abstract level. He argues that this agreement is simply that which is necessary to ensure an understanding, so that we are actually arguing about the same things. He thus qualifies this requirement for consensus by noting that it is uncontroversial; “[f]or example, at a certain stage in the development of the practice, everyone agrees that courtesy, described most abstractly, is a matter of respect.”¹⁹ By this Dworkin means that this consensus consists of agreement on the most general understanding of a concept, such as the example of a generally agreed notion that courtesy is a matter of respect. As such, respect is a concept of courtesy upon which competing conceptions will develop as to how that concept is best served or understood. We all agree on the general concepts, but we will develop different conceptions of it according to our own interpretations. In sum, this distinction between concept and conception serves to account for disagreement within an interpretive community.

Feminist legal theorists are highly critical of analysis which relies heavily on abstract generalizations. They are sceptical of the extent to

¹⁸ *Ibid.* at 70.

¹⁹ *Ibid.*

which such abstractions can ever give proper expression to women's interests which tend to be concrete, particular, diverse and relational. They call into question both the utility and accuracy of abstraction—either it is in danger of misrepresenting the realities on which it is based, or it is simply incapable of providing any valuable information on the phenomenon it seeks to describe.

Dworkin himself concedes that a concept may be so abstract that its usefulness is limited, especially in attempts to pin down notions of justice:

[Political philosophers] cannot develop semantic theories that provide rules for “justice” like the rules we contemplated for “book.” They can, however, try to capture the plateau from which arguments about justice largely proceed, and try to describe this in some abstract proposition taken to define the “concept” of justice for their community, so that arguments over justice can be understood as arguments about the best conception of that concept. Our own philosophers of justice rarely attempt this, for it is difficult to find a statement of the concept at once sufficiently abstract to be uncontroversial among us and sufficiently concrete to be useful. Our controversies about justice are too rich, and too many different kinds of theories are now in the field.²⁰

This observation accords with feminist concerns to the extent that Dworkin recognizes that abstract generalizations about the concept of justice may be impossible because our controversies are too “rich.” However, he gets himself into potential difficulty insofar as the unifying capabilities of such abstractions are lost in the recognition of controversy surrounding them. If we cannot give expression to such concepts of law because nobody agrees on what they are, then perhaps no such unified concepts exist at all. One feminist position here might be that these abstractions are in fact illusory because they are incapable of capturing diversity. In other words, a concept like “courtesy” may not exist in any true sense apart from the acts it encompasses where there is sufficiently broad disagreement about what courtesy actually is. If so, feminists would only recognize conceptions, and would do away with Dworkin's concepts altogether.

In conclusion, Dworkin's concepts of law evince a reliance on generalized abstraction as a means of transcending controversy about terms like justice. He is reluctant to say that philosophers can describe a concept of justice, because such description would effectively constrain possibilities for disagreement. Instead, Dworkin uses the euphemism of

²⁰ *Ibid.* at 74.

“capturing a plateau” to avoid having to commit himself in this way. The suggestion here is that Dworkin does in fact believe that philosophers can intuit some actual meaning of the term “justice,” even if they cannot describe it. He thereby posits some agreement which operates as a kind of universal standard upon which concepts may be judged. This stands in direct opposition to the feminist argument that no such universal criteria or concepts actually exist: “Abstract universality is ideology, pure and simple ... Feminist analysis begins with the principle that objective reality is a myth.”²¹

IV. OBJECTIVITY AND GENDER BIAS

One specific tenet of feminist jurisprudence which is particularly relevant to Dworkin’s theory is the idea that the systematic oppression of women is perpetuated by a characterization of legal rules as objective or neutral. This argument focuses on the utility of objective standards in disguising the inherently political or ideological content of the law. Such value-laden law is difficult to challenge on normative grounds because it is not aware of its own perspective. Ann Scales calls this “the tyranny of objectivity.”²² The result is a supposedly neutral law which in fact embodies a covert male ethos. In this context, objectivity is rejected by feminists because it is a chimeric and dangerously misleading concept, making gender bias in law notoriously difficult to identify and expose.

This critique of objectivity is pertinent to Dworkin’s theory of interpretive concepts to the extent that these concepts are founded on some objective criteria for selection among competing interpretations. Dworkin himself denies that his theory of interpretive concepts is objective in that interpretations cannot be demonstrated to be true or false. Instead, Dworkin describes his own theory as subjective because it depends on the interpreter’s choice of interpretation. He stresses, however, that the attitude taken by the interpreters themselves seems to be more objective: “[Interpreters] think the interpretations they adopt are better than, not merely different from, those they reject.”²³ Dworkin carefully avoids asserting that there is one right answer—that one

²¹ “The Emergence of Feminist Jurisprudence,” *supra*, note 5 at 1378.

²² *Ibid.* at 1376.

²³ *Law’s Empire*, *supra*, note 1 at 76.

interpretation may be said to be objectively better than another. He tries to leave the question open, allowing for the mere possibility of an objective truth, which should be sufficient for the interpreter's purpose:

Objectivity is another matter. It is an open question, I think, whether the main judgments we make about art can properly be said to be true or false, valid or invalid ... Of course, no important aesthetic claim can be "demonstrated" to be true or false ... but it does not follow that no normative theory about art is better than any other, nor that one theory cannot be the best that has so far been produced.²⁴

By implication, Dworkin's position is a pragmatic acceptance of the possibility of one right answer in the absence of evidence to the contrary. At the same time, he avoids the conclusion that this is an objective standard. Dworkin would seem to prefer to leave the debate over objectivity behind:

There is no obvious reason in the account I gave of legal interpretation to doubt that one interpretation of law can be better than another and that one can be best of all ... we would do well, in considering these general issues, not to begin with any fixed ideas about the necessary or sufficient conditions of objectivity ... In the meantime, we can sensibly aim to develop various levels of a conception of law for ourselves, to find the interpretation of a complex and dramatically important practice which seems to us at once the right kind of interpretation for law and right as that kind of interpretation.²⁵

V. OBJECTIVE CONSTRAINTS ON FEMINIST DISAGREEMENT

In this rather tortuous approach to objectivity, Dworkin leaves the door open for reliance on objective standards within his interpretive community. As such, his theory is susceptible to feminist arguments about the specious quality of these objective criteria. Conversely, the interpretive community will not be able to accommodate feminist challenges to the law if that community has its own political agenda which is not compatible with feminist concerns. Dworkin's interpretive practice may effectively constrain disagreement and exert an ideological hegemony through its requirement of fit and the homogenizing purpose of making law the best that it can be.

²⁴ "Law as Interpretation," *supra*, note 1 at 535.

²⁵ *Ibid.* at 546.

A. *The Requirement of Fit*

Dworkin's theory of interpretive concepts imposes an important constraint on the interpreter; that is, the requirement that an interpretation fits with the prior law to some extent. "A judge's duty is to interpret the legal history he finds, not to invent a better history. The dimension of fit will provide some boundaries."²⁶ In other words, the interpreter is not completely free to construct any interpretation of that practice; "[h]e must interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own."²⁷ In this way, the history or previous practice of law exerts an independent influence on any interpretation of that practice.

Fit thus emerges as a second kind of conviction (following the preinterpretive consensus) which is necessary to the interpretive attitude. This conviction about the necessity of fit may vary somewhat between interpreters, but this variation must not be too great, and such convictions must stand independently from the interpreter's political opinions. They are formal constraints *vis-à-vis* substantive views of what the law should be:

But we have already seen ... two different dimensions along which any interpretation can be tested: the "formal" dimension, which asks how far the interpretation fits and integrates the text so far completed, and the "substantive" dimension, which considers the soundness of the view about what makes a novel good on which the interpretation relies.²⁸

Do feminists have such a conviction that their theories of law must fit the current practice well enough that it provides a justification for it? Our prior discussion of feminism as a theory of the systematic oppression of women suggests that this is not the case. Scales seems quite prepared to abandon the practice of law if it fails to meet social goals, as evidenced in her instrumental view of law as being "only extrinsically important." A more important feminist objection to the notion of fit arises in the context of our current discussion of objectivity. The problem here is that fit, as informed by notions of integrity or

²⁶ *Ibid.* at 544.

²⁷ *Ibid.* at 543.

²⁸ *Ibid.* at 541 n. 6.

coherence, effectively operates as an objective criterion for what sort of interpretation is best. It thus elevates history to a normative status as something to be valued in itself.

There is no clear reason why feminists should accept this assertion of the *prima facie* value of historical consistency, and feminist legal theorists may in fact have good reason for seeking to disrupt that tradition. If gender bias is well entrenched in the body of the common law, then a feminist theory must by definition seek to displace the *status quo* to some extent. Marsha Hanen discusses this element of Dworkin's theory in her article on "Feminism, Objectivity and Legal Truth":

But even if we grant the "right answer" thesis, the question that leaps to mind is whether these existing conceptions of settled law and political morality are as they should be. To the extent that they are not, Dworkin's right answer may well be a morally incorrect one. The emphasis on history, on entrenchment in the legal system, is thus troubling, not least because the law has not historically always treated women and minorities the way we would wish. Dworkin, of course, thinks that he can give arguments within the legal system for the morally correct outcomes, but whether he is right about this is at least controversial.²⁹

On the basis of the foregoing analysis, the Dworkinian requirement of fit must be rejected by feminist legal theorists because it stands as an example of a supposedly neutral criterion which does not comprehend its own perspectivity—namely, the gender-biased perspective which is inherent in the *status quo*. Once again, feminist jurisprudence departs from a Dworkinian analysis on the basis of differing assumptions—here, regarding the relative value of consistency in the current practice of law.

B. *The Best That It Can Be*

Disagreement over the utility of a requirement of fit illuminates a central point of departure from a Dworkinian analysis in feminist jurisprudence—their differing conceptions of the purpose of making the practice of law the best that it can be. Earlier, it was asserted that Scales seeks to justify the practice of law according to her own normative judgments about what social goals the law ought to pursue. However, a review of the assumptions which must buttress an interpretive attitude in

²⁹ M.P. Hanen, "Feminism, Objectivity and Legal Truth" in L. Code, S. Mullett, & C. Overall, eds, *Feminist Perspectives: Philosophical Essays on Method and Morals* (Toronto: University of Toronto Press, 1988) 29 at 41.

Dworkin's scheme demonstrated a fundamental difference; feminist jurisprudence falls outside the purview of the interpretive community insofar as it rejects the assumption of any unifying concepts or general agreement. The result is an attempt to make law the best that it can be which is unconstrained by shared preinterpretive boundaries or a commitment to the requirement of fit.

In the end, Dworkin's efforts to allow some latitude in interpretation are undermined by the restrictions he imposes on the scope of permissible disagreements. He thus arrives at a point where there is a "right answer"; one single interpretation will emerge as the best in terms of its fit with the practice of law as a whole. The purpose of making the law the best that it can be thus ceases to be open-ended, and instead operates as an objective standard upon which to judge competing conceptions.

We have yet to establish where feminist theories are situated on the continuum between objectivity and relativism, but it is clear that there is a general mistrust of assertions of objectivity in the law. This mistrust is apparent in Scales' comment that "the narcotic influence which objectivity has increasingly exerted over our minds makes us ever less alert to the mythic structure around us."³⁰ Following from this is a large degree of scepticism as to whether there can ever be one right answer or one best interpretation. As Hanen observes, this scepticism is both plausible and appealing.

C. *External Scepticism*

Dworkin labels this charge that there is in fact no single right answer "external scepticism." He characterizes it as a metaphysical argument about "the philosophical standing or classification" of truth claims. The external sceptic insists that any such claims "are not descriptions that can be proved or tested like physics."³¹ Dworkin refutes this criticism by arguing that his own theory does not claim to be provable in any scientific manner. Interpretive claims should be understood as moral rather than metaphysical claims, and their objective cast is intended only to qualify the kind of belief held:

³⁰ "The Emergence of Feminist Jurisprudence," *supra*, note 5 at 1379.

³¹ *Law's Empire*, *supra*, note 1 at 79-80.

We use the language of objectivity, not to give our ordinary moral or interpretive claims a bizarre metaphysical base, but to repeat them, perhaps in a more precise way, to emphasize or qualify their content ... We also use the language of objectivity to distinguish between claims meant to hold only for persons with particular beliefs or connections or needs or interests (perhaps only for the speaker) and those meant to hold impersonally for everyone.³²

Dworkin then argues that the external sceptic's critique is misplaced because it attacks claims that the interpreter does not make; furthermore, that critique is dishonest insofar as it relies on the weight of metaphysical arguments to attack what are essentially moral claims.

The feminist critique of objectivity stands, however, *vis-à-vis* Dworkin's theory. A feminist assertion that there are no right answers does not confine itself to claims which must be proven to be true; it also addresses those moral assertions which do not claim scientific status but are simply meant to hold impersonally for everyone. In other words, it does not matter that Dworkin's interpreters themselves do not view their claims as enjoying some metaphysical status. The very fact that they lay claim to the universality of their moral views is in itself sufficient to grant them this metaphysical status. The distinction between moral and metaphysical breaks down as soon as a moral claim transcends the view of the subject, being elevated to the metalevel status of being true for everyone.

Leaving aside the question of whether feminism has its own transcendent moral agenda, it is possible to conclude that the external scepticism articulated in feminist legal theory presents problems for the use of interpretive concepts. This does not mean that feminist jurisprudence is therefore more defensible or plausible than a Dworkinian analysis. The point to be made is simply that there is a genuine disagreement here which is not contemplated within the interpretive community. Dworkin's theory thus fails to recognize the validity of the contention that there may not be any right answers.

VI. CONCLUSIONS

From the foregoing discussion, we may conclude that feminist jurisprudence departs from Dworkin's theory of interpretive concepts at a very early stage in the analysis. These two perspectives offer radically

³² *Ibid.* at 81.

different accounts of the place of law in society; Dworkin is involved in the traditional endeavour of justifying the existing practice of law, while feminists are busy trying to replace it with something new. This accounts for the inability of Dworkin's theory to accommodate a controversy concerning the legitimacy of the interpretive community itself and the practice of law as a whole. In his efforts to incorporate political opinions, Dworkin repeatedly underestimates the extent of that disagreement.

The kind of analysis which Dworkin presents is also threatening to feminist jurisprudence in precisely the manner anticipated in our discussion of objectivity in the law. By subjecting political opinions to the objective or external requirement of fit, Dworkin actually imposes a political agenda upon the interpreter. He allows that the *status quo* may be challenged from within by new interpretations, but fails to recognize the operant power dynamics which militate against such change. These new interpreters face the nearly impossible task of persuading the existing legal edifice that it ought to change, while they are confined to the tools of language, logic and argument developed within the practice of law for the purpose of justifying its existence. Not surprisingly, then, some feminists have instead chosen to step outside of the interpretive community. Such constraints have necessitated a departure from Dworkin's standard criteria of integrity, coherence and consistency at every turn, so that feminist jurisprudence starts to look like it is not about the law at all.

