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Law's Empire

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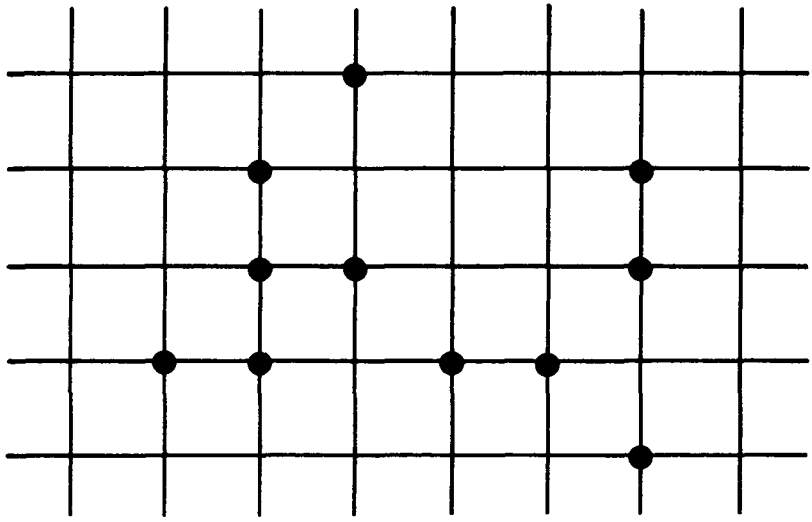
BOOK REVIEW

LAW'S EMPIRE. By Ronald Dworkin. Cambridge Massachusetts: Belknap Press 1986, 470 Pages.

*Reviewed by Jeremy M. Miller**

When I first was exposed to Ronald Dworkin I was attending a Jurisprudence Seminar at Yale Law School. My professor drew what he labeled the famous Dworkin grid:



The lineal points of intersection are representative of existing and relevant case precedent. The vast areas of open space indicate where no case rule has given direct guidance to the particular legal query.

Professor Dworkin, however, unlike the then prevailing "positivist" position espoused by his mentor H.L.A. Hart,[1] explained

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1. *See* H.L.A. HART, THE CONCEPT OF LAW (1961).

that judges deciding cases truly were not allowed unmitigated discretion in filling these gaps. Instead, they were bound by "principles." Among the principles expressed by Dworkin were: not allowing one to profit by his own wrongs, equal treatment of society's members, and fairness.[2]

In his latest book Professor Dworkin has refined and re-expressed his statement of the law—which is actually a vision for the law. Where his earlier work seemed satisfied to prove there were such creatures as ever-valid principles, and where more recent work focused on the viability of principles in day-to-day law, e.g., that one right answer to hard legal questions like "affirmative action" did exist, Professor Dworkin has taken his boldest step in this book. In typical Dworkin manner, the approach is as incomplete as it is illuminating.

In beginning his quest for a radical "new" view of law, Dworkin states an obvious underlying tenet. Law is not mechanically self-applying, but instead predominantly relies on *interpretation.*[3] Of course, once law is seen as primarily an interpretive endeavor, the positivistic attitudes of "strict constructionism" and "mechanical" judicial reasoning (e.g., that judges simply and only should follow *stare decisis*) must be dismissed. If law is not self-applying, if law requires constructive and substantial interpretation to "live" in the system, then an emphasis on written rules and history—and a de-emphasis of the judicial function—is misplaced.[4]

Once it is conceded that law is based and should be based on constructive interpretation, the next logical query becomes, what if anything should that interpretation be based upon? Perhaps responding to general criticism aimed at such "natural law"[5] theories, Dworkin has attempted a summary exposition of the interpretive principles.

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2. *See generally* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

3. R. DWORKIN, LAW'S EMPIRE 45-73 (1986) [hereinafter LAW'S EMPIRE].

4. *Id.* at 355-69.

5. Natural law is a traditional school of legal philosophy holding there to be certain ever-valid, universal, moral principles; discovered by human reason and based in attributes of the natural world and psyche of man. *See, e.g.,* T. AQUINAS, *Summa Theologica* in II THE BASIC WRITINGS OF SAINT THOMAS AQUINAS (A. Regis ed. 1945). Professor Dworkin's philosophy has always borne a striking resemblance to natural law theory. However, since his theory does not impute his principles to be attributes of the real world—but instead, constructs—he has taken, and continues to take, great pains to dissociate himself from traditional natural law. *See, e.g.,* LAW'S EMPIRE, *supra* note 3, at 35-36.

However, the exposition is not what one would have expected, and perhaps is not particularly helpful. "Integrity" is the guiding juridical light, the goal and underlying attitude of the growth of the law.[6] Integrity includes such notions as justice, fairness, and procedural due process.[7] By justice is meant a moral social order. By fairness is meant a concern for the plight of the individual. By procedural due process is meant a concern for maximizing equality among society's citizens. Integrity encompasses these values, but above all, demands there be consistency to society's moral fabric. The judge, in the process of decision, should take an attitude typified foremost by integrity and its above stated values.

And that, it turns out, is the heart of this matter. In a manner less clandestine than any of his previous writing (although the style continues to be overly academic and abstruse) Professor Dworkin argues for a moral standpoint, a moral attitude to law. In essence, he tells us that the "attitude" of the judge is everything, for it is from this attitude that all decisions manifest. A concern for the result (justice), for the individual (fairness), and most importantly for a self-consistent dynamic framework for society to live (integrity) characterizes the empire of law—which, as such, is if not all-inclusive, then certainly far-reaching.[8]

However, when the present United States Supreme Court reaches a decision by weighing the public interest versus the private interest in a reasoned and good faith manner, I cannot perceive how it materially differs from what Dworkin recommends. The "public interest" is his justice. The "private interest" is his fairness, and their attitude of reason and good faith—the perennial judicial attitude—is his integrity. Yet, *Terry v. Ohio*[9] and its progeny are not profound law—or at least not so profound as to require an erudite jurisprudential philosophy.

Professor Dworkin, like the fabled flawed knight, Don Quixote, is a moralist. I salute him for that and for making this long-awaited admission. However, when all is said and done, I do not believe he has said much more than, be moral in your legal decisions, keep them principled, consistent to the goals of the past, and

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6. LAW'S EMPIRE, *supra* note 3, at 178, 411.

7. *Id.* at 73, 164-67, 225.

8. *Id.* at vii.

9. Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk does not violate the fourth amendment when there is reasonable suspicion that the individual stopped is engaged in criminal activity, because the public interest outweighs the individual interest).

with an eye to the goals of the future.

Further, when specific guidance is required, there is little available. Although Dworkin expresses an unproven need for a redistribution of society's wealth so as to maximize "equality"[10] and also expresses a concern for governmental neutrality regarding matters of belief,[11] we are left with merely an attitude.[12] The problem with a principled moral perspective is teaching it to others. I do not believe Professor Dworkin will enlist followers because of this book. Law, as such, is not a legacy, certainly not an empire.

10. LAW'S EMPIRE, *supra* note 3, at 296-301.
11. *Id.*
12. *Id.* at 413.