

REVIEW

The Sustained Dworkin

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Law's Empire. RONALD DWORKIN. Harvard University Press, Cambridge, Mass., 1986. Pp. x, 470. \$20.00.

Unlike Dworkin's two previous books,¹ *Law's Empire*² is not an anthology of separate essays, but a sustained work. It has a unity his previous books lack, using consistent terminology to develop a coherent set of arguments. For this reason alone, the book will be welcome even to those who disagree with Dworkin's major theses. The book is also welcome because in it Dworkin addresses objections to his view that he has previously ignored or misunderstood. Those who, like myself, find fault with some of Dworkin's fundamental points can still admit that *Law's Empire*, as is usual with Dworkin's work, is stimulating and original.

For the sake of brevity, I shall concentrate on Dworkin's main theses and methodology. I omit his discussion of subsidiary issues, including his reply to critics; his criticism of positivism as what he calls "a semantic theory"; his detailed discussion of legislative intent and statutory interpretation (continued from *A Matter of Principle*³); his view of when statutes are unclear; his criticisms of alternative theories of adjudication; and his critiques of historicism, passivism, and activism as theories of constitutional adjudication; I shall also pass over Dworkin's spirited attack on the Critical Legal Studies Movement, his enumeration of some of the difficulties he sees in the "speaker's meaning" thesis of legislative intent, and his reply to the economic analysis of tort law, though these issues are worthy of the reader's close attention. This is not

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¹ RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985) [hereinafter cited as *PRINCIPLE*]; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

² RONALD DWORKIN, *LAW'S EMPIRE* (1986) [hereinafter cited without cross-reference as *LAW'S EMPIRE*].

³ R. DWORKIN, *PRINCIPLE*, *supra* note 1.

because I agree entirely with Dworkin's treatment of these subsidiary issues. It is because any errors in these issues seem relatively minor compared to the errors that I will discuss.

I. THE GENERAL THESIS OF LAW AS INTERPRETATION

As in *A Matter of Principle*, Dworkin develops the view that "law is an interpretive concept."⁴ In *Law's Empire*, Dworkin refines the thesis, dividing it into a general part and a specific part. The general part describes what interpretation is and then what an interpretation of law is; the specific part offers an interpretation of American law. I shall first consider the general part.

Dworkin tells us that "[r]oughly, 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. . . . A participant interpreting a social practice . . . proposes value for the practice by describing some scheme of interests or goals or principles the practice can be taken to serve or express or exemplify."⁵ He goes on to describe the process of interpretation as a kind of reflective equilibrium.⁶ The first stage, he tells us, is a 'preinterpretive' stage in which "the rules and standards taken to provide the tentative content of the practice are identified. . . . I enclose 'preinterpretive' in quotes because some kind of interpretation is necessary even at this stage."⁷ This is followed by

an interpretive stage at which the interpreter settles on some general justification for the main elements of the practice identified at the preinterpretive stage. This will consist of an argument why a practice of that general shape is worth pursuing, if it is Finally, there must be a postinterpretive or reforming stage, at which he adjusts his sense of what the practice "really" requires so as better to serve the justification

⁴ LAW'S EMPIRE, at 50; see also R. DWORKIN, PRINCIPLE, *supra* note 1, at 410 ("Judges should decide what the law is by interpreting the practice of other judges deciding what the law is.").

⁵ LAW'S EMPIRE, at 52. Dworkin also says "the more abstract goal of constructive interpretation [is] to make the best of what is interpreted," *id.* at 61, that interpretation "aims to make the object or practice being interpreted the best it can be," *id.* at 77, and that an interpretation of legal practice "offers to show that practice in its best light," *id.* at 139.

⁶ He even characterizes the interpretation of legal practice as a process of achieving "equilibrium between legal practice as [one finds] it and the best justification of that practice." *Id.* at 90.

⁷ *Id.* at 65-66.

he accepts at the interpretive stage.⁸

Dworkin's general theory of interpretation has been attacked before in the literature.⁹ I will add only two comments. First, the idea of reflective equilibrium seems bizarre when applied to artistic interpretation. It is not interpretation, at least not in a strict sense, to declare some lines from a play, movements in a symphony, or images in a painting "mistakes" (not really part of the work in question) on the ground that it is a better work without them. This is artistic or critical melioration of the original work.¹⁰ Second, Dworkin claims that "a theory of interpretation is an interpretation of the higher-order practice of using interpretive concepts."¹¹ This view of how disputes about the nature of interpretation are to be resolved is question-begging if we understand the second "interpretation" as Dworkin does, and if the nature of the second "interpretation" in this sentence is itself at issue, the pronouncement is both unhelpful and possibly false.

It quickly becomes clear that Dworkin thinks the best "interpretation" of legal practices provides a moral justification¹² for the use of state coercion "flowing from"¹³ past legal and political decisions. Indeed, he thinks all "interpretations" of law must strive to do so, and he takes this as an uncontroversial assumption about the nature of law.¹⁴ Dworkin then asserts that if we encounter legal practices so evil that we decide that past legal and political decisions "can never provide any justification at all, even a weak one, for state coercion," then "the interpretive attitude is wholly inappropriate" and "no general supportive interpretation [of them] is possible."¹⁵ This is inconsistent with his general characterization of "interpretation," unless (1) by adding "supportive" Dworkin means to say that the best "interpretation" does not succeed in

⁸ *Id.* at 66.

⁹ For example, see the exchange between Dworkin and Stanley Fish, beginning with Fish's *Working on the Chain Gang: Interpretation in Law and Literature*, 60 *TEX. L. REV.* 551 (1982), followed by Dworkin's *My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk About Objectivity Anymore*, in *THE POLITICS OF INTERPRETATION* 287 (W. Mitchell ed. 1983), and finally Fish's *Wrong Again*, 62 *TEX. L. REV.* 299 (1983).

¹⁰ See *infra* note 27 (discussing Dworkin's views of the ontological status of the work). Because of my reservations about Dworkinian interpretation, I will hereafter use quotation marks to refer to Dworkinian "interpretation."

¹¹ *LAW'S EMPIRE*, at 49.

¹² He characterizes his interpretation as directing a judge "also to regard as law what morality would suggest to be the best justification of . . . past decisions." *Id.* at 120.

¹³ *Id.* at 94.

¹⁴ See *infra* notes 35-37 and accompanying text.

¹⁵ *Id.* at 105.

justifying what it nonetheless succeeds in "interpreting"; (2) by saying that an "interpretation" of a practice "proposes value for the practice," Dworkin refers to justifying value, so that putting a practice in its "least bad light" is not good enough to constitute an "interpretation" of the practice, where the best light is still very bad indeed;¹⁶ or (3) the nature of an "interpretation" depends upon beliefs of the interpreter as follows: if the interpreter thinks he is proposing a justifying moral value for a practice, then he is offering an "interpretation" of it, even if he is such a bad moral thinker that he is wrong about the justifying moral value. Dworkin also contradicts his remarks about evil legal systems by asserting that pragmatism might be "an eligible interpretation of our legal practice after all, if it turns out that our judges declare people to have legal rights only, or mainly, when a self-consciously pragmatist judge would pretend that they did."¹⁷ Yet pragmatism, as he characterizes it, *denies* "that past political decisions in themselves provide any justification for either using or withholding the state's coercive power."¹⁸

II. THE PROBLEM OF STARTING POINTS

My major criticism of Dworkin's theory of law as "interpretation" of legal practices is that this theory cannot consistently answer the question of which practices are to be "interpreted" by a judge who is developing a theory of the law of his legal system or political subdivision. Not all practices may count. Some practices might be results of officials or others acting unconstitutionally or illegally. Others may result from decisions by judges who were misled by incorrect theories of law or judicial justification. Still others may be practices imported from different legal systems, or even different political subdivisions within a legal system. Such practices should not be considered if the aim is illumination of the law of a particular political subdivision.

Those with an equilibrium-constructive view of law might say that certain practices are fixed points in this equilibrium. At the very least, they might regard such practices as "epistemologically

¹⁶ Dworkin refers to an "interpretation" that puts the wicked practices in "their least bad light." *Id.* at 107. He considers the possibility that the "best interpretation" of some social practice may be "that no competent account of the institution can fail to show it as thoroughly and pervasively unjust." *Id.* at 203. These remarks seem inconsistent with the second possible reading of his views offered in the text.

¹⁷ *Id.* at 153.

¹⁸ *Id.* at 151.

privileged" paradigms of the legal and political practices that are intimately tied to the law of the legal system or political subdivision. An "epistemologically privileged" practice should be the *last* practice to be rejected in an attempt to achieve internal consistency or coherence in the process of "interpreting" a legal system or a political subdivision. A fixed practice may not be rejected even for these reasons.

Certain practices might be "fixed" by conventional understandings as paradigms of judges applying law. Dworkin comes close to this view. He says: "[A] very great degree of consensus [in identifying the rules and standards taken to provide the tentative content of the practice] is needed . . . 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."¹⁹ He also notes that paradigms of law can change over time.²⁰ But Dworkin ultimately rejects the view that convention determines which practices are legal practices.²¹ "The interpretive attitude needs paradigms to function effectively, but these need not be matters of convention. It will be sufficient if the level of agreement in conviction is high enough at any given time to allow debate over fundamental practices like legislation and precedent [and to allow] contesting discrete paradigms one by one."²²

According to Dworkin, then, an "interpretation" that will become an "interpretation" of law starts with agreed-upon practices and their agreed-upon content (law in the "preinterpretive" sense), but not because these count as law as a matter of convention. Moreover, it is clear that Dworkin does not treat these starting points as fixed. It is unclear whether they are even epistemologically privileged. He talks of "[c]ertain interpretive solutions," which are "the paradigms and quasi-paradigms of their day," suddenly being challenged in a "new or even radical interpretation" and, subsequently, abandoned by a minority of judges.²³ Apparently, there is nothing necessarily wrong with such a radical rein-

¹⁹ *Id.* at 66. But what does he mean by the "interpretive attitude" being "fruitful"? "Law cannot flourish as an interpretive enterprise in any community unless there is enough initial agreement about what practices are legal practices so that lawyers argue about the best interpretation of roughly the same data." *Id.* at 90-91.

²⁰ See *infra* text accompanying note 23.

²¹ "[N]othing need be settled as a matter of convention in order for a legal system not only to exist but to flourish." *Id.* at 138 (emphasis in original).

²² *Id.* at 138-39.

²³ *Id.* at 89-90.

terpretation.²⁴ Dworkin adds: "Since even the preinterpretive stage requires interpretation, these boundaries around the practice are not precise or secure."²⁵ But why do they exist at all?

To put it another way: what reason is there, in Dworkin's view, for taking these agreed-upon things as starting points in what becomes a kind of reflective equilibrium? Dworkin wants them to be starting points, and he does not want the "postinterpretive stage" to dispense with too many of them (that is, he wants a high degree of "fit"), because he sees an analogy between "interpreting" the law of a legal system and interpreting, say, a work of fiction. He recognizes that in the latter case there is an important difference between interpreting the story and inventing a similar but different story.²⁶ So, too, one might suppose there is an important difference between "interpreting" the law of one's legal system and inventing a similar but different body of law. But this presupposes that what we start out with is law. In turn, this raises ontological questions about what is the law that is to be "interpreted," or, to put it in terms more acceptable to Dworkin, what are the practices of applying, enforcing, justifying, and interpreting law that themselves are to be "interpreted."²⁷ No philosopher of law can afford to finesse these questions.

Dworkin tries to finesse them by insisting that "we have no difficulty identifying collectively the practices that count as legal practices in our own culture."²⁸ He also simply asserts that judges are engaged in this kind of interpretive activity when they decide cases and so, in our own culture, almost all judges identify the same practices as starting points.²⁹ The former proposition can surely be challenged with particular examples of practices that do not command anything near universal recognition by judges. For instance, Dworkin accepts as a legal practice of our culture the

²⁴ However, in such cases it is not clear what is being interpreted. Perhaps it is some, but not all, of the old starting points; perhaps it is none of them.

²⁵ *Id.* at 425 n.22.

²⁶ *See, e.g., id.* at 52, 66; *see also* R. DWORKIN, *PRINCIPLE*, *supra* note 1, chs. 6, 7.

²⁷ A similar point can be made about Dworkinian "interpretation" of a story or a novel. Dworkin claims, following his critic Fish, that there is no novel independent of a Dworkinian "interpretation" of it. *LAW'S EMPIRE*, at 238. This view is in trouble on starting points for exactly the same reason Dworkin's view of interpretation of legal practice is in trouble. It might be noted that Dworkin's only defense of this ontological thesis, if it is meant as a defense, confuses epistemological questions with ontological questions. He responds to the imaginary charge that an "interpreter" has departed from the real novel by responding to the charge that "the 'real' novel can be discovered in some way other than by a process of interpretation," which confuses the two sorts of questions. *Id.*

²⁸ *Id.* at 91.

²⁹ *Id.* at 87-90.

practice of consulting official statements of statutory purpose made by legislative committees and by sponsors of legislation in floor debates. He does so on the grounds that American judges have a practice of looking to these statements of purpose in their interpretation of statutes.³⁰ But although most American judges look to these statements of purpose in interpreting statutes, there is no near-universal agreement about *why* this practice should be part of the process of statutory interpretation. For example, there is no agreement that such statements are relevant because they reveal the state of law antecedent to the judge's current decision, or because this practice is otherwise the kind of legal practice that is a "source" or "ground" of law. There may be more widespread agreement that this practice has something to do with law, but this is not enough for Dworkin's purposes. For he needs agreement that the "something to do with" relationship is the *right* sort of relationship for a constructive model of law.³¹

Nor do judges universally agree that when they decide cases, they characteristically apply (or seek to apply) law to the issues raised before them. Hence, there is no universal agreement that the practice of judges deciding cases is properly a starting point for a constructivist model of law. Those who do not agree include those persuaded by certain forms of legal realism and followers of a view Dworkin attributes to Hart that in hard cases the law has run out.

But even if there were near-universal agreement that only certain practices would count in such a constructivist enterprise and that certain standards are the content of the law of a particular legal system, Dworkin cannot use these practices as starting points without abandoning some of his own views. Even if Dworkin is right in saying that judges are in fact "interpreting" these starting points, the significance of engaging in the same activity from the same starting points is entirely questionable *unless* there is something about those starting points that makes the resulting "interpretation" an "interpretation" of (our) law. If there is not, then judges are engaging in an interesting exercise, but not one of great importance to legal philosophers concerned with the nature of law.

³⁰ *Id.* at 343.

³¹ Besides better revealing implicit law, another example of the right sort of relationship is the relationship of having law implied in its justification. But most judges would bridle at the suggestion that there are some legal standards implicit in the practice of looking to official statements of statutory purpose—that, in other words, the justification of that practice itself is law.

That issue can be divided into three sub-issues: (1) the extent to which decisions in cases for which no statute makes explicit provision, or for which analogies can be drawn to any of several prior cases reaching different results, bear resemblances to clear examples of preexisting law; (2) the extent to which these decisions bear resemblances to fresh legislation; and (3) whether this is best described by postulating the existence of unwritten, unarticulated, unformulated law.³²

What characteristic of the starting points makes the resulting "interpretation" an "interpretation" of law? It is begging the most important questions simply to assert that an "interpretation" from agreed-upon starting points about what legal practices are, and what content the law has, makes the resulting "interpretation" an "interpretation" of the law of a particular community. So there must be some reason to suppose that the majority of things commonly regarded as law, or as legal practices having the right connection to law, must be law; and that reason must be independent of a Dworkinian "interpretation." Only three such reasons seem possible: (1) persons have an intuitive insight into objective legal truths; (2) agreed-upon paradigms of law are law because of the nature of a paradigm (or because of the connection between paradigms and concepts or truth conditions of propositions); or (3) certain characteristics of the things that are taken as paradigms of law make them law (e.g., they have the right pedigree).

The third reason is the beginning of a theory of the nature of law. Perhaps someone sympathetic to Dworkin would say it is the beginning of a theory of the nature of explicit law, as opposed to implicit law. He might say that implicit law is implicit only when it bears a relation to explicit law that Dworkin characterizes as the best "interpretation" of the latter.³³ But then "law as an interpretive concept" applies only to implicit as opposed to explicit law, which is not how Dworkin intends it to apply.

I doubt that Dworkin would endorse the first view, and I think that he rejects the second. At the least, his rejection of the second view would explain why his discussion about "paradigms of the

³² See *infra* notes 35-40 and accompanying text for Dworkin's views on the nature of the inquiry into legal philosophy.

³³ "Law is a matter of which supposed rights supply a justification for using or withholding the collective force of the state because they are included in or implied by actual political decisions of the past." *Id.* at 97. Integrity in adjudication "requires our judges, so far as this is possible to treat our present system of public standards as expressing and respecting a coherent set of principles, and, to that end, to interpret these standards to find implicit standards between and beneath the explicit ones." *Id.* at 217.

day" is not qualified by a notation that some paradigms must be permanent. It also would explain why he does not say that in the "postinterpretive stage" some things are immune to reinterpretation. Instead, his discussion here and in *Taking Rights Seriously* suggests that in principle nothing is so immune.³⁴ However, if any of these three views is correct, the starting points should be absolutely fixed and immune to the "postinterpretive" stage of Dworkinian interpretation. The only exception to this principle would be in the case of the first reason, and then only insofar as people's intuitive judgments were unreliable.

Dworkin has a view about which practices are practices of enforcing, applying, and interpreting law, but he cannot rely on it at this point in his meta-theory. By his own explicit admission, the theory itself is an "interpretation" of legal practice, and one Dworkin thinks is the best "interpretation." Indeed, he has a view about why certain statutory rules are rules of American law, but by his own theory, he cannot rely on this at this point, either. Relying on his view at this point would be viciously circular.

III. DWORKIN ON THE CONCEPT OF LAW

Dworkin offers a general "interpretation" of "our concept of law," which he takes to be uncontroversial.³⁵ "Our concept of law is furnished . . . by rough agreement across the field of further controversy that law provides a justification *in principle* for official coercion."³⁶ It follows that "[a] conception of law must explain how what it takes to be law provides a general justification for the exercise of coercive power by the state, a justification that holds except in special cases when some competing argument is specially power-

³⁴ The grounds for rejecting starting points as mistakes, according to Dworkin, are inconsistency with the justification the interpretive theory offers for the rest of its "data," *id.* at 99, and injustice or unfairness according to fundamental principles of the interpretive theory, *id.* at 219. He also says that "[e]ven if [a practice] is settled and unquestioned, the interpretive attitude may isolate it as a mistake because it is condemned by principles necessary to justify the rest of the institution." *Id.* at 203. Earlier, Dworkin said that the grounds for identifying statutes or judicial decisions as mistakes are wide regret at the decision "within the pertinent branch of the profession," unfairness "within the community's own concept of fairness," and the unattractiveness of its principle to legislatures or courts, making further such decisions unlikely. R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 1, at 122.

³⁵ "[This is] the initial, uncontroversial interpretation [that] provides our concept of law," he says when he has introduced it. *LAW'S EMPIRE*, at 94. "[F]or us, legal argument takes place on a plateau of rough consensus that if law exists it provides a justification for the use of collective power against individual citizens or groups." *Id.* at 108-09.

³⁶ *Id.* at 109-10 (emphasis in original).

ful.”³⁷ According to Dworkin, a “conception of law is a general, abstract interpretation of legal practice as a whole.”³⁸ Setting aside the question of what is being “interpreted,” if this thesis is accepted then Dworkin may have a standard for taking certain practices as starting points for “interpretation”: there must be some connection between a practice and the exercise of coercive power.

This thesis, however, is hardly uncontroversial. There is no universal commitment to the view, even in “our” political community, that law (and not just our law) is something that justifies coercion or that law *necessarily* is something that justifies coercion (that is, that the first proposition is true as a conceptual matter, and not contingently).

To see this, consider first paradigms of laws, and then paradigms of legal systems. It is intelligible to say that some statute is a paradigm of law, even when its existence gives no one even *prima facie* a moral reason for coercing anyone else. Suppose, for instance, the statute’s contents are exceedingly evil. In order to avoid the difficulties that attend discussions of “Nazi law,” assume for the moment that the statute is part of a legal system that is, by and large, not itself wholly evil. The statute’s immorality might in itself defeat, rather than override or outweigh, any general moral reason an official may have for coercing people on the basis of statutes. Such reasons for coercion include democratic theory, the obligation-generating force of the official voluntarily accepting his position, or the fairness of treating like cases alike. It is doubtful, however, that any of these principles, or any other principle one might consider that justifies coercing people on the basis of statutes, always gives a reason for such coercion, regardless of the content of the statute and regardless of what it is people are being coerced to do. Just as promises do not obligate when they are promises to do something one is morally required not to do, so too other things may not license coercion when the thing people would be coerced to do is something they are morally required not to do. In this way, the substantive immorality of a statute may defeat *prima facie* license, just as it defeats *prima facie* obligation.

I am not arguing that substantive immorality indeed defeats such license. Rather, I am arguing that the view that substantive immorality defeats license is intelligible and plausible. And one can intelligibly regard an immoral statute as a paradigm of law even when one believes substantive immorality to be a defeater. I

³⁷ *Id.* at 190.

³⁸ *Id.* at 139.

venture to say that most people in our political community do regard immoral statutes in this fashion, and that they would continue to do so even if they were to be convinced that substantive immorality is a defeater.

Perhaps I have misunderstood Dworkin's claim. Some philosophers have thought that our concept of law is derivative from our concept of a legal system. One might take this line and hold that our concept of a legal system is a concept of something that justifies coercion. Even this, I think, is mistaken. Consider an alleged legal system that is procedurally unobjectionable (that meets, for example, Fuller's eight conditions of the "internal morality of law"³⁹) and is very much like any simple monarchical state, but in which most of the laws are immoral. Although there are those who would deny that what I have described is a paradigm of a legal system (on the grounds, for instance, that it does not in general promote the common good), many in the history of legal philosophy would have no difficulty regarding it as a paradigmatic legal system. Judging from my students, most of their modern-day readers have no such difficulty, either.

Someone might wish to deny that there are paradigms of law or of legal systems apart from the product of some philosophical theory about the nature of law. This line, however, will not help Dworkin, for in our political community there is no uncontroversial philosophical theory about the nature of law. Certainly theories that produce the concept of law as Dworkin characterizes it are all highly controversial.

It should be noted that Dworkin has a view about how disagreements about the concept of law are in principle to be settled. He says that "interpretation" is what all legal philosophers answering the question "What is law?" are doing.⁴⁰ This is not obviously true, and in fact it seems false. Most legal philosophers have not been at all concerned with showing "legal practice in its best light," although there is now a growing body of them who are. Austin, for one, would be amazed at this characterization of his philosophical activities.

In summary, my major criticism of Dworkin's "law as interpretation" theory is as follows: *Either* not all law or all legal-practice-that-has-the-right-connection-to-law is a product of "interpreta-

³⁹ LON FULLER, *THE MORALITY OF LAW* 39 (1964).

⁴⁰ "General theories of law . . . are constructive interpretations: they try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice." *LAW'S EMPIRE*, at 90.

tion," or there is no reason to believe that a Dworkinian "interpretation" of those practices he thinks are appropriate can answer philosophical puzzles concerning what law is and how far it extends. Of course, this leaves open the possibility that "interpretation," as Dworkin understands it, may be a philosophically significant model of how adjudication is or morally ought to be conducted.

IV. SPECIFICS: LAW AS INTEGRITY

Dworkin holds that the best "interpretation" of legal practice is a conception of law that he calls "law as integrity."⁴¹ One of the tenets of "law as integrity" is this: "rights and responsibilities flow from past decisions and so count as legal, not just when they are explicit in these decisions but also when they follow from the principles of personal and political morality the explicit decisions presuppose by way of justification."⁴² Implicit principles determine which rights and responsibilities flow from given past decisions.⁴³ Lower level "interpretations" of these past decisions determine which standards are implicit.⁴⁴ But the lower-level interpretations must fit into one grander "interpretation." These implicit principles must be capable of being "defended together as expressing a coherent ranking of different principles of justice or fairness or procedural due process,"⁴⁵ at least to a large extent.⁴⁶ For this rea-

⁴¹ "[Law as integrity] is, all things considered, the best interpretation of what lawyers, law teachers, and judges actually do and much of what they say." *Id.* at 94.

⁴² *Id.* at 96.

⁴³ So do implicit policies, at least when the interpretation of statutes is at issue. *Id.* at 338-39.

⁴⁴ "[L]aw as integrity asks [judges] to continue interpreting the same material that it claims to have successfully interpreted itself. It offers itself as continuous with—the initial part of—the more detailed interpretations it recommends." *Id.* at 226-27. When Hercules, the ideal judge, is asked to decide a case under a statute, "[h]e will ask himself which reading of the act . . . shows the political history including and surrounding that statute in the better light." *Id.* at 313.

⁴⁵ *Id.* at 184; see also *id.* at 245 ("Law as integrity . . . requires a judge to test his interpretation of any part of the great network of political structures and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole."). Dworkin apparently thinks the three fundamental values of which justice, fairness, and due process are the implicit principles collectively or ultimately produce a conception. He says, "Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards." *Id.* at 243. He gives no reason why these values must be the values of the "political morality" in terms of which the best interpretation of law is to be given.

⁴⁶ "Law as integrity . . . asks judges to make the law coherent as a whole, so far as

son, it is doubtful that it is consistent to maintain, as Dworkin does, that Hercules (Dworkin's ideal judge) "interprets each [statute] so as to make its history, all things considered, the best it can be."⁴⁷ The best available alleged justification of a statute and its history may be incoherent with some larger coherent conception of justice, fairness, due process, and their relations.⁴⁸ So not only is it true in general that law is an interpretive concept, but there is a further connection between the law on any particular point and "interpretation."⁴⁹

I will not here challenge Dworkin's claim that this conception of law fits our legal practices best (or at least better than two other conceptions he constructs), nor will I challenge his claim that this conception of law shows these practices in an extremely good light, providing a successful moral justification for them. I do, however, want to mention one further difficulty in interpreting Dworkin's text. At first, Dworkin says that convictions about the acceptable minimal degree of fit are to be independent of one's political morality. He says that one who is offering an "interpretation" needs "convictions about how far the justification he proposes at the interpretive stage must fit the standing features of the practice to count as an interpretation of it" but that "convictions about which kinds of justification really would show the practice in best light . . . must be independent of the convictions about fit just described, otherwise the latter could not constrain the former."⁵⁰ Yet he later says that an ideal judge's "convictions about fit . . . are political not mechanical. They express his commitment to integrity: he believes that an interpretation that falls below his threshold of fit shows the record of the community in an irredeemably bad light, because proposing that interpretation suggests that the community has characteristically dishonored its own principles."⁵¹ I am unable to reconcile these two quotations.

I entertain some important doubts about Dworkin's general characterization of standards implicit in past decisions. He says

they can. . . ." *Id.* at 251.

⁴⁷ *Id.* at 379.

⁴⁸ *But see infra* notes 59-72 and accompanying text (discussing coherence).

⁴⁹ Dworkin proposes that we view law as Hercules, his ideal judge, does: "The actual, present law, for Hercules, consists in the principles that provide the best justification available for the doctrines and devices of law as a whole." *Id.* at 400. Law as integrity "makes the content of law depend . . . on more refined and concrete interpretations of the same legal practice it has begun to interpret." *Id.* at 410.

⁵⁰ *Id.* at 67-68. And the interpreter "cannot claim in good faith to be interpreting his . . . practice at all." *Id.* at 255.

⁵¹ *Id.* at 257.

they are the ones that are "necessary to justify" past decisions, or those "presupposed" by past decisions.⁵² Putting aside difficulties about the differentiation of standards (e.g., how much modification of one standard does it take to produce an entirely different standard?), why should we believe that any particular standard is *necessary* to justify any particular decision? Why should we assume that there are not different but overlapping standards embedded in the same set of decisions? If there are, many decisions can equally well be justified by different standards. More to the point, why should we assume that there are not distinct and mutually incompatible sets, each of which contains standards that will justify the decisions in question?

Dworkin is prepared to admit that such underdetermination of embedded standards may occur in legal systems that are immature and contain a paucity of prior legal decisions.⁵³ But he assumes that such an underdetermination will not occur in mature and "dense" systems. This assumption is the one that is questionable. It is based on further assumptions about the constraints on implicit standards. In "law as integrity," the aim is to produce a grand interpretation of the law of a legal system that embodies a coherent conception of justice, fairness, and procedural due process. The concepts of justice, fairness, and due process will set limits on the things that can sensibly be taken as conceptions of them. These limits will constrain the choice of embedded standards. Coherence may set other constraints. So, for example, Dworkin says that an ideal judge would reject as a principle implicit in American emotional injury cases the principle that "[p]eople have a moral right to compensation for emotional injury suffered at the scene of an accident . . . but have no right to compensation for emotional injury suffered later."⁵⁴ The principle is rejected because "it does

⁵² This thesis first emerged in Dworkin's *TAKING RIGHTS SERIOUSLY*, *supra* note 1, at 66: "We might then ask what set of principles taken together would be necessary to *justify* the adoption of the explicit rules of law and institutional rules we had listed." It finds expression repeatedly in *Law's Empire*. For example, see the first tenet of "law as integrity," characterized above. For another example, see *LAW'S EMPIRE*, at 185, which asserts that unlike "bare logical consistency," integrity "demands fidelity not just to rules but to the theories of fairness and justice that these rules presuppose by way of justification." Moreover, "[t]he integrity of a community's conception of justice demands that the moral principles necessary to justify the substance of its legislature's decisions be recognized in the rest of the law." *Id.* at 166. According to "law as integrity," "the law . . . contains not only the narrow explicit content of [past collective] decisions but also, more broadly, the scheme of principles necessary to justify them." *Id.* at 227.

⁵³ Dworkin, *No Right Answer?*, in *LAW, MORALITY, AND SOCIETY* 58, 83-84 (P. Hacker & J. Raz eds. 1977).

⁵⁴ *Id.* at 240.

not state a principle of justice at all. It draws a line that is arbitrary and unconnected to any more general moral or political consideration."⁵⁵ Dworkin also says that there is no principle justifying a statute "prohibiting abortion except to women born in one specified decade each century"; rather, a state with this statute "must endorse principles to justify part of what it has done that it must reject to justify the rest."⁵⁶ This, according to Dworkin, is an example of "inconsistency in principle."⁵⁷

Finally, other constraints arise because the aim is to produce the *best* "interpretation." Such an interpretation will be best because it represents the optimum tradeoff between fit to starting points and deviation from the "best" (i.e., objectively true) conception of justice.⁵⁸ But the assumption that these constraints will lead to exactly one set of implicit principles for a given set of legal decisions is unfounded. It depends on several other hypotheses, each of which is no more plausible than its denial: (1) there is exactly one best conception of justice, fairness, and due process, and exactly one true thesis about their priority relations; (2) *either* there is exactly one dimension along which standards vary their relative "distances" from these best conceptions *or* there is exactly one correct metric of various dimensions, yielding a single true proposition about relative proximity of each standard; and (3) *either* there is exactly one true thesis about the threshold of fit that an "interpretation" must have to given starting points in order to be adequate *or* there is exactly one way to balance fit against proximity to best conception in order to yield the best "interpretation" of a given legal practice.

The debate between Dworkin and those he calls "skeptics" centers largely on the truth of hypothesis (1) (and therefore of (2)) and on who has the burden of proof in this debate. In general, Dworkin seeks to foist the burden of proof on those he calls "internal skeptics." It may be correct to place the burden of proof on that group if the aim is to get on with making moral judgments. But Dworkin has a burden he has not met. Dworkin bases claims about implicit law and implicit legal principles, and about the ex-

⁵⁵ *Id.* at 242.

⁵⁶ *Id.* at 183-84.

⁵⁷ *Id.* at 184.

⁵⁸ *Id.* at 255-56. Contrast this proposition with the view expressed in Dworkin, *Seven Critics*, 11 GA. L. REV. 1201, 1252 (1977) ("One justification may be better than another . . . on two different dimensions: it may prove a better fit, in the sense that it requires less of the material to be taken to be 'mistakes,' and it may prove a morally more compelling justification, because it comes closer to capturing sound political morality.").

tent to which a judge has discretion in a hard case, on these controversial assumptions without trying to defend them. Yet it is important to know if they can be defended, for if not, then Dworkin's theory implies that a judge ordinarily has more discretion in deciding hard cases than Dworkin allows. Further, it seems implausible to claim that the differing principles in equal but conflicting "interpretations" are all implicit law.

V. THE ROLE OF LOCAL PRIORITY AND COHERENCE IN A "LAW AS INTEGRITY" "INTERPRETATION"

Something new in *Law's Empire* deserves to be mentioned. In Chapter 7, Dworkin admits that there may be a kind of "local priority" in "departments" of law. For example, if a proposed decision in, say, real property law is based on some standards that do not fit past decisions in real property law (though they fit decisions in some other department of law), that fact may suffice to show that these standards must be rejected as embedded in law, on grounds of inadequacy of fit. Dworkin says that where there is a practice of treating a subset of law (such as real property law) as special, an interpretation must show "that practice in its best light."⁵⁹ If a justification of the practice can be found within a judge's political philosophy, his interpretation would assign local priority. If no such justification can be found, no local priority should be assigned.⁶⁰

The question arises of how this squares with Dworkin's insistence that an "interpretation" should "make the law coherent as a whole."⁶¹ Dworkin builds a certain amount of coherence into some of his characterizations of interpretation in general. He equates a practice having value with a practice serving "some interest or purpose or enforc[ing] some principle—in short, [having] some point."⁶² Dworkin says an interpretation of anything "proposes a way of seeing what is interpreted . . . as if this were the product of a decision to pursue one set of themes or visions or purposes, one 'point,' rather than another."⁶³ He talks about a judge's "interpre-

⁵⁹ *LAW'S EMPIRE*, at 252.

⁶⁰ See also *id.* at 403 ("The topology of departments is . . . part of [the judge's] interpretive problem."). But then Dworkin adds something curious, which I do not think he has defended: "But special constraints apply to his judgments about boundaries: they must in principle respect settled professional and public opinions that divide law into substantial areas of public and private conduct." *Id.*

⁶¹ *Id.* at 251.

⁶² *Id.* at 47.

⁶³ *Id.* at 58-59.

tive theories" being "grounded in his own convictions about the 'point'—the justifying purpose or goal or principle—of legal practice as a whole."⁶⁴ He says "we might understand law better if we could find a[n] . . . abstract description of the point of law most legal theorists accept."⁶⁵ This rules out pluralistic interpretive theories, and builds a dimension of coherence into the nature of "interpretation" itself.

After characterizing "our concept of law," Dworkin invokes additional grounds for demanding coherence. In an "interpretation" of what Dworkin claims is our shared concept of law, "[e]ach part will in some way depend on the rest because they will be knit together by some unifying vision of the connection between legal practice and political justification."⁶⁶ A thesis "about whether and why past political decisions . . . provide . . . a justification [for the use of collective power against individuals and groups] provides a unifying structure for the conception [of law] as a whole."⁶⁷

Finally, Dworkin introduces additional coherence into what he thinks is the best "interpretation" of legal practice: "law as integrity." Without this additional requirement of coherence, a political theory, like a democratic theory, might knit each part of an "interpretation" of law together. Democratic theory treats laws as justifying coercion independently of their content. It is their source that matters. But laws must be knit together through their content. They must embed a "single and comprehensive" conception of justice, fairness, and procedural due process.⁶⁸

Insofar as an "interpretation" recognizes local priority, this additional coherence is sacrificed. Dworkin recognizes this when he says that the ideal judge will "give effect to statutes that pull against substantive coherence and to precedents and local priorities that stand in the way of consistency over different departments of law."⁶⁹ Judges are not "free simply to pursue coherence in the principles of justice that flow through and unite different de-

⁶⁴ *Id.* at 87-88.

⁶⁵ *Id.* at 93.

⁶⁶ *Id.* at 101.

⁶⁷ *Id.* at 109.

⁶⁸ *Id.* at 184. "These several claims [of integrity in a community's conception of fairness and in its conception of justice and procedural due process] justify a commitment to consistency in principle valued for its own sake." *Id.* at 167. Consistency in principle is characterized as requiring "that the various standards governing the state's use of coercion against its citizens be consistent in the sense that they express a single and comprehensive vision of justice." *Id.* at 134.

⁶⁹ *Id.* at 405.

partments of law.”⁷⁰ “If a judge is satisfied that a statute admits of only one interpretation, then, barring constitutional impediment, he must enforce this as law even if he thinks the statute inconsistent in principle with the law more broadly seen.”⁷¹

While it seems correct to recognize such local priority, Dworkin’s rationale for recognizing it is too weak. He depends too heavily on popular opinion about what issues are different in kind, where difference is judged independent of legal categories. “Dividing departments of law to match that sort of opinion promotes predictability and guards against sudden official reinterpretations that uproot large areas of law [and] allow[s] ordinary people . . . to interpret law within practical boundaries that seem natural and intuitive.”⁷²

Surely, however, there are many ways to promote predictability and allow ordinary people to interpret law. One such method might be to promote the kind of coherence that is threatened by recognizing local priority, so that when someone knows a bit about one department of law, he can guess about others by analogy. Moreover, promoting predictability is not very important compared to other virtues that may be promoted by ignoring departmentalization (e.g., an advance in substantive justice). Either Dworkin has failed to come up with the best “interpretation” of a judicial practice of recognizing special departments of law, or an

⁷⁰ *Id.* at 406.

⁷¹ *Id.* at 401 (footnote omitted). Dworkin earlier observed:

Hercules must discover principles that fit, not only the particular precedent to which some litigant directs his attention, but all other judicial decisions within his general jurisdiction and, indeed, statutes as well, so far as these must be seen to be generated by principle rather than policy. He does not satisfy his duty to show that his decision is consistent with established principles, and therefore fair, if the principles he cites as established are themselves inconsistent with other decisions that his court also proposes to uphold.

Suppose, for example, that he can justify Cardozo’s decision in favor of Mrs. MacPherson by citing some abstract principle of equality, which argues that whenever an accident occurs then the richest of the various persons whose acts might have contributed to the accident must bear the loss. He nevertheless cannot show that that principle has been respected in other accident cases, or, even if he could, that it has been respected in other branches of law, like contract, in which it would also have great impact if recognized at all. If he decides against a future accident plaintiff who is richer than the defendant, by appealing to his alleged right or equality, that plaintiff may properly complain that the decision is just as inconsistent with the government’s behavior in other cases as if *MacPherson* had been ignored. The law may not be a seamless web; but the plaintiff is entitled to ask Hercules to treat it as if it were.

R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 1, at 116. Dworkin then goes on to admit such absolute consistency cannot be achieved often, but the only remedy he offers is declaring part of settled law to be a mistake. *Id.* at 119-22.

⁷² *LAW’S EMPIRE*, at 252.

“interpretation” based on “law as integrity” will not recognize local priority in many cases in which judges would consider themselves institutionally bound to do so.

CONCLUSION

I have serious doubts about the most fundamental of Dworkin’s theses. In general, Dworkin attempts to bring together a number of issues that on the surface look different without good arguments for why they are in fact the same. Those issues include a philosophical theory of the nature of law, a theory of what it takes legally to justify a decision in a hard case, and a theory about how judges morally should decide hard cases. My criticisms in this review have been primarily directed against “law as interpretation” as a philosophical theory of the nature of law. They should not be taken to derogate the valuable contribution of much of *Law’s Empire* and, for that matter, all three of Dworkin’s books, toward resolving the second and third of these issues as well as other more specific issues in American legal scholarship.