

BOOK REVIEW

DWORKIN'S "EMPIRE"

LAW'S EMPIRE. By Ronald Dworkin.* The Belknap Press of Harvard University Press, Cambridge, Mass., 1986. Pp. 470. \$20.

Reviewed by George C. Christie †

Ronald Dworkin has been the phenomenon of our age. He has dominated jurisprudential discussion over the past twenty years even more completely than John Rawls has dominated discussion of ethics since the publication of *A Theory of Justice*¹ in 1971. It has often seemed that, if an author was not prepared to focus primarily on Dworkin's work, he was not doing jurisprudence. Whether this domination of a field by one person is a healthy phenomenon is another question. The importance of Dworkin's latest work, *Law's Empire*,² however, lies not only in the fact that it will undoubtedly continue Dworkin's domination of jurisprudential discourse, but also in the fact that it is his first real book. His enormously successful *Taking Rights Seriously*³ was a collection of previously published essays, as was most of his second book, *A Matter of Principle*.⁴ *Law's Empire*, by contrast, was written to be read as a coherent whole.

Dworkin began his domination of contemporary jurisprudence by attacking H.L.A. Hart's concession that, at its penumbras, law was uncertain.⁵ It was the task of the judge to resolve this uncertainty as best he

* Professor of Jurisprudence, Oxford University, and Professor of Law, New York University.

† James B. Duke Professor of Law, Duke University School of Law.

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

2. R. DWORKIN, *LAW'S EMPIRE* (1986).

3. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

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

5. The focus of Dworkin's attack was H.L.A. Hart's *The Concept of Law*. See Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967). This is among the essays reprinted in *Taking Rights Seriously*. R. DWORKIN, *supra* note 3, at 14. Dworkin had sketched out his argument a few years earlier in Dworkin, *Judicial Discretion*, 60 J. PHIL. 624 (1963). Cf. MacCollum, *Dworkin on Judicial Discretion*, 60 J. PHIL. 638 (1963). Among Dworkin's other early works are Dworkin, *The Case for Law—A Critique*, 1 VAL. U.L. REV. 215 (1967), and Dworkin, *Does Law Have a Function?*, 74 YALE L.J. 640 (1965) (originally published as Dworkin, *Wasserstrom: The Judicial Decision*, 75 ETHICS 47 (1964)).

could, given the legal sources available to him. In the performance of this task, according to Hart, the exercise of some degree of judicial discretion was inevitable. Dworkin set out to show that, even in cases where the conventional sources of law (namely the statutes and the previously decided cases) did not seem to provide a clear answer, the courts were not called upon to exercise the significant degree of discretion that Hart supposed.

Dworkin initially asserted that, when existing rules of law did not cover a case or when the existing rules of law were in conflict, resort could be had to the "principles" embedded, so to speak, in the legal system to ascertain the right decision of the case.⁶ He recognized that a number of principles could point in competing directions and might even directly conflict.⁷ A means for weighting principles was thus required. Neither Dworkin nor anyone else has yet produced that weighted list of principles, however. Taking a slightly different tack, Dworkin then asserted that, in difficult cases (the so-called hard cases), it is the task of the judge "to find a coherent set of principles" that will justify his decision. These guiding principles are to be selected "in the way that fairness requires" in light of the "institutional history" of a society's legal structure.⁸ Pursuing this suggestion further, Dworkin next claimed that in nearly all cases, at least in advanced and complex societies with long legal traditions such as the United States or Great Britain, one set of principles, and the decision they justify, would provide a better fit with that society's basic legal structure than would a competing set of principles pointing to a different or even contrary decision.⁹ Dworkin did not, however, support this assertion; he assumed that it was obviously true. He came to assume that there was some notion of "normative consistency" that could be relied on to support his position.¹⁰ Furthermore, when one of those rare cases arises in which no one set of principles is accepted as dispositive by most of the participants in the legal enterprise, Dworkin thought that recourse should be had to what he called "moral facts."¹¹ These moral facts in some way proceed from political theory and ultimately produce moral rights. Thus, in hard cases, when conventional legal theory cannot produce the right answer, the right answer may still be found by asking what moral rights are at stake. Dworkin

6. See R. DWORKIN, *supra* note 3, at 22-31.

7. See *id.* at 22-31, 35-36.

8. Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1098-99 (1972), reprinted in R. DWORKIN, *supra* note 3, at 81, 120-21.

9. See Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1, 30 (1978), reprinted in R. DWORKIN, *supra* note 4, at 119, 143.

10. *Id.* at 28-29.

11. *Id.* at 30-32.

claimed that it would be an "extremely rare" case, if any such case "exist[s] at all," for which there would be "no right answer."¹²

In trying to meet the objections of his critics, Dworkin thus came to assume that there are almost always "right answers" to the moral questions confronting a society. Otherwise, under Dworkin's theory, there could not almost always be right answers to legal questions. Seeking to support this thesis, Dworkin broadened the scope of his intellectual interests. He became interested in interpretation and the similarity he detected between the task of the literary critic trying to come up with the *best* interpretation of a literary text and the task of the judge trying to come up with the *best* decision in the light of his society's legal traditions—traditions informed ultimately by the basic morality underpinning that society.¹³ In the course of expanding his intellectual focus, Dworkin openly came to acknowledge that legal decisions are a species of political decision not merely because they necessarily involve the application of power by state organs, but also because they are and must be motivated by basic political theory.¹⁴ While some might think that law and politics are diametrically opposed, Dworkin seemed driven to equate them. For him, politics is ultimately premised on morality, and, as we have seen, it is only through resort to morality that the legal system attains the closure that permits us to claim that there are indeed right answers to (almost) all legal questions. In *Law's Empire*, Dworkin sets out to present a coherent restatement of his position as it has thus evolved. In the course of doing so, he has added some significant nuances that make his theories somewhat less controversial, and unfortunately, less original and interesting. Although well written, *Law's Empire* is a long and complex book. Accordingly, I will set out Dworkin's argument as accurately as I am able and reserve most of my critical remarks, some of which I am afraid will be quite critical indeed, for the final pages of this review.

12. *Id.* at 31-32.

13. See generally Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982), reprinted in R. DWORKIN, *supra* note 4, at 146; Dworkin, *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), reprinted in modified form in R. DWORKIN, *supra* note 4, at 167; Dworkin, *Law's Ambitions for Itself*, 71 VA. L. REV. 173 (1985).

14. Dworkin wrote in *A Matter of Principle*:

I shall argue that legal practice is an exercise in interpretation not only when lawyers interpret particular documents or statutes but generally. Law so conceived is deeply and thoroughly political. Lawyers and judges cannot avoid politics in the broad sense of political theory. But law is not a matter of personal or partisan politics, and a critique of law that does not understand this difference will provide poor understanding and even poorer guidance.

R. DWORKIN, *supra* note 4, at 146. These are the opening lines of Dworkin, *Law as Interpretation*, *supra* note 13.

I.

Dworkin begins *Law's Empire* by distinguishing between two different kinds of disputes that might arise when people cannot agree on "what is the pertinent law."¹⁵ In the first kind of dispute, people might disagree over whether there are any statutes or precedents on point. Dworkin calls this "empirical disagreement about law."¹⁶ Presumably such disputes can be resolved by a more thorough examination of the statute books and the law reports. These are not the kinds of disputes with which Dworkin is interested. Rather, he is interested in what he calls "theoretical disagreement."¹⁷ Theoretical disagreement arises when people "disagree about the grounds of law, about which other kinds of propositions, when true, make a particular proposition of law true"¹⁸—that is, when "they disagree about whether statute books and judicial decisions exhaust the pertinent grounds of law."¹⁹ In examining the nature of theoretical disagreement about law, Dworkin adopts the internal point of view of the participants in the legal process, and more specifically the point of view of the judge, not the external point of view of a sociologist or historian.²⁰ Dworkin sets out to attack what he describes as the central thesis of positivism: that "genuine disagreement about what the law is must be an empirical disagreement about the history of legal institutions,"²¹ and that, if a thorough examination of that history cannot resolve the disagreement, then disagreement over what the law is is "disguised argument about what the law should be."²²

In developing his argument against positivism, Dworkin attacks what he calls "the semantic sting."²³ This is his pejorative term for the mind-set that "we can argue sensibly with one another if, but only if, we all accept and follow the same criteria for deciding when our claims are sound, even if we cannot state exactly, as a philosopher might hope to do, what these criteria are."²⁴ Dworkin maintains, on the contrary, that "members of particular communities who share practices and traditions" can have genuine disagreements about the requirements of those traditions and practices in "concrete circumstances . . . even though [these] people use different criteria in forming or framing [their] interpretations;

15. R. DWORKIN, *supra* note 2, at 3.

16. *Id.* at 5.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 14.

21. *Id.* at 33.

22. *Id.* at 37.

23. *Id.* at 45-46.

24. *Id.* at 45.

[this disagreement] is genuine because the competing interpretations are directed toward the same objects or events of interpretation."²⁵

Taking the social practice of "courtesy" as a possible paradigm, Dworkin maintains that those who participate in the practice may well over time develop an "interpretive" attitude towards the rules of courtesy."²⁶ The interpretive attitude has two components: first, it starts from "the assumption that the practice of courtesy does not simply exist but has 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."²⁷ Second, it accepts "the further assumption that the requirements of courtesy . . . are not necessarily or exclusively what they have always been taken to be but are instead sensitive to its point, so that the strict rules must be understood or applied or extended or modified or qualified or limited by that point."²⁸ Once the interpretive attitude takes hold, the social practice or institution ceases to be mechanical. "People now try to impose *meaning* on the institution—to see it in its best light—and then to restructure it in the light of that meaning."²⁹ This is the nub of Dworkin's argument; it is the approach that he utilizes over and over again throughout the remainder of the book.

Dworkin's argument, of course, is that if we wish to understand law we must adopt the interpretive attitude. That is, we must accept that law must have a point, and we must construe individual legal provisions in the light of what we conceive that point to be. For Dworkin's argument, however, it is essential that the interpretive attitude we adopt *not* be a form of "conversational interpretation" that "assigns meaning in the light of the motives and purposes and concerns it supposes the speaker to have, and reports its conclusions as statements about his 'intention' in saying what he did."³⁰ Rather the interpretation of a social practice like courtesy or law is like "artistic interpretation."³¹ They are, in short, types of "creative interpretation." Dworkin declares:

I shall defend a different solution: that creative interpretation is not conversational but *constructive*. Interpretation of works of art and social practices, I shall argue, is indeed essentially concerned with purpose not cause. But the purposes in play are not (fundamentally) those of some author but of the interpreter. Roughly, constructive interpre-

25. *Id.* at 46.

26. *Id.* at 47.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 50.

31. *Id.*

tation 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. It does not follow, even from that rough account, that an interpreter can make of a practice or work of art anything he would have wanted it to be, that a citizen of courtesy who is enthralled by equality, for example, can in good faith claim that courtesy actually requires the sharing of wealth. For the history or shape of a practice or object constrains the available interpretations of it, though the character of that constraint needs careful accounting, as we shall see. Creative interpretation, on the constructive view, is a matter of interaction between purpose and object.³²

Understanding a social practice, accordingly, is something different from understanding what other participants mean by the statements they make while they are engaged in that practice. Instead of merely observing and interpreting data, "a social scientist must participate in a social practice if he hopes to understand it, as distinguished from understanding its members."³³

Because Dworkin lays so much importance on the similarity between the creative interpretation of social practices and artistic interpretation, he must defend his assertion that artistic interpretation is not "inevitably a matter of discovering some author's intention[,] . . . a factual process independent of the interpreter's own values."³⁴ Dworkin begins his defense by rejecting any sharp distinction "between discovering an artist's intention and finding value in what he has done."³⁵ Dworkin accepts the suggestion that "[a]n insight belongs to an artist's intention . . . when it fits and illuminates his artistic purposes in a way he would recognize and endorse even though he has not already done so."³⁶ This technique, of course, can be applied to authors that have long been dead. Most importantly, Dworkin contends that this approach "brings the interpreter's sense of artistic value into his reconstruction of the artist's intention in at least an evidential way, for the interpreter's judgment of what an author would have accepted will be guided by his sense of what the author should have accepted, that is, his sense of which reading would make the work better and which would make it worse."³⁷ Applying this approach to the interpretation of social practices, Dworkin rejects "the thesis that creative interpretation aims to discover some actual historical intention" but nevertheless maintains that "the concept of in-

32. *Id.* at 52.

33. *Id.* at 55.

34. *Id.*

35. *Id.*

36. *Id.* at 57.

37. *Id.*

tion . . . provides the *formal* structure for all interpretive claims."³⁸

Interpretation

is by nature the report of a purpose; it proposes a way of seeing what is interpreted—a social practice or tradition as much as a text or a painting—as if this were the product of a decision to pursue one set of themes or visions or purposes, one “point” rather than another.³⁹

This is true even when what is being interpreted is a social practice, that is, “even when there is no historical author whose historical mind can be plumbed.”⁴⁰

In his discussion of artistic interpretation as the paradigm of the creative interpretation of social practices, Dworkin makes some concessions to the critics who have attacked him ever since he turned his attention to the question of interpretation. He concedes, under attack from Stanley Fish,⁴¹ “that interpreters think within a tradition from which they cannot wholly escape.”⁴² Dworkin inserts the qualification “wholly” because he will not accept the conclusion that “it is a mistake to think one interpretive opinion really can be better than another.”⁴³ He is, of course, bound to resist that conclusion because he rejects the assertion “that there can be no right answers to hard [legal] cases but only different answers.”⁴⁴ Dworkin uses the analogy to artistic interpretation to support his contrary assertion.

II.

The notion that Dworkin wishes to carry forward from this preliminary discussion of methodology is that, in interpreting a social practice like courtesy or law, one is not engaged in reporting what the participants in the practice mean but in determining “what *it* means.”⁴⁵ This is important because Dworkin recognizes that the participants do not always agree on what the point of the practice (or the law) is. They must, of course, share the dictionary and

what Wittgenstein called a form of life sufficiently concrete so that the one can recognize sense and purpose in what the other says and does. . . . But this similarity of interests and convictions need hold only to a point: it must be sufficiently dense to permit genuine disa-

38. *Id.* at 58.

39. *Id.* at 58-59.

40. *Id.* at 59.

41. Fish, *Wrong Again*, 62 TEX. L. REV. 299 (1983); Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551 (1982).

42. R. DWORKIN, *supra* note 2, at 61-62. Although Dworkin does cite Fish, *see id.* at 66 n.16, the citation comes several pages later and in a somewhat different context.

43. *Id.* at 77.

44. *Id.*

45. *Id.* at 63.

greement, but not so dense that disagreement cannot break out.⁴⁶

As Dworkin sees it, the interpretive enterprise has three stages. First, there is a "preinterpretive" stage in which the rules and standards taken to provide the tentative content of the practice are identified.⁴⁷ Second, "[t]here must be an interpretive stage at which the interpreter settles on some general justification for the main elements of the practice identified at the preinterpretive stage."⁴⁸ This process will consist of arguments as to "why a practice of that general shape is worth pursuing,"⁴⁹ if it is worth pursuing at all. Third, "there must be a postinterpretive or reforming stage" at which the interpreter "adjusts his sense of what the practice 'really' requires so as better to serve the justification he accepts at the interpretive stage."⁵⁰ In engaging in this enterprise, our hypothetical interpreter needs several types of convictions and assumptions. At the outset, "[h]e needs assumptions or convictions about what counts as part of the practice in order to define the raw data of his interpretation at the preinterpretive stage."⁵¹ Next, he "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 rather than the invention of something new."⁵² These second types of convictions might collectively be considered the interpreter's sense of what "fits." Finally, the interpreter "need[s] more substantive convictions about which kinds of justification really would show the practice in the best light."⁵³ These last convictions will flow from the interpreter's ultimate values, his sense of justice, if you will.

To those who are skeptical of his project of interpretation, Dworkin replies that the only type of skepticism about his enterprise that is intellectually coherent is "internal skepticism," which he contrasts to "external skepticism."⁵⁴ For Dworkin, "[e]xternal skepticism is a metaphysical theory, not an interpretive or moral position."⁵⁵ The external skeptic does not say that it is a mistake to think of a play as having a point or of a social practice as possessing or failing to possess moral value. He merely insists that such statements "are not descriptions that can be proved or tested like physics."⁵⁶ The external critic will have opinions of

46. *Id.* at 63-64.

47. *Id.* at 65-66.

48. *Id.* at 66.

49. *Id.*

50. *Id.*

51. *Id.* at 67.

52. *Id.*

53. *Id.*

54. *Id.* at 78-86.

55. *Id.* at 79.

56. *Id.* at 79-80.

his own about the interpretation of a play (say *Hamlet*), or about the worth of a social practice (say slavery), but he will insist "that all of these opinions are projected upon, not discovered in 'reality.'"⁵⁷ The external skeptic relies very much on the fact that different cultures view moral issues differently and the fact that there is often disagreement even within cultures. To Dworkin, such evidence in no way proves that there are not right answers to moral, and hence legal, questions.

The internal skeptic, by contrast, particularly one motivated by what Dworkin calls "global internal skepticism,"⁵⁸ believes that no interpretation of a social practice or of anything else can be right or wrong, that judgments about moral issues are personal, like judgments about flavors of ice cream. Global internal skepticism is a coherent intellectual position, but Dworkin doubts that many people consistently adopt it. One cannot adopt the internal skeptic's position in philosophical debate and then turn around and say "but, personally, I believe slavery to be wrong." Anyone who believes that slavery is wrong, whether that person is an internal skeptic or an external skeptic, is committed to there being a right answer to the question of slavery, namely, that it is wrong.⁵⁹

At the same time, Dworkin wants to make it clear that he rejects any form of conventionalism. Specifically, he wants to make it clear that he rejects the notion that we can agree on the right answers to legal questions because there are certain authorities—statutes and precedents—and certain forms of argument that are accepted as conclusive.⁶⁰ Nevertheless, without withdrawing his insistence that discussion of law and justice is possible despite the "difficulty in finding any adequate statement of the concept of justice," Dworkin maintains that some "abstract account that organizes further argument about law's character" would be helpful.⁶¹ He then continues:

Our discussions about law by and large assume, I suggest, that the most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way. Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.⁶²

Proceeding from this general statement of the point of law, he declares

57. *Id.* at 80.

58. *Id.* at 79, 84.

59. *See id.* at 80-86.

60. *Id.* at 87-150.

61. *Id.* at 93.

62. *Id.*

that he is proposing a model of "law as integrity."⁶³ Law as integrity refuses to accept the conclusion of legal pragmatism which "denies that a community secures any special benefit by requiring that judges' adjudicative decisions be checked by any supposed right of litigants to consistency with other political decisions made in the past."⁶⁴ Rather,

[l]ike conventionalism, [law as integrity] accepts law and legal rights wholeheartedly. . . . It supposes that law's constraints benefit society not just by providing predictability or procedural fairness, or in some other instrumental way, but by securing a kind of equality among citizens that makes their community more genuine and improves its moral justification for exercising the political power it does.⁶⁵

The notion of law as integrity emphasizes again the connection among law, politics, and morality. Dworkin's analysis is subtle, however. He distinguishes between "popular morality" and "true justice."⁶⁶ Dworkin's conceptual account of law "is different from each [of these concepts] because its content may depend on the other."⁶⁷ As thus presented, Dworkin's model of law as integrity differs from the model of law as conventionalism not because law as integrity is not concerned with what people believe is good or bad but because law as integrity is a more general conception of law. As such, it "must also have external connections to other parts or departments of political morality and, through these, to more general ideological and even metaphysical convictions."⁶⁸

Dworkin's rejection of conventionalism is not based on theoretical considerations alone. As a theoretical description of practice, conventionalism does not work. If a judge adopts the attitude of strict conventionalism, before a new case could be said to be governed by the existing legal sources it would have to be part of the explicit extension of those sources. Dworkin maintains that such an extension is "the set of propositions which (almost) everyone said to be a party to the convention actually accepts as part of its extension."⁶⁹ Where this agreement does not exist—and it is a known fact that it often does not—there will be gaps in the law, because conscientious judges often disagree about what the accepted sources of law say about the case before them. Strict conventionalism provides no way of filling these gaps other than through "the exercise of extralegal judicial discretion."⁷⁰ If, on the other hand, a

63. *Id.* at 94.

64. *Id.* at 95.

65. *Id.* at 95-96.

66. *Id.* at 96-98.

67. *Id.* at 96.

68. *Id.* at 101. Because law as integrity is an "interpretive concept," it is less troubled by the semantic controversies of whether Nazi law was indeed law. *Id.* at 103-08.

69. *Id.* at 123.

70. *Id.* at 126.

judge adopts what might be called "soft conventionalism," he is prepared to acknowledge that "the law of a community includes everything within the implicit extension of these conventions."⁷¹ But soft conventionalism, with its focus on what is "implicitly" in the existing legal materials, is "a very abstract undeveloped form of law as integrity . . . [that] rejects the divorce between law and politics that conventionalist theory . . . tries to secure."⁷² Soft conventionalism neither protects expectations by restricting the exercise of collective force to situations where widely accepted conventions make its application uncontroversial nor does it clearly identify those supposed special situations where there is no law.⁷³ Only strict conventionalism can do that. Strict conventionalism is inadequate, however, not merely because it gives judges a vast degree of discretion, which we may find objectionable on theoretical grounds, but because of the more prosaic fact that judges do not accept it:

[O]ur judges actually pay *more* attention to so-called conventional sources of law like statutes and precedents than conventionalism allows them to do. A self-consciously strict conventionalist judge would lose interest in legislation and precedent at just the point when it became clear that the explicit extension of these supposed conventions had run out.⁷⁴

Actual judicial practice "make[s] sense only on the assumption that the law judges have an *obligation* to enforce depends on the 'correct' reading [of a statute] even when it is controversial what that is."⁷⁵ If we are tempted to choose conventionalism because we are seeking a balance between certainty and flexibility, Dworkin argues that we would be far better advised to choose pragmatism.⁷⁶

Dworkin, of course, is not about to choose pragmatism himself. If pragmatism were the guiding force in legal decisionmaking, it would mean that judges, in deciding cases on the basis of the purported rights of the parties, were engaged in deception on a grand scale. They would in, Dworkin's terms, be deciding the case "*as if*" the parties had rights.⁷⁷ In so doing they would be engaged in a "noble lie."⁷⁸ How far the courts would attempt to disguise what they were doing would itself be determined for a pragmatist by the strategic question of whether "the community [is] so anxious that its judges not behave as pragmatists that this

71. *Id.* at 124.

72. *Id.* at 127-23.

73. *Id.* at 128.

74. *Id.* at 130.

75. *Id.* at 131.

76. *Id.* at 149.

77. *Id.* at 151-55.

78. *Id.* at 155, 159.

'noble lie' will help him serve its true interests better in the long run."⁷⁹ It comes as no surprise that Dworkin turns again to law as integrity as the only possible model of the legal system worthy of acceptance.

III.

Dworkin begins his more intensive discussion of the model of integrity by explicitly declaring that he will personify the community and its political manifestation, the state, as a single distinct moral agent.⁸⁰ It is only in this way that it will be possible for him to discuss the coherence and integrity of a community's legal system and its conception of justice. For the same reasons, Dworkin insists that a community can have principles that are distinct from those of the officials who act in the community's name.⁸¹ Dworkin will concede, as the discussion unfolds, that it will be impossible to bring all the discrete rules and other standards that form a society's legal system into one single coherent scheme, but "[o]ur commitment to integrity means . . . that we must report this fact as a defect . . . and that we must strive to remedy whatever inconsistencies in principle we are forced to confront."⁸²

The society that Dworkin envisions is one in which the members of the community have obligations toward the community and the officials have duties that flow from the fact that they are acting in the name of a community.⁸³ The obligations of the members of a community follow from the fact that, as members of a community, they have received the benefits of the community.

Dworkin's discussion of communal obligation is one of the more convincing parts of *Law's Empire*. He rejects consent as the source of political obligation. There never has been an actual social contract and the notion of tacit consent is not an adequate substitute. Even if we consciously decide not to emigrate, the argument that this constitutes the type of consent that legitimizes government "would fail . . . because a person leaves one sovereign only to join another; he has no choice to be free from sovereigns altogether."⁸⁴ Dworkin also finds inadequate the more currently popular notion that political obligation is bottomed on notions of "fair play." The argument that political obligation is based on considerations of fair play is premised on the questionable notion that "people can incur obligations simply by receiving what they do not seek

79. *Id.* at 155.

80. *Id.* at 167-75.

81. *Id.* at 172.

82. *Id.* at 217.

83. *Id.* at 167-216.

84. *Id.* at 193.

and would reject if they had the chance.”⁸⁵ Moreover, the “fair play” argument assumes that people benefit from political organization. If the argument requires that, in order to incur political obligations, we must be better off in the system under which we are living than “under any other system that might have developed in its place,”⁸⁶ then it is too strong a condition. If the argument merely requires that we be better off under the society in which we live then we would be in a state of anarchy, then it is too weak.⁸⁷

For Dworkin, “associative obligations,” such as those of family, neighborhood, even of friendship, can arise independently of our choosing to assume them.⁸⁸ These obligations arise through a shared history. Such associational obligations require a kind of reciprocity, but the reciprocity required is not that one person must do for another what the latter thinks the obligations, say of friendship, concretely require. If that were true, “friendship would only be possible between people who shared a detailed conception of friendship and would become automatically more contractual and deliberative than it is, more a matter of people checking in advance to see whether their conceptions matched well enough to allow them to be friends.”⁸⁹ At this point Dworkin turns again to the concept of integrity and the interpretive attitude that underlies it:

Friends have a responsibility to treat one another as friends, and that means, put subjectively, that each act out of a conception of friendship he is ready to recognize as vulnerable to an interpretive test, as open to the objection that this is not a plausible account of what friendship means in our culture.⁹⁰

The notion that the political association of the members of a state can be analogized to friendship is, of course, at least as old as Aristotle.⁹¹ Dworkin extracts his version of that notion from the concept of “genuine fraternal obligations.”⁹² He describes the circumstances in which people will be regarded as having such fraternal obligations as follows:

First, they must regard the group’s obligations as *special*, holding distinctly within the group, rather than as general duties its members owe equally to persons outside it. Second, they must accept that these responsibilities are *personal*: that they run directly from each member to

85. *Id.* at 194.

86. *Id.*

87. *Id.*

88. *See id.* at 195-216.

89. *Id.* at 198.

90. *Id.* at 199.

91. *See ETHICA NICOMACHEA* (bks. VIII, IX), in 9 THE WORKS OF ARISTOTLE TRANSLATED INTO ENGLISH (W.D. Ross trans. 1925).

92. R. DWORKIN, *supra* note 2, at 199.

each other member, not just to the group as a whole in some collective sense. . . .

Third, members must see these responsibilities as flowing from a more general responsibility each has of *concern* for the well-being of others in the group; they must treat discrete obligations that arise only under special circumstances, like the obligation to help a friend who is in great financial need, as derivative from and expressing a more general responsibility active throughout the association in different ways. . . .

Fourth, members must suppose that the group's practices show not only concern but an *equal* concern for all members. Fraternal associations are in that sense conceptually egalitarian.⁹³

Dworkin, in sum, wants to distinguish between a "bare community" and a "true community."⁹⁴ It is his conclusion that

legitimacy—the right of a political community to treat its members as having obligations in virtue of collective community decisions—is to be found not in the hard terrain of contracts or duties of justice or obligations of fair play that might hold among strangers, but in the more fertile ground of fraternity, community, and their attendant obligations.⁹⁵

Political association is like family and friendship and other forms of association that are "more local and intimate."⁹⁶

It should now be obvious how Dworkin integrates this discussion of political obligation with the general thesis of his book. He is concerned, in his own words, "with the interpretive question of what character of mutual concern and responsibility our political practices must express in order to justify the assumption of true community we seem to make."⁹⁷ Dworkin quickly rejects the notion of a political community as merely "a de facto accident of history and geography."⁹⁸ He likewise rejects the "rulebook model" of a community that "supposes that members of a political community accept a general commitment to obey rules established in a certain way that is special to that community."⁹⁹ The members of such a community, even if "wholly honest," can be "self-interested." They may well "obey the rules they have accepted or negotiated as a matter of obligation and not merely strategy, but they assume that the content of these rules exhausts their obligation."¹⁰⁰ The rules in such a community "represent a compromise between antagonistic inter-

93. *Id.* at 199-200.

94. *Id.* at 201-02.

95. *Id.* at 206.

96. *Id.*

97. *Id.* at 209.

98. *Id.*

99. *Id.* at 209-10.

100. *Id.* at 210.

ests or points of view."¹⁰¹ Such a view of community, of course, resembles the already rejected point of view of the person who looks at law with the model of conventionalism in mind. For Dworkin, neither the "de facto" community nor the "rulebook community" is a "true community." Only the "model of principle" permits us to view the political community as a true community:

Members of a society of principle accept that their political rights and duties are not exhausted by the particular decisions their political institutions have reached, but depend, more generally, on the scheme of principles those decisions presuppose and endorse.¹⁰²

A community based on the model of principle will, of course, accept the notion of *integrity* as the guiding force in legal argument.

IV.

In presenting the "model of principle" and the central place it fills in the notion of "law as integrity" that has just been described, Dworkin makes some interesting observations about the role of legislators. In what I believe is the clearest language that he has ever used on this subject, Dworkin openly asserts that the notion of law as integrity applies to legislators as well as courts.¹⁰³ He could not do otherwise now that he has openly espoused the view that judicial decisionmaking is itself also a form of political decisionmaking. As such, judicial decisionmaking is not different in kind from legislative decisionmaking. If the former must be committed to integrity, why not the latter? The problem that Dworkin sees in applying the view of law as integrity to the legislative arena arises from so-called "internal compromises" and the temptation to enact checkerboard statutes. A checkerboard statute might, for example, involve a compromise in which strict liability is imposed on manufacturers of automobiles but not on, say, manufacturers of washing machines.¹⁰⁴ The problem is a difficult one because, as Dworkin points out:

Of course we do accept arbitrary distinctions about some matters: zoning, for example. We accept that shops or factories be forbidden in some zones and not others and that parking be prohibited on alternate sides of the same street on alternate days. But we reject a division between parties of opinion when matters of principle are at stake. We follow a different model: that each point of view must be allowed a voice in the process of deliberation but that the collective decision must nevertheless aim to settle on some coherent principle whose influence then extends to the natural limits of its authority. If there must

101. *Id.*

102. *Id.* at 211.

103. *See id.* at 217-19.

104. *See id.* at 217-18.

be compromise because people are divided about justice, then the compromise must be external, not internal; it must be a compromise about which scheme of justice to adopt rather than a compromised scheme of justice.¹⁰⁵

I shall return to this question after Dworkin's thesis has been completely set out. For the moment, recall that Dworkin sees "integrity" as the (best) resolution of the sometimes conflicting claims of fairness and justice. As applied to legislation, the legislature must never "enact checkerboard statutes just out of a concern for fairness."¹⁰⁶ But that is not to say a checkerboard solution is never justified. Sometimes considerations of justice must prevail:

Integrity condemns the result, but justice recommends it [that is, the compromise checkerboard statute] over no change at all, and on balance half the loaf might be better than none. The legislature would abandon its general commitment to integrity, and so forfeit the argument for legitimacy . . . if it made that choice in every case or even characteristically. But that does not mean it should never choose justice over integrity.¹⁰⁷

The judiciary is more constrained, but Dworkin clearly accepts that the "adjudicative principle of integrity [is not] absolutely sovereign over what judges must do at the end of the day."¹⁰⁸ Dworkin's point is that the principle of adjudicative integrity "is decisive over what a judge recognizes as law,"¹⁰⁹ but not decisive of how a judge should decide particular cases. The example Dworkin gives is the Fugitive Slave Act. If, under the principle of integrity, the Fugitive Slave Act had to be considered part of the law of the United States, the judge should consider whether his sense of justice would allow him to "actually enforce it on the demand of a slave owner, or whether he should lie and say that this was not the law after all, or whether he should resign."¹¹⁰ It is interesting that Dworkin uses events of some 130 or more years ago as an example. The way he tells the story is as important as the story he tells.

V.

The question, then, to which Dworkin has been leading the reader, is how does integrity figure in the interpretive exercise that Dworkin asserts is the essence of judicial decisionmaking? According to what Dworkin terms "law as integrity," propositions of law are true if they

105. *Id.* at 179 (footnote omitted).

106. *Id.* at 217.

107. *Id.* at 218. Dworkin is discussing a statute imposing strict liability only upon automobile manufacturers.

108. *Id.*

109. *Id.*

110. *Id.* at 219.

figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice.¹¹¹ In more concrete terms, a judge seeking to decide a particular case must decide whether "legal practice is seen in a better light if we assume the community has accepted" one principle rather than another.¹¹² Dworkin recognizes that history will be important, but the notion of integrity being put forward by him "does not require consistency in principle over all stages of a community's law"; integrity "commands a horizontal rather than vertical consistency of principle across the range of legal standards the community *now* enforces."¹¹³ Throughout this process Dworkin never lets us forget the contention with which he launched his academic career: that "the law—the rights and duties that flow from past collective decisions and for that reason license or require coercion—contains not only the narrow explicit content of these decisions but also, more broadly, the scheme of principles necessary to justify them."¹¹⁴

Dworkin then proceeds, along grounds he has made familiar in recent years, to analogize the development of the law to the writing of a chain novel.¹¹⁵ Each succeeding author is obliged to search for the interpretation of the text supplied to him that best fits that text. Dworkin recognizes that it may be impossible to come up with an interpretation that explains every "major structural aspect of the text."¹¹⁶ The chain novelist will then be forced to look for interpretations that fit the bulk of the text and, if more than one such interpretation presents itself, he must then "judge which of these eligible readings makes the work in progress best, all things considered."¹¹⁷ Some interpretations may fit more of the text; others will be more interesting, perhaps making the novel "substantively better."¹¹⁸ It is of course possible that no interpretation will survive even the "relaxed test"¹¹⁹ of conformity with the bulk of the text. One would then have to abandon the task. But the point Dworkin wants to make, with its obvious application to legal interpretation, is that "you cannot know in advance that you will reach that skeptical result";¹²⁰ rather, "the wise-sounding judgment that no one interpretation could be

111. *Id.* at 225.

112. *Id.* at 226.

113. *Id.* at 227 (emphasis added).

114. *Id.*

115. *See id.* at 228-38.

116. *Id.* at 230.

117. *Id.* at 231.

118. *Id.* at 235.

119. *Id.* at 237.

120. *Id.*

best must be earned and defended like any other interpretive claim."¹²¹

The chain novel analogy of course cannot automatically be applied to the project of legal interpretation. To begin with, as Dworkin himself notes, the project of coming up with the "best story" to encompass the so-called legal text is that of seeking "the best story . . . from the standpoint of political morality, not aesthetics."¹²² More importantly, it requires the acceptance of Dworkin's contention that "[t]he adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness,"¹²³ a requirement that many people would dismiss as absurd. In the succeeding pages, Dworkin resurrects his faithful alter ego Hercules and applies the technique of interpretation he has just described to a series of cases. He begins with *McLoughlin v. O'Brian*,¹²⁴ a case in which the House of Lords allowed a woman to recover damages for emotional harm suffered, when, about an hour and a half after a motor vehicle accident in which one of her children was killed and her husband and several other children were injured, she saw "her surviving daughter begrimed with dirt and oil," her husband with "his shirt hanging off him" and who "started sobbing" when he saw her, and her surviving son "the whole of [whose] left face and left side was covered."¹²⁵ When the girl "had been cleaned up . . . [she] was too upset to speak and simply clung to her mother."¹²⁶ I will have occasion to consider Dworkin's discussion of *McLoughlin* later¹²⁷ when I make some general criticisms of *Law's Empire*. Dworkin then applies his interpretive technique to cases of statutory interpretation and constitutional adjudication. Along the way Dworkin argues against an economic interpretation of the common law. Because the theories of the law and economics school and the popular moral theory of utilitarianism are not, in Dworkin's view, morally sufficient justifications of legal practice, neither is acceptable: "[an] interpretation must not only fit but also justify the practice it interprets."¹²⁸ The law and economics theories are unacceptable because we do not have a moral duty to maximize wealth,¹²⁹ and utilitarianism fails as a justification because "people do not accept [the] strict requirement

121. *Id.* at 237-38.

122. *Id.* at 239.

123. *Id.* at 225.

124. [1983] 1 A.C. 410 (1982).

125. *Id.* at 417. The facts are stated in the speech of Lord Wilberforce.

126. *Id.*

127. See *infra* notes 211-16 and accompanying text.

128. R. DWORKIN, *supra* note 2, at 285.

129. See *id.* at 286-88.

always to consider other people's interests as equal in importance to their own."¹³⁰

When Dworkin turns to statutory interpretation, it is no surprise to find that his alter ego, Hercules, "will treat Congress as an author earlier than himself in the chain of law, though an author with special powers and responsibilities different from his own."¹³¹ Hercules "will see his own role as fundamentally the creative one of a partner continuing to develop, in what he believes is the best way, the statutory scheme Congress began."¹³² Dworkin labors to show how lesser judges, such as Hermes, will be driven in the end to adopt the interpretive approach of Hercules. Hermes may begin by believing that, in interpreting the contested provisions of a statute, he should be governed by the hopes and expectations of the legislator whose statements appear in the legislative record. He will, however, end up concluding

that the speaker's meaning theory of statutory interpretation requires taking [legislator] Smith's intentions to lie in her *convictions*, that is, her beliefs about what justice or sound policy would require, which may, of course, be different from either her hopes or her expectations.¹³³

Hermes will not look to "Smith's hopes or expectations or to what she would have done in circumstances that did not arise but to the political convictions out of which she voted for the act, *or would have if she had been voting on principle*."¹³⁴ Ultimately, Hermes will conclude "that statutes should be read to promote the aims of a community of principle, that is, that they should be read to express a coherent scheme of convic-

130. *Id.* at 294. The point that people generally do not always consider other people's interests equal to their own is made best *id.* at 292. In the final pages of chapter eight, where these issues of common law adjudication are considered, Dworkin concludes that if, as he himself is inclined to do, a person accepts equality of resources as a "better overall interpretation of his community's property scheme . . . then he should adopt a view of his private responsibilities that produces market-stimulating choices on most occasions when abstract legal rights compete." *Id.* at 301-02. Even if one believes that resources have been distributed unequally, one would "normally have no reason to presume anything about the direction of the inequality with respect to the particular people [one's] act will affect." *Id.* at 305. Dworkin appears to be trying to concede that there is something to the law and economics school and, at the same time, show that his concept of equality is not vulnerable to Nozick's criticism that any scheme that requires equality as an end-state of social processes will require an elaborate coercive structure through which the state is able to prevent people from making imprudent bargains. See R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 160-64 (1974). Dworkin limits his obeisance to the law and economics school to situations in which abstract rights compete. Where no such rights are involved, Dworkin makes clear that legislatures, in forming and implementing policy, are not constrained by economic considerations. See R. DWORKIN, *supra* note 2, at 310-12.

131. *Id.* at 313.

132. *Id.*

133. *Id.* at 324.

134. *Id.* at 327 (emphasis added).

tion dominant within the legislature that enacted them."¹³⁵

The case that Dworkin uses as the focus of his discussion is the "snail darter" case¹³⁶ in which the Supreme Court interpreted the Endangered Species Act to require the halting of a virtually completed federal dam and power project.¹³⁷ Dworkin assumes that his hypothetical legislator, Smith, has expressed her opinion that the TVA project in question should be halted to save the snail darter. Dworkin, on the contrary, believes the decision, since overruled by Congress, was a mistake and wants to show why. As Dworkin sees the case, it all boils down to whether the Secretary of the Interior would have acted reasonably if he had not listed the snail darter as an endangered species under the Act. The issue thus is whether Smith would be opposed to reasonable conduct on the part of the Secretary. Obviously she would not. Now, suppose Smith believed it would have been unreasonable for the Secretary to fail to list the snail darter, would that not force the Court's hand? Not for Dworkin, because Dworkin takes it as given that Smith does "not think that the Secretary should have no power to make decisions *she* regards as unreasonable—that would be an extraordinary opinion—but that he should not have power to make decisions that are *in fact* unreasonable."¹³⁸ For Dworkin, "[n]o other reading of her conviction makes sense of it as a conviction." Thus, Hermes

will probably decide that [Smith's] opinion about the snail darter is, within the larger set of her more general opinions, a mistake. He will then think he respects her convictions as a whole better by ignoring her concrete opinion about the snail darter and allowing the dam to open.¹³⁹

This is quite a *tour de force*!

In considering how statutes should be construed, as in the discussion of all other types of judicial decisionmaking, we eventually return to Hercules. We supposedly now see how the conclusion Dworkin supports in the snail darter case follows from Hercules' idea that statutes must be read in whatever way follows from the best interpretation of the legislative process as a whole."¹⁴⁰ For each statute that he is asked to enforce, Hercules constructs a justification that "fits and flows through that statute and is, if possible, consistent with other legislation in force."¹⁴¹ This approach, asserts Dworkin, "might lead him to reject an interpretation

135. *Id.* at 330.

136. *TVA v. Hill*, 437 U.S. 153 (1978).

137. See R. DWORKIN, *supra* note 2, at 313-54.

138. *Id.* at 333.

139. *Id.*

140. *Id.* at 337.

141. *Id.* at 338.

that would be closer to the concrete intentions of the draftsman."¹⁴² It is not that Hercules is cavalier with legislative history. It is just that "official statements of purpose . . . should be treated as themselves acts of the state personified." These statements are "political decisions" embraced by the "command of integrity."¹⁴³ In short, Hercules aims to make the legislative story, as a whole, as good as it can be.¹⁴⁴ Thus, while Hercules will treat "the formal statements that make up legislative history as acts of the state," he will not treat them as "part of the statute itself."¹⁴⁵ This is an important point because it enables Dworkin to argue that a statute's meaning is not fixed at a particular moment of time. Hercules will look to

whichever expression of political views seems relevant to deciding whether a particular statute constructed according to an interpretation he is considering would be fair, given the character and spread of public opinion. In this context the televised address of an important politician might be *more* important than the fine print of a committee report.¹⁴⁶

Using the snail darter case again as an example, Dworkin concludes that Hercules will "look not to public opinion at the beginning, when conservation was in flower, but now, when it must be decided whether the Secretary can waste large public funds to save a minor species."¹⁴⁷ For Dworkin, fairness requires this approach to legislative history because declarations found in that history "are reports of public purpose and conviction, and so they are naturally vulnerable to reassessment."¹⁴⁸ As statutes age, people have less reason to rely on these declarations. They may have been "supplemented and perhaps replaced, as formal interpretations of public commitment, by a variety of other interpretive explanations attached to later statutes on related issues."¹⁴⁹ Consequently, "Hercules will pay less and less attention to the original legislative history." In the end,

Hercules interprets history in motion, because the story he must make as good as it can be is the whole story through his decision and beyond. He does not amend out-of-date statutes to suit new times, as the metaphysics of speaker's meaning [theories] would suggest. He recognizes what the old statutes have since become.¹⁵⁰

142. *Id.* at 447 n.7.

143. *Id.* at 343.

144. *Id.* at 348.

145. *Id.* at 346.

146. *Id.* at 349.

147. *Id.*

148. *Id.* at 350.

149. *Id.*

150. *Id.*

VI.

Dworkin finally turns to constitutional adjudication. He begins by discussing liberal and conservative judges, concluding that "[t]he distinction between [them] is inexact and unlikely to contribute much to any serious account of constitutional adjudication."¹⁵¹ Even the more recent distinction between "interpretivist and noninterpretivist camps" is "highly misleading."¹⁵² These labels

suggest a distinction between judges who believe constitutional decisions should be made only or mainly by interpreting the Constitution itself and others who think they should be based on extraconstitutional grounds. This is an academic form of the crude popular mistake that some judges obey the Constitution and others disregard it.¹⁵³

These notions are a mistake because, as the reader is now well aware, they ignore "the philosophical character of law as interpretive."¹⁵⁴ Using the important question of how segregation in schools comports with the fourteenth amendment as the focus of his discussion, Dworkin has Hercules respond to the criticism of *Brown v. Board of Education*¹⁵⁵ that is premised on the proposition that those lawmakers who voted for the fourteenth amendment did not think they were outlawing racially segregated education. Applying the techniques that he used in construing statutes, Hercules focuses not on what these lawmakers may or may not have said (or thought) about segregated education, but on their dominant conviction: to treat all citizens as equals. Thus, even an historicist, if he "believes that racial segregation is inconsistent with the conception of equality the framers accepted at a more abstract level, will think that fidelity to their convictions as a whole requires holding segregation unconstitutional."¹⁵⁶ Such a person might also hold "a different view: that circumstances have changed so that although segregation was consistent with that conception in the late nineteenth century, it is not consistent now."¹⁵⁷ In short, like Hermes before him, a hypothetical historicist is driven to reject speaker's meaning approaches and to approximate the methods of Hercules who, as we know, is searching for a political theory that makes the constitutional story a better story when the Constitution is read in one way rather than another. To use Dworkin's own words:

It would be silly to take the opinions of those who first voted on the Fourteenth Amendment as reporting the public morality of the United

151. *Id.* at 359.

152. *Id.*

153. *Id.* at 359-60.

154. *Id.* at 360.

155. 347 U.S. 483 (1954).

156. R. DWORKIN, *supra* note 2, at 362.

157. *Id.*

States a century later, when the racial issue had been transformed in almost every way. It would also be perverse; it would deny that community the power to change its public sense of purpose, which means denying that it can have public purposes at all.¹⁵⁸

After making this claim, Dworkin sets out to meet the argument that stability and predictability require that constitutional adjudication be tied to the concrete intentions of its authors. In its stronger version, this argument means that the courts will not "overturn some legislative or executive decision unless historical scholarship has demonstrated that this result was intended in a concrete way."¹⁵⁹ In its weaker version, "[n]o statute or decision will be overturned if it can be shown on historical grounds that the framers expected that it would not be."¹⁶⁰ Dworkin asks if either of these versions of historicism offer "a decent interpretation of American constitutional practice."¹⁶¹ He concludes that "[t]he stronger version does not fit that practice at all" and that "[t]he weaker version fits the practice better just because it is weaker and it may fit well enough to survive if the argument from stability is strong enough in substance."¹⁶² In short, the question becomes, how strong an argument of political morality is the argument from stability? Dworkin suggests an answer to that question by asking how plausible it is to make the "correct interpretation of [the] Constitution depend on the concrete opinions of its authors, no matter how dated these may be, rather than on fresh, contemporary interpretive decisions that may contradict" them.¹⁶³

For Dworkin, the historicist's argument is wanting in persuasive power because it "relies most on the importance of certainty when that virtue is least important to good government."¹⁶⁴ As to some issues, such as the term of the President's office, it matters more that the law be settled than what the law is.¹⁶⁵ As to another class of issues, stability is also important, but it is not always more important than the details of what has been decided. Decisions on the allocation of power required by the overall scheme of federalism are placed by Dworkin into this class. Then there is, he argues, a class of cases where the issue is one of principle, where substance is more important than the historicist idea of stability. These cases involve construction of those clauses of the Constitution that recognize individual rights against the state: freedom of speech, due

158. *Id.* at 365.

159. *Id.* at 366.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 367.

164. *Id.*

165. *See id.* at 365-69 (discussing the importance of stability in various types of constitutional adjudication).

process in criminal prosecutions, and "treatment as an equal in the disposition of public resources, including education."¹⁶⁶ The crucial kind of stability that Dworkin maintains is needed here is that of integrity: "the system of rights must be interpreted, so far as possible, as expressing a coherent vision of justice."¹⁶⁷ Historicism, particularly in its strongest form, "is tantamount to denying that the Constitution expresses principles, for principles cannot be seen as stopping where some historical statesman's time, imagination, and interest stopped. The Constitution takes rights seriously; historicism does not."¹⁶⁸

As a Justice of the Supreme Court imbued with this vision, Hercules adopts neither passivism nor activism, the latter of which Dworkin considers another version of the discredited position of pragmatism. Rather, Hercules considers the requirements of justice, of fairness, and of majority rule. While fairness demands deference to stable and abstract features of national life, it does not demand deference to the views of "a local or transient political majority just because these have triumphed on a particular political occasion."¹⁶⁹ The Constitution as the foundation of law must be foundational as a whole. Because "[i]t must fit and justify the most basic arrangements of political power[,] . . . it must be a justification drawn from the most philosophical reaches of political theory. Lawyers are always philosophers, because jurisprudence is part of any lawyer's account of what the law is."¹⁷⁰

With this background behind him, Dworkin finally turns to examine the theoretical issues raised by *Brown v. Board of Education*: what are the "character" and the "dimensions" of the right not to be discriminated against?¹⁷¹ Dworkin is vitally interested in the question because he wishes to determine how, if at all, the principles underlying *Brown* apply to the problem of affirmative action. Dworkin examines three possible groundings for that right. The first adopts the method of suspect classifications and "supposes . . . that people have no distinct right not to be the victim of racial or other discrimination beyond what the rationality restraint already requires."¹⁷² It merely insists, according to Dworkin, that the classifications adopted by the legislature give "equal effect to all the preferences displayed in the community."¹⁷³ The second theory "in-

166. *Id.* at 368.

167. *Id.*

168. *Id.* at 369.

169. *Id.* at 376. *See also id.* at 369-79 (arguing for rejection of passivism as a possible judicial strategy).

170. *Id.* at 380.

171. *Id.* at 382.

172. *Id.* at 383.

173. *Id.* at 385.

sists that the Constitution does recognize a distinct right against discrimination as a trump over any state's conception of the general interest."¹⁷⁴ The third is more subtle. Unlike most conceptions of equality, it does not "make the public interest, and therefore public policy, sensitive to people's tastes, preferences, and choices."¹⁷⁵ The third theory instead requires

that people have a right, against this type of collective justification, that certain sources or types of preferences or choices not be allowed to count in that way. It insists that preferences that are rooted in some sort of prejudice against one group can never count in favor of a policy that includes the disadvantage of that group.¹⁷⁶

The first theory, which relies on suspect classifications, might or might not condemn racially segregated schools. It would depend upon the factual circumstances. Hercules will therefore reject it.¹⁷⁷ Even in 1954 it did not reflect people's convictions about racial justice. The second theory, which relies on "banned categories," would condemn all racially segregated education. Hercules would respond more favorably to it. Hercules would also respond favorably to the third theory, which admittedly would also be more difficult to apply in the adjudication of cases. It would require the construction of "a practical elaboration based on judgments about the kinds of preferences that often or typically have been generated through prejudice, and about the kinds of political decisions that in normal circumstances could not be justified were such preferences not counted as part of the justification."¹⁷⁸ Difficult as this task may be, Hercules chooses the third theory because it gives a better answer when he confronts "legislation whose purpose and effect is to benefit people who have historically been the victims of prejudice."¹⁷⁹ The third theory, the "banned sources" theory, distinguishes between affirmative action and Jim Crow. The "banned categories" theory treats them both in the same way. Dworkin here, of course, is restating in more abstract form his previous contentions that the affirmative action programs involved in *Bakke*¹⁸⁰ and *DeFunis*¹⁸¹ were constitutionally valid.¹⁸²

174. *Id.* at 383-84.

175. *Id.* at 384.

176. *Id.*

177. *See id.* at 385.

178. *Id.* at 386.

179. *Id.*

180. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

181. *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

182. *See* R. DWORKIN, *supra* note 4, at 293-315 (commenting on *Bakke*); Dworkin, *Reverse Discrimination*, in R. DWORKIN, *supra* note 3, at 223-39 (commenting on *DeFunis*). All these essays first appeared in the *New York Review of Books*. Dworkin specifically discusses *Bakke* in *Law's Empire*. *See* R. DWORKIN, *supra* note 2, at 393-97.

Dworkin ends on a high rhetorical note. To the old shibboleth that "law works its way pure," Dworkin responds:

The actual present law, for Hercules, consists in the principle that provides the best justification available for the doctrines and devices of the law . . . [O]nce Hercules has worked out what the law now is, there can be no purer law latent within it. Law as integrity (we might say) is the idea of law worked pure.¹⁸³

We accept integrity as an ideal "because we want to treat ourselves as an association of principle, as a community governed by a single and coherent vision of justice and fairness and procedural due process in the right relation."¹⁸⁴ For Hercules, justice alone—that is, "coherence in the substantive principles of justice"—is insufficient to achieve integrity. Instead, he seeks "a wider integrity that gives effect to principles of fairness and procedural due process as well."¹⁸⁵

VII.

I have spent so much time setting out the argument in *Law's Empire* because it is a complex book. Confronted with such a book it is all too easy for the critic to focus on the big picture. The fact that Dworkin himself often writes at a very high level of abstraction is additional encouragement for the critic to do likewise. In resisting the tendency to start out from a global perspective, I have striven to present an accurate description of Dworkin's thesis and how it has evolved from his earlier work.¹⁸⁶ I would submit that, when they are presented succinctly,

183. R. DWORKIN, *supra* note 2, at 400.

184. *Id.* at 404.

185. *Id.*

186. I have tried to put my concise statement of Dworkin's thesis as much as possible in his own words because one of the criticisms I have made of Dworkin in the past is that the cases he claimed established the validity of his approach were clearly misstated and misused by him. See Christie, *The Model of Principles*, 1968 DUKE L.J. 649 (responding to Dworkin, *The Model of Rules*, *supra* note 5).

In *Law's Empire*, Dworkin no longer makes the claims for *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889) that he made in *The Model of Rules*. In *Riggs*, a grandson murdered his grandfather and the question was whether the young man could inherit under the old man's will. In *The Model of Rules*, Dworkin described the case as being an instance in which there was clear law—the statutory rules governing wills—that would permit the young man to inherit. Dworkin claimed that instead of applying that law, the court invoked the principle that no man should profit by his own wrongdoing in order to change the law. See Dworkin, *The Model of Rules*, *supra* note 2, at 29. In *The Model of Principles*, I pointed out that this was an inaccurate characterization of *Riggs* and the prior case law. See Christie, *supra*, at 660-62. The United States Supreme Court had already held that a beneficiary who murdered the insured could not receive the proceeds of the policy and the courts had long since held that, the statutory provisions on wills notwithstanding, a will procured by fraud could be avoided. Dworkin seems to have accepted the validity of my criticism because in *Law's Empire* he does not use *Riggs* (which he refers to as "Elmer's Case") as an illustration of the use of a principle to change a rule of law but rather as a case in which the court was searching for the

Dworkin's arguments readily display their weaknesses. Accordingly, rather than extend this review inordinately I will focus only on a few major points.

First, I would note the criticism that has been skillfully leveled by others against Dworkin's earlier work: it is a sophisticated attempt to justify, on supposedly objective grounds, some highly controversial decisions of the Supreme Court.¹⁸⁷ That Dworkin is driven by a political agenda seems clear. Nowhere perhaps is this made clearer than on the issue of affirmative action. Dworkin attempts to lead the Court further than it has ever thus far been prepared to go. It is a topic that he has addressed on a number of occasions and to which, as noted above, he returned in *Law's Empire*. As I have said on another occasion, "[a] clever person . . . can always 'explain' to a DeFunis or a Bakke that *Sweatt v. Painter* really does not control the disposition of his case because, according to a 'correct' background moral theory, denying admission to him does not denigrate his right to equal respect as a person whereas denying Sweatt admission to law school does."¹⁸⁸ Dworkin's argument is that no one has a right to be admitted to law school or to

law in the situation presented. R. DWORKIN, *supra* note 2, at 15-20, 122-23 (describing the case as one in which the court was trying to discover legislative intent).

The other case that Dworkin relied upon as an illustration of his thesis was *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), a very complicated case. The issue on which Dworkin focused was the court's striking down a disclaimer of further liability contained in the warranty provided by the automobile manufacturer and the automobile dealer. Dworkin saw this as a conflict between a rule recognizing the validity of contractual obligations and a principle that "courts generally refuse to lend themselves to the enforcement of a 'bargain' in which one party has unjustly taken advantage of the economic necessities of the other." Dworkin, *The Model of Rules*, *supra* note 5, at 24. In *The Model of Principles*, I analyzed *Henningsen* in great detail and pointed out that it was grossly inaccurate to characterize the case in such a simple way. Christie, *supra*, at 662-67. Dworkin does not even discuss *Henningsen* in *Law's Empire*.

I avert to these matters now not because I wish to reopen old controversies, so to speak, but because Dworkin continues to use cases to illustrate his points and describes the cases in a very abstract and, from a lawyer's point of view, very inaccurate way. Given that Dworkin writes as much for nonlawyers as he does for lawyers, the use of case citation gives his argument a patina of validity that, I would submit, is not justified. In the course of the present review, I have not attempted to criticize Dworkin's use of cases except with regard to his somewhat simplified treatment of *McLoughlin v. O'Brian*. See *infra* notes 211-16 and accompanying text. I might point out, however, the following statement found at the beginning of *Law's Empire*: "In 1975 the House of Lords, the highest court in Britain, laid down rules stipulating how long a Cabinet officer must wait after leaving office to publish descriptions of confidential Cabinet meetings." R. DWORKIN, *supra* note 2, at 2. The reference given is "Attorney-General v. Jonathan Cape, Ltd. [1975] 3 All E.R. 484." *Id.* at 417 n.4. I will simply point out that the case was *not* decided by the House of Lords; it was instead decided by Lord Chief Justice Widgery in Queen's Bench, a trial court! Secondly, the case did not lay down the definitive rules that Dworkin claims it did.

187. See, e.g., Letwin, Book Review, *THE AM. SPECTATOR*, Jan. 1986, at 33-40 (reviewing R. DWORKIN, *A MATTER OF PRINCIPLE* (1985)).

188. Christie, *Why the First Amendment Should not be Interpreted from the Pathological Perspective: A Response to Professor Blasi*, 1986 *DUKE L.J.* 683, 692.

medical school; the only right anyone has is not to be discriminated against because of prejudice. Denying a person like Bakke admission to medical school because of an affirmative action program does not reflect any prejudice against him.¹⁸⁹ One wonders how the Bakkes of this world analyze the situation. Dworkin, of course, now openly admits that he is pursuing a political agenda because he now asserts that law is a political activity—but a political activity with morally correct solutions. Dworkin's whole argument, sketched out above, for refusing to accept even clear and unambiguous expressions of legislative intent when it runs counter to his political agenda strikes me as pure sophistry.¹⁹⁰

A second and more important point I wish to make about *Law's Empire* is that in the process of reformulating and extending his basic thesis, Dworkin has abandoned one of the principal claims that catapulted him to the forefront of the contemporary jurisprudential scene: that legal questions, if properly analyzed, have only one right answer.¹⁹¹ Throughout *Law's Empire*, Dworkin readily concedes that judges operating in good faith, even when using Dworkin's methods, will often arrive at different solutions to legal questions.¹⁹² They will each strive to achieve what for them is the right answer, but that of course is a different matter. Anyone who is not prepared to decide cases by a flip of the coin, and who is not prepared to accept that it is a matter of indifference what decision he arrives at, will, if he is acting in good faith, strive to arrive at the best solution he can. Dworkin strives to maintain a semblance of consistency with his earlier assertions by insisting that it is meaningful to talk of right answers even when it is contestable what those right answers are.¹⁹³ This is an assertion to which the critic can only reply, "So what?"

189. See *supra* notes 180-82 and accompanying text.

190. I do not purport to be a trained literary critic, and I am therefore reluctant to say much about the validity of Dworkin's methods when applied to literary criticism. To demonstrate my naïveté, if, in interpreting a text, the critic endeavors to make it the best literary work he can, why should he not also make the text the best text that he can? What if there are some (small) gaps in the text because portions of the manuscript have been destroyed? To change perspectives, what about someone faced with the task of restoring an old painting. What is his function? To make the painting the best he thinks it can be? Or is it to restore it, as nearly as possible, to the painting Valasquez or Michelangelo or some unknown artist painted? See *Profiles*, THE NEW YORKER, Mar. 16, 1987, at 44. Is all philosophy interpretation of Aristotle? Does not the importance of past work, as my colleague William Van Alstyne maintains, lie instead in its provocative power, challenging us to do better in our *own* work no matter how elegant the text of that older work may be or how subtle and profound its argument?

191. For expositions of this view, see in particular Dworkin, *supra* note 8, and Dworkin, *supra* note 9. Dworkin insisted in *The Model of Rules* that judges only have discretion in the "weak sense" of discretion. Dworkin, *The Model of Rules*, *supra* note 5, at 39.

192. See, e.g., R. DWORKIN, *supra* note 2, at 85-86, 237-39, 250, 256, 334, 413.

193. One can do no better than quote Dworkin's own words when he is discussing whether external skepticism—particularly external skepticism with regard to moral questions—"is a significant theory." *Id.* at 80. Dworkin does not see how, even if external skepticism is a sound theory, it

Or, if the critic is more charitable, "That's interesting." In practice it is an admission that we shall never be able to agree on what the right answer is. Perhaps Dworkin is merely and belatedly recognizing reality or perhaps he is striving to convince the critical legal scholarship school—which he criticizes¹⁹⁴ but nevertheless wishes to continue to engage in dialogue—"to take Dworkin seriously."

A third point I would like to note is that *Law's Empire* has greatly softened the sharp distinction Dworkin used to make between the legislative role and the judicial role. He now openly concedes that the regime of principle required by the model of law as integrity applies to legislators as well as judges.¹⁹⁵ The problem that gives Dworkin difficulty is what he calls the "checkerboard statute," such as a legal regime providing for strict liability against the makers of automobiles but not of some other products, such as washing machines.¹⁹⁶ He is prepared to permit legislatures to adopt that sort of solution occasionally out of a concern for "justice" even at the expense of "integrity" on the ground that half a loaf is better than none.¹⁹⁷ To some extent the problem is a self-created one. Dworkin has a predilection for operating on a plane of generality in which he can make sweeping declarations of what a commitment to principle requires and in which the so-called principles in play can be pithily described. If he were to examine the problems of, say, accidents involving automobiles and accidents involving washing machines in detail, there might be no "checkerboard" problem at all. One type of machine might be more dangerous, be less likely to be covered by first-party insurance, involve more difficult problems of proof of fault, etc. In short, the situations might not be all that comparable. Indeed, there might be nothing unprincipled in a court's constructing the same regime, namely a regime in which strict liability is imposed upon the makers of some products but not upon the makers of others.¹⁹⁸

"would in any way condemn the belief interpreters commonly have: that one interpretation of some text or social practice can be on balance better than others, that there can be a 'right answer' to the question which is best even when it is controversial what the right answer is." *Id.* (footnote omitted).

194. *See id.* at 271-75.

195. *See supra* notes 103-10 and accompanying text.

196. *See supra* note 104-07 and accompanying text.

197. *See supra* note 107.

198. As a historical matter, courts have done precisely that. *See, e.g.,* *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612 (1948) (cosmetics); *Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942) (food); *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913) (food). Even liability based on negligence distinguished among products. *See MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 389, 111 N.E. 1050, 1053 (1916) ("If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger.").

There are any number of telling criticisms that could be made against the argument that Dworkin is attempting to sketch out about the appropriateness or inappropriateness of certain types of distinctions in judicial reasoning. Is, for example, the distinction between economic loss and physical injury any more principled than the distinction between automobiles and washing machines?¹⁹⁹ At the level of generality at which Dworkin pitches his argument, it is pointless to pursue this line of argument much further. The basic problem goes back to one of Dworkin's original assertions, that it is improper for courts to decide cases on the ground of policy; courts must only decide cases on the ground of principle. Over the years, this has been one of the best known features of Dworkin's writing. People such as Greenawalt²⁰⁰ have dismissed Dworkin's contention as nonsense; courts do and must rely on policy in deciding difficult cases that involve major social ramifications. Others have found Dworkin's argument more congenial. Among these seemingly have been judges sitting in the House of Lords, particularly Lord Scarman and, perhaps to a lesser extent, Lord Bridge of Harwich in *McLoughlin v. O'Brian*.²⁰¹ In that case, Lord Edmond-Davies found the suggestion that the policy issue was not justiciable—that liability must instead turn solely on the principle of foreseeability—"novel" and "counter to well-established and wholly acceptable law."²⁰² Lord Scarman and Lord Bridge of Harwich were particularly concerned with rejecting the relevance of the "floodgates argument" in establishing the ambit of the duty of care with regard to emotional injury. The attempt to make judicial development of the common law responsive only to principle is a hazardous endeavor. Subsequent cases, in which both the

199. The closest Dworkin comes to addressing this issue is when he declares "[i]f [government] appeals to the principle that people have a right to compensation from those who injure them carelessly, as its reason why manufacturers are liable for defective automobiles, it must give full effect to that principle in deciding whether accountants are liable for their mistakes as well." R. DWORGIN, *supra* note 2, at 165. He cites *Hedley Byrne & Co., Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465 (1963). He does not mention that the liability for negligent misrepresentation recognized in *Hedley Byrne* was hedged by many restrictions not applicable to automobile manufacturers. See *Hedley Byrne*, [1964] A.C. at 491-93. More to the point, in the United States automobile manufacturers are subject to strict liability in most states for physical injuries caused by defective automobiles. Should accountants be strictly liable for mistakes? One would have liked to have seen how Dworkin would approach the whole question of liability for pure economic loss under English law, a subject discussed in a number of recent decisions, some of the more important of which are cited *infra* notes 203-06.

200. See Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991 (1977); Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359 (1975).

201. [1983] 1 A.C. 410 (1982).

202. *Id.* at 427. Lord Edmund-Davies was responding to the arguments of Lord Scarman, *id.* at 430-31, and Lord Bridge of Harwich. *Id.* at 431-43. For Lord Bridge of Harwich's rejoinder, see *id.* at 443.

House of Lords and the Privy Council limited the right to recover in tort for pure economic loss that had seemingly been established by earlier cases clearly show that the English judiciary is not about to embrace the foreseeability principle regardless of so-called pragmatic or policy considerations.²⁰³ In one of these cases, *Governor of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co.*,²⁰⁴ Lord Scarman and Lord Bridge of Harwich concurred in a judgment that sharply limited a local governmental authority's liability to one who had suffered economic loss. The authority's inspector negligently failed to take any action when he discovered that the contractor was installing a drainage system different from the one approved by the authority. A prior decision of the House of Lords directly on point²⁰⁵ was distinguished²⁰⁶ on the ground that the plaintiff owner, an individual who did recover for mere economic loss, was potentially threatened with physical injury. Because the plaintiff in *Peabody Donation Fund* was a charitable foundation, the Lords concluded that there was, of course, no possibility of such injury to the owner!²⁰⁷

Rather than pursue the question of whether it is or is not appropriate for courts to consider policy in arriving at their decisions, or what types of policy, if any, it is appropriate for legislatures to consider—questions upon which the contending factions will never be able to convince the other—it might be appropriate to ask: What does Dworkin mean by a principle and what does he mean by a policy? One of the positive qualities about *Law's Empire* is that, in it, Dworkin presents some concrete examples of what he means by a principle that go beyond the examples presented in his earlier work. In one of his first articles on common law adjudication, Dworkin used as examples of principles such ancient maxims of the law as “[n]o one shall be permitted to profit by his own fraud or to take advantage of his own wrong,”²⁰⁸ “courts will not permit themselves to be used as instruments of inequity and injustice,”²⁰⁹ and “courts generally refuse to lend themselves to the enforcement of a ‘bargain’ in which one party has unjustly taken advantage of [another].”²¹⁰ It would be hard for any lawyer to reject any of these maxims, or principles, if you

203. See, e.g., *Candlewood Navigation Corp. v. Mitsui O.S.K. Lines, Ltd.*, [1986] 1 A.C. 1, 9-11 (1985); *Governors of Peabody Donation Fund v. Parkinson*, [1985] 1 A.C. 210 (1984).

204. [1985] 1 A.C. 210 (1984).

205. *Anns v. Merton London Borough County*, [1978] 1 A.C. 728 (1977).

206. [1985] 1 A.C. at 241-45.

207. This attempted distinction is severely criticized in Todd, *The Negligence Liability of Public Authorities: Divergence in the Common Law*, 102 LAW Q. REV. 370, 385-88 (1986).

208. R. DWORKIN, *supra* note 3, at 23.

209. *Id.* at 24.

210. *Id.*

will, although how these generalities apply to concrete cases is another matter. In *Law's Empire*, by contrast, Dworkin is prepared to go beyond these traditional platitudes in his discussion of what are legal principles and how they are to be applied. In his discussion of *McLoughlin v. O'Brian*, the emotional distress case whose facts are described in some particularity above,²¹¹ Dworkin sets forth six possible interpretations of the common law that might serve as the basis for the decision of the case:

(1) No one has a moral right to compensation except for physical injury. (2) People have a moral right to compensation for emotional injury suffered at the scene of an accident against anyone whose carelessness caused the accident but have no right to compensation for emotional injury suffered later. (3) People should recover compensation for emotional injury when a practice of requiring compensation in their circumstances would diminish the overall costs of accidents or otherwise make the community richer in the long run. (4) People have a moral right to compensation for any injury, emotional or physical, that is the direct consequence of careless conduct, no matter how unlikely or unforeseeable it is that that conduct would result in that injury. (5) People have a moral right to compensation for emotional or physical injury that is the consequence of careless conduct, but only if that injury was reasonably foreseeable by the person who acted carelessly. (6) People have a moral right to compensation for reasonably foreseeable injury but not in circumstances when recognizing such a right would impose massive and destructive financial burdens on people who have been careless out of proportion to their moral fault.²¹²

Interpretation (1) is clearly inconsistent with the previously decided cases and must therefore be rejected.²¹³ Interpretation (2) is dismissed because it does not state a principle of justice at all; it merely establishes an arbitrary line.²¹⁴ Dworkin also dismisses interpretation (3) because under at least one plausible interpretation it can be considered "a naked appeal to policy," which of course is forbidden under his system.²¹⁵ The others all pass initial muster; the only question is, are they plausible interpretations of the precedent cases? Dworkin thinks that interpretations (5) and (6) are the two most plausible contenders.²¹⁶ He incidentally is diffident about choosing between them, demonstrating how far he has come from his single-right-answer days. For present purposes, the point that I make is merely this: the difference between these sorts of motivating considerations, especially number (6), and what most people would call "policy" frankly escapes me. Is it then pointless to argue about

211. See *supra* notes 124-26 and accompanying text.

212. R. DWORKIN, *supra* note 2, at 240-41.

213. See *id.* at 242.

214. See *id.*

215. See *id.* at 243.

216. See *id.* at 245-50.

whether judges should or should not rely on policy because what is called a principle as opposed to what is called a policy is largely a verbal question? Should not the inquiry focus instead on the content of a proposed basis of decision and on whether it is an appropriate one for a court to consider? As Dworkin has worked out his system in practice it is ludicrous to make the appropriateness of criteria turn on the labels clever people affix to them rather than on the soundness of the criteria themselves.

VIII.

Reading Dworkin's book carefully and attempting to answer his provocative arguments is a very worthwhile enterprise for anyone seriously interested in jurisprudence. It has always been my submission that, in the end, Dworkin fails to convince. *Law's Empire* is a noble attempt by Dworkin to restate his theory of jurisprudence in a single, coherent form. Unfortunately, not only does he fail to convince, but, in the process of restating and refining his theory, he has compromised many of the positions that established him as the wonder of contemporary Anglo-American jurisprudence.

