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STILL WRONG AFTER ALL THESE YEARS

Ronald Dworkin's new book, *Law's Empire*, is quite long, but its basic argument is easily grasped. Dworkin is looking for an account of law that both fits legal practice and can serve as a justification of it. He finds that account in what he calls "law as integrity" (the latest version of what earlier in his work was termed first "articulate consistency" and then "chain practice"), a notion he defines in opposition to conventionalist and pragmatist accounts of law. A conventionalist account, as Dworkin characterizes it, is one which "restricts the law of a community to the explicit extension of its legal conventions like legislation and precedent" (p. 124). The consequence (an unfortunate one in Dworkin's view) is that when the conventions run out – when situations arise in the law that conventions do not cover – judges are left on their own and "must find some wholly forward-looking ground of decision" (p. 95). Although conventionalism begins by insisting on severe – indeed positivistic – constraints, it ends in a vision of constraints entirely left behind. Pragmatism's route to inadequacy is even shorter in Dworkin's story, for a pragmatist's first principle is that there are no first principles, merely the judge's opinion as to what, at any moment, is the best thing to do. In a pragmatist account of law, "judges do and should make whatever decisions seem to them best for the community's future", irrespective of "any form of consistency with the past as valuable for its own sake" (p. 95).

For law as integrity, in contrast, consistency is the chief obligation. It "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" (p. 245). That is to say, "law as integrity asks judges to assume... that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it

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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" (p. 243). The contrast is clear and (apparently) powerful: conventionalism offers rigid and mechanical principles that are inadequate to the unfolding complexity of legal life, while pragmatism forsakes even the possibility of linking up with a history that principle has informed. Only law as integrity affords both flexibility and continuity, for when a fresh case presents an apparently novel face, law as integrity throws up neither its hand in resignation (as a strong conventionalism would) nor decides on the basis of wholly contemporary pressures (as pragmatism must). Rather, it labors to bring the case in line with a chain of decisions, attending not to the particular details or outcomes of those decisions but to the underlying story ("coherent theory") their succession tells. In short, law as integrity at once respects history (as pragmatism does not), but refuses to be bound by its surface or literal shape (as conventionalism is), looking instead to the *abstract* shape to which history points and from which it is derived.

In what follows, I shall put forward three related objections to Dworkin's thesis. I shall argue first that his critique of conventionalism and pragmatism, however persuasive or unpersuasive it might be, is irrelevant because neither is a program according to which a judge might operate his practice. I shall then turn directly to the concept of "law as integrity" and question the claim (made frequently) that it represents an additional or extra step in adjudication – a "distinct virtue" (p. 411) – which can be invoked as a constraint against the appeal of lesser virtues and as a check against the pressures of the political and the personal. And finally, I shall contend that if "law as integrity" is anything, it is either the name of what we already do (without any special prompting) or a rhetorical/political strategy by means of which we give a certain necessary coloring to what we've already done.

My first point, then, is that conventionalism and pragmatism are not names of possible forms of self-conscious action. Conventionalism is not a possible form of action because for one to be able to "perform" it – to "do" conventionalism – it would have to be the case that language, at least in some of its instantiations, can set limits on its

own interpretation. That is after all what conventionalism, as Dworkin defines it, asserts: certain words found in certain authoritative texts (the Constitution, statutes, precedents) contain explicit directions that serve to guide the activities of legal actors. "A right or responsibility flows from past decisions only if it is explicit within them or can be made explicit through methods... accepted by the legal profession as a whole" (p. 95). The attraction of conventionalism is the constraint it seems to place on the interpretive power of judges and administrators; an avowedly conventional jurist will feel himself bound by the explicit or literal meaning of the appropriately identified texts.

But, of course, this entire picture of things, and the possibility of *being* a conventionalist, depends on the assumption that explicit or literal meanings do in fact exist, and it is my contention that they do not. It is also Dworkin's contention (at least when he correctly observes that conventionally authoritative texts, rather than limiting interpretation, are the objects of interpretation) that different legal actors may point to the "same" authoritative texts but assert for them entirely different meanings, and their opinions will, as Dworkin says, "express an interpretation rather than a direct or uncontroversial application of the institution of legislation" (p. 123). In fact, there is no possibility of a direct or uncontroversial application of the institution of legislation or of anything else. To be sure, you can always cite a statute or a piece of the Constitution and declare roundly that you stand on it and will not go beyond it; but, in fact, you will *already* have gone beyond it, if by "it" you understand a meaning that declares itself and repels interpretation. Meanings only become perspicuous against a background of interpretive assumptions in the absence of which reading and understanding would be impossible. A meaning that seems to leap off the page, propelled by its own self-sufficiency, is a meaning that flows from interpretive assumptions so deeply embedded that they have become invisible.

They can sometimes be made visible by someone who hears the "same" words within different assumptions in relation to which a quite other meaning "leaps off the page". Consider, for example, the stipulation in the Constitution that no one shall be eligible to be

President "who shall not have attained to the age of thirty five years" – a clause often cited wistfully by those who wish that the entire document had been written in the same absolutely explicit and precise language. But its explicitness and precision seem less certain the moment one pauses to ask an apparently nonsensical question: What did the writers mean by thirty five years of age? The commonsensical answer is that by thirty five years of age they meant thirty five years of age; but thirty five is a point on a scale, and the scale is a scale of something; in this case a scale of *maturity* as determined in relation to such matters as life-expectancy, the course of education, the balance between vigor and wisdom, etc. When the framers chose to specify thirty five as the minimal age of the President they did so against a background of concerns and cultural conditions within which "thirty-five" had a certain meaning; and one could argue (should there for some reason be an effort to "relax" the requirement in either direction) that since those conditions have changed – life expectancy is much higher, the period of vigor much longer, the course of education much extended – the meaning of thirty five has changed too, and "thirty five" now means "fifty". One might object that this argument (which has already been developed in different ways by Mark Tushnet, Gary Peller, and Giradeau Spann, among others) could be made only by instituting special circumstances within which "thirty five" received a meaning other than its literal one; but the circumstances within which the framers wrote and understood thirty five were no less special; and therefore the literal meaning thirty five had for them was no less contextually produced than the literal meaning thirty five might now have for those who hear it within the assumption of contemporary political and social conditions.

The moral is clear: someone who stands on a literal or explicit meaning in facts stands on an interpretation, albeit an interpretation so firmly in place that it is impossible (at least for the time being) not to take as literal and unassailable the meanings it subtends. What is also clear is that this truth about meaning (it is always and already interpretive) means that conventionalism is not a possible program for judicial action, for to *be* a conventionalist is to bind oneself to mean-

ings that have not been sullied by one's interpretive assumptions, and that is not something one could possibly do. Dworkin himself seems almost to say as much in his discussion of "soft" as opposed to "strict" conventionalism. Strict conventionalism is the impossible program we have been discussing, it "restricts the law of a community to the explicit extension of its legal conventions like legislation and precedent" (p. 124). Soft conventionalism, on the other hand, "insists that the law of a community includes everything within the implicit extension of these conventions" (p. 124). Of course, since what is and is not an implicit extension will always be a matter of dispute and interpretation, Dworkin is correct to conclude that soft conventionalism "is not really a form of conventionalism at all" (p. 127). and that "if conventionalism is to provide a distinct and muscular conception of law... it must be strict, not soft, conventionalism" (p. 128). I would add only that since it is a practical impossibility, strict conventionalism cannot provide a distinct and muscular conception of law either and that, therefore, there is no point in arguing against it.

The same thing can be said of pragmatism, although for slightly different reasons. A pragmatist, as Dworkin defines him, would be one who does not take into account "any form of consistency with the past" (p. 95). Not bound by any sense of obligation to history, he would "stand ready to revise his practice" and "the scope of what he counts as legal rights" in the light of his judgment as to which course of action best serves the community's future (pp. 154, 95). His actions would comprise "a set of discrete decisions" which he would be "free to make or amend one by one, with nothing but a strategic interest in the rest" (p. 167), with "no underlying commitment to any... fundamental pubic conception of justice" (p. 189). My question simply is, could there be such a person performing such actions, and my answer is, no. What, for example, would a "discrete decision" be like? If we are to take Dworkin at his word, it would be a decision that turned on a judgment of what was best for the community's future irrespective of the history of decisions, statutes, and invoking of precedents that preceded it. But where would one's sense of what was "best" come from if not from that very history, which, because it formed the basis of the agent's education, would be the content

of his judgment? The very ability to formulate a decision in terms that would be recognizably legal depends on one's having internalized the norms, categorical distinctions, and evidentiary criteria that make up one's understanding of what the law is. That understanding is developed in the course of an educational experience whose materials are the unfolding succession of cases, holdings, dissents, legislative actions, etc., that are the stuff of law school instruction and of the later instruction one receives in a clerkship or as a junior associate. These are not materials the legal actor thinks *about*; they are the material with which and within which he thinks, and therefore whether he "knows" it or not, whether he likes it or not, his very thinking is irremediably historical, consistent with the past in the sense that it flows from the past.

Dworkin's discussion of pragmatism repeatedly refers to the actions of "self-conscious" pragmatists (p. 154) – lawyers and judges who, if asked to render an account of their practice, would reply in pragmatist terms and say that when they decide something they never seriously consider the history of the enterprise, but make "discrete decisions". My point is that even if there are those who would thus characterize their actions, they would be mistaken, and the mistake they would be making is the mistake Dworkin makes when he hypothesizes about them: the mistake of assuming a direct and causal relationship between one's account of one's practice and the actual shape of that practice. The mere fact that a lawyer or a judge *says* that he is doing something impossible (acting freely and in disregard of the past) doesn't make him capable of doing it. One can be a "self-conscious" pragmatist only in the sense that one can sincerely believe oneself to be acting on pragmatist principles (or, from Dworkin's perspective, non-principles), but self-conscious pragmatist action, as opposed to the philosophical action of thinking of oneself as a pragmatist, is not an available option, and therefore there is no need to counsel against it.

That, of course, has been my argument all along, that Dworkin's strictures against conventionalism and pragmatism are "academic" (in the familiar pejorative sense) because they are not positions one could put into practice; and this argument, if understood, already includes another argument that "law as integrity" is a position that one could

not fail to put into practice. The reasoning is simple: if pragmatism is not an option for practice because the history it supposedly ignores is an ingredient of any judge's understanding, then law as integrity, which enjoins us to maintain a continuity with history, enjoins us to something we are already doing. This is a conclusion that Dworkin would certainly resist since it is his basic thesis that law as integrity is a "distinct political virtue" (pp. 166, 411), a thesis that is first developed in the context of a distinction between conversational and constructive (or creative) interpretation.

Conversational interpretation is the name of what a hearer does when processing the words of a speaker: "it assigns meaning in the light of the motives and purposes and concerns it supposes the speaker to have, and it reports its conclusions as statements about his intention in saying what he did" (p. 50). Constructive interpretation, on the other hand, turns on the purposes not of "some author, but of the interpreter":

> Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong (p. 52).

Now, much in this book depends on what Dworkin intends when he counsels us, as he does here, to make of something the "best" it can be. On the evidence of what he says here, the procedure seems to be a two step one in which the interpreter first determines the shape (or meaning) an object apparently has, and then wrestles it into another shape according to some prior sense of what it would be *best* for it to mean. The trouble with this account of interpretation is that it commits Dworkin to both of the positions he wants to avoid: strict conventionalism and free-wheeling pragmatism. The account is conventionalist, or formalist, in that it posits an identity for the object apart from any interpretation of it (step one); but it is pragmatist, and, in fact, subjectivist, when it assigns to the interpreter the power of *imposing* purpose (step two). Indeed, if we take the word "imposing" seriously, this is not an account of interpretation at all, but an instance of what Dworkin has elsewhere stigmatized as "changing" or "altering".

Dworkin is obviously uneasy about moving in that direction, for he immediately checks himself with this defensive qualification:

> It does not follow... that an interpreter can make of a practice or a work of art anything he would have wanted it to be... For the history or shape of a practice or object constrains the available interpretations of it... Creative interpretation, on the constructive view, is a matter of interaction between purpose and object (p. 52).

But to say this is to fall right back into the formalist trap, for while the caveat may absolve the interpreter of the charge of willful imposition, it does so at the expense of his creativity; and since, if the object or practice constrains what can be said about its purposes, then there is very little (if anything) for the interpreter to construct, and therefore no difference at all between conversational and constructive interpretation. At this point Dworkin again reacts against his own formulation, and in the next sentence he veers back in the direction of constructive creativity – returning purpose to the interpreter. "Creative interpretation, in the constructive view, is a matter of interaction between purpose and object". This time, however, he attempts to arrest the pendulum and soften his dilemma by means of the word "interaction", which suggests that purpose (and power) are distributed *between* the object and the interpreter. But that suggestion has no intelligible translation since, even if the object only dictates the *range* of the purposes that can be predicated of it, it still holds all the power, whereas on the other hand, if the choice of purpose belongs to the interpreter then the power is wholly his. Either the object or practice is *already* the best it can be and doesn't need the interpreter's help (in which case Dworkin is a positivist) or by *making* it the best it can be, the interpreter rides roughshod over the object and refashions it (in which case Dworkin is a subjectivist).

But, Dworkin might object, you miss the point. True, the interpreter imposes a purpose (and therefore a meaning) on the object, but the purpose is not his own and neither does it belong to the object, at least not in any simple or superficial way. Rather, it belongs to that "coherent theory" (p. 245) or abiding "set of principles" (p. 243) which, while they may not be explicit in particular decisions or statutes, are what "the explicit decisions presuppose by way of

justification" (p. 96). The idea is that the continuity of legal practice is not something one can spot on its surface, but is something one can grasp only by seeing through the practice to the underlying and abstract assumptions of which particular decisions and statutes are the intended instantiations. That is the interpreters task: to construct or reconstruct that abstract shape and then to characterize and decide the present case in a way that makes of it a confirmation and extension of that same shape. Such an interpreter is creative without being willful since he is guided by something independent of him, and he is also constrained without being slavishly so since the something that guides him is something he must construct.

This more complex picture is at first glance both coherent and satisfying, but at second glance it exhibits the old familiar problems. First of all, it rests on a distinction between legal practice as a set of discrete acts and legal practice as a continually unfolding story about such principles as justice, fairness, and equality. But the distinction is a false one insofar as it purports to represent genuine conceptual alternatives, for it is not possible (except in a positivist world of isolated brute phenomena) to conceive of a legal act apart from just that story and those principles. Indeed, as I pointed out in the first of my exchanges with Dworkin, "a case could not even be seen as a case if it were not *from the very first* regarded as an item in a judicial field and therefore as the embodiment of some or other principle" (*Politics of Interpretation*, p. 277). If one were to construe a case without any such regard or strong sense of the judicial field as both a structure and an ongoing narrative, the result would not be a case at all, but a set of facts and meanings that would touch only accidentally and intermittently on legal emphases and concerns. The truth of this could be attested to by those many law students who spend most of their first year not being able to make the *right* sense of the materials before them, until that happy (and mysterious) day when everything, or at least most things, suddenly become clear, at least to the extent that they now feel that they are in the game. It is not that the novice student sees the practice detached from the principles underlying it; he doesn't see "the practice" at all but something else (perhaps some other practice if its assumptions are strongly enough the content of

his perception). Conversely, the initiated student who has thoroughly internalized the distinctions, categories, and notions of relevance and irrelevance that comprise "thinking like a lawyer", cannot see anything *but* the practice (nor can he remember what it was like to not see it) and along with it, because it is inseparable from the practice, he sees the set of principles of whose unfolding the practice is the story.

Dworkin is right, then, to insist that present cases must be construed either as instances of a general and continuing narrative or as a consistent or consistency-desiring story about justice and equality. But he is wrong to think of that narrative and that continuity as something that must be first constructed and then *added* to a first level perception of discrete events, for the competent lawyer or judge is always and already an actor in that narrative and is necessarily tellings its story with his every gesture.

Dworkin comes close to seeing this when he entertains the possibility of collapsing the two categories of conversational and constructive interpretation into one:

> The constructive account of creative interpretation therefore, could perhaps provide a more general account of creative interpretation in all its forms. We would then say that all interpretation strives to make an object the best it can be, as an instance of some assumed enterprise, and that interpretation takes different forms in different contexts only because different enterprises engage different standards of value or success. Artistic interpretation differs from scientific interpretation, we should say, only because we judge success in works of art by standards different from those we use to judge explanations of physical phenomena (p. 53).

This is almost right: all interpretation *does* strive to make an object the best it can be if we understand "best" to mean nothing more (or less) than the standard of value or relevance that is the defining characteristic of that object. So that, for example, the defining characteristic of a judicial opinion would be that it presented itself as flowing from the principles of justice, of a scientific explanation that it strove to be accurate; or of a work of art that it set out to be beautiful or profound or unified. In each instance the interpretation of the object would begin from within the assumption that it was *that* kind of object one was interpreting and therefore, simply by

virtue of his interpretive "style" or angle of interpretive entry, the interpreter would *already* – from the very first – be seeing the object as an instance of its defining aspiration (to be accurate, or just, or beautiful). That is, he would be seeing it as "the best it could be", a standard *built into* that aspiration. All interpretation would then fall under the same category, but it would be conversational, assigning "meaning in the light of the motives and purposes and concerns it supposes the speaker to have". Those motives would be understood to include the motive of producing the kind of meaning appropriate to the enterprise and its built-in sense of the value its projects (including its meanings) embody, and no effort to add value by a special act of construction would be necessary.

But Dworkin is committed to there being such a special or extra act – a distinct level of interpretive striving which distinguishes the truly responsible interpreter – and it is time to inquire into the reasons for his commitment. One reason returns us to his earliest work, and to a fear that his writings consistently display: the fear of individual or subjective preference. In *Law's Empire*, the additional interpretive step enjoined by the doctrine of "law as integrity" has precisely the function of constraining or checking preference. The idea is that a judge may, by virtue of his own opinions and desires, prefer a particular outcome in a case, but if he practices "law as integrity" he will be in possession of a "coherent theory", or set of abstract principles, which he will then interpose between the case and his own opinions (pp. 341, 258). Thus, for example, a judge "deciding" *McLoughlin* – a well known case that turns on the question of compensation for emotional injury – may personally believe (a nonsense phrase that I use here only for the sake of argument) that no one should be compensated for emotional injury, but "if he accepts integrity" – that is, if he considers himself to be respecting and continuing an institutional history – "and knows that some victims of emotional injury have already been given a right to compensation, he will have a reason for deciding in favor of Mrs. McLoughlin nevertheless" (p. 177).

The example suggests that there are two kinds of reasons – personal ones and institutional ones – and that if a judge "accepts

integrity" as his working principle the institutional reason will exert a pressure that would not be felt by a judge who feels free to discount the history of past decisions. But are the two kinds of reasons really so different? How does a judge come to "think it unjust to require compensation for any emotional injury" (p. 177)? Indeed, what makes a judge *capable* of having such a thought? It will be available to him only because his very ways of thinking have been formed by that institutional history in which notions like compensation, categories like emotional vs. physical injury, and distinctions between just and unjust were assumed and in place. In short, the so-called personal reason is no less institutional and attentive to history than the reason that derives from a commitment to "integrity", and indeed, the very notion of a "personal" reason that a judge might assert against his obligation to the history of past decisions is finally incoherent. *Any* reason that finds its way into a judge's calculations will be per force a *legal* one, and therefore one whose very existence is a function of that history (that is, of some view of it) – a history he could not possibly discount even if he declared himself to be doing so. (This is simply to repeat, from a slightly different angle, my argument against the possibility of a pragmatist judicial practice.)

This is not to deny that judges might have personal reasons of another more alarming kind. A judge hearing *McLoughlin* might be inclined to decide against the plaintiff because she reminds him of a hated stepmother or because she belongs to an ethnic group he reviles. But think of what he would have to do in order to "work" such "reasons" into his decision. He could not, of course, simply declare them, because they are not legal reasons and would be immediately stigmatized as inappropriate. Instead, he would be obliged to find recognizably legal reasons that could lead to an outcome in harmony with his prejudices; but if he did that he would not be ruled by those prejudices, but by the institutional requirement that only certain kinds of arguments – arguments drawn from the history of concerns and decisions – be employed.

We begin to see that the fear of personal preferences is an empty one, and I would go so far as to say that there are no such things as "personal preferences" if by that phrase one means preferences

formed apart from contexts of principle. A preference is something one cannot have independently of some institution or enterprise within which the preference could emerge as an option, and an institution or enterprise is itself inconceivable independent of some general purpose or value – some principle – its activities express. It follows then that it is a mistake to oppose preference to principle. Rather, what opposition there is will be between preferences that are appropriate to a given enterprise and preferences that are appropriate to some other enterprise; and, more often than not, there is no choice to be made between them since the choice has *already* been made the moment you see yourself as being engaged in one enterprise rather than another. I may be a judge deciding a case involving voter fraud who "personally" prefers one political party to another (it would be hard to imagine a judge of whom this would not be true), but if I am thinking of myself as a judge, I automatically conceive of my task as a judicial one and comport myself accordingly. Or, on a scale of pleasurable activities, I might prefer watching a game on television to having tea with my mother-in-law, but as a husband who wishes to remain happily married, I might prefer to do the prudent thing. The conflict then is never between preference and principle, but between preferences that represent different principles, and if I am deeply enough embedded in some principled enterprise, the conflict will never be actualized because some preferences simply will not come into play.

Of course there can be conflict between the preferences – or pulls – that represent different principles within the umbrella of an overarching (and principled) enterprise. This is the situation that Dworkin imagines when he posits a judge whose conviction regarding the justness of compensation for emotional injury is at odds with his reading of the chain of decisions in which the matter has been in dispute. That judge, as Dworkin says, will have a reason for deciding in Mrs. McLoughlin's favor. That reason needn't be decisive, however, for the judge may view it as a challenge to the exercising of his judicial skills, or as an invitation either to reread the chain of decisions in a way that excludes the present case from its scope or to characterize the present case in a way that leads it to be seen as turning on an issue other than

the issue linking the chain of decisions. The judge who succeeds in doing either will not have chosen preference over principle, or personal conviction over the obligation to continue the judicial enterprise. Rather, he will have continued the enterprise by combining two of its legitimate elements – notions of what is and is not just and a deference to the "conversation" in which the nature of justice has been debated – into a story that links them together. *Whatever shape that story then has will be a principled shape; that is to say, it will be a shape that reflects a commitment to law as integrity.*

What this means is that "law as integrity" is not the name of a *special* practice engaged in only by gifted or Herculean judges, but the name of the practice engaged in "naturally" – without any additional prompting – by any judge whose ways of conceiving his field of action are judicial, that is, by any judge. The moment he sees a case *as* a case, a judge is already seeing it as an item in a judicial history, and at the same moment, he is already in the act of fashioning (with a view toward later telling) a story in which his exposition of the case exists in a seamless continuity with his exposition (and understanding) of the enterprise as a whole. In one of the many places at which he recommends "law as integrity" as a *method*, Dworkin declares that it is "possible for any judge to confront fresh and challenging issues as a matter of principle, and this is what law as integrity demands of him" (p. 258). My point is that it is impossible for a judge to do anything else and still be acting and thinking like a judge, and that therefore the demands of integrity are always and already being met. Dworkin's conditional clause, "if he accepts integrity" (p. 177) is superfluous, since acceptance is simultaneous with his acceptance of his role. (It is as if one distinguished between those baseball players who thought it their obligation to try and score runs and those who thought it something else.) As an account of what legal actors do, "law as integrity" is powerful and persuasive; lawyers and judges do, in fact, see the law as "structured by a set of coherent principles" which they feel obliged to take into account and extend. But, precisely because this is what they already do by virtue of their being judges and lawyers, it is pointless to enjoin them to do it.

But enjoining them to do it is Dworkin's whole point, and this is

the second reason for his commitment to "law as integrity" (the first, you will recall, is to keep personal preference in check): it gives Dworkin something to do and something to be. The something to do is to urge integrity, and the something to be is a philosopher. Indeed, from its very beginning, the book is an argument for the necessity of philosophy and for the superiority of that judge who is the most philosophical which, in Dworkin's terms, means the judge most capable of abstracting away from the everyday world of practical pressures. The Herculean or philosophical judge, mired as we all are in the machinations and calculations of political agents, is nevertheless "aware of a different, more abstract calculation: *pure* integrity... invites him to consider what the law would be if judges were free simply to pursue coherence in the principles of justice that flow through and unite different departments of law" (pp. 405–6). These principles are the content of "pure integrity" for they "offer the best justification of the present law seen from the perspective of no institution in particular" (p. 407); and since even the best judge is confined within the perspective of his institution, "it falls to philosophers... to work out law's ambitions, the purer form of law within and beyond the law we have" (p. 407).

I pass over the egregious elitism of this picture (the ladder of insight with ordinary, unreflective people at the bottom rung, conventionalists and pragmatists slightly higher, practitioners of law as integrity nearing the top and looking upward to the one philosopher who resides wholly in integrity's realm) to note that this is the latest version of an impulse that Dworkin's work has displayed from the very beginning, the impulse to ascend "from the battleground of power politics to the forum of principle" ('Forum of Principle', p. 71). Thus, in the last of his characterizations of "law as integrity", Dworkin declares that its aim is "to lay principle over practice to show the best route to a better future, keeping the right faith with the past" (p. 413). As a recommendation, however, this makes sense only if practice is or could be unprincipled (if it is merely a collection or succession of actions unrelated by any overarching norms or goals). But as I have argued again and again, insofar as practice is always practice of *something* (of law, literary criticism, baseball), its gestures are already in-

formed by the sense of value and continuity that make that something a distinct activity. In short, one is always in the forum of principle; it is simply that the forum of the principle may not be the one acknowledged by others. The distinction between principle and policy – the distinction with which Dworkin began his career and which sustains it today – is finally a *political* distinction, a distinction with the political aim of claiming for some policy the label of principle.

This is not to say that the distinction is invoked insincerely or for base motives; the motives will be those that are inherent in asserting a position or point of view in which you believe, for in relation to that point of view the assertions of others flow not from principle but from policy (or false principle). It is just that whenever the distinction between principle and policy is invoked, the line it draws will be bright and visible only within the assumptions of some policy that is, for the moment, so deeply in force as to be beyond challenge; but the challenge can always be made, and when it is, that line – interpretive, constructed, and political to the core – will be drawn again. Either the forum of principle – "the perspective of no institution in particular" – is empty and therefore incapable of guiding or constraining, or it is the name of a policy (of an institutional perspective) that has achieved a particular political and institutional success. Either we could never ascend to it or we are always and already within it – always in the grip of some vision that is at once the content and the set of practices of the enterprise in which we are embedded. I believe the latter to be the case, and therefore any discourse striving to operate within a "pure" forum of principle will always be thin and (to say the least) uncompelling. This is why Dworkin's lengthy accounts of Hercules making his way through hypothetical cases, although they are intended to be the centerpiece of the book, are flat and uninteresting. To be interesting they would have to be non-hypothetical arguments Dworkin was actually making in the service of a specific program he wished us to adopt, for only then could they speak to concerns that we might actually have, concerns relative to issues of policy and politics (the only kind of issues there are). One of the ironies of *Law's Empire* is that the closer it gets

to its announced ideal, the less of a claim it has on our serious attention.

To summarize, *Law's Empire* has a negative and a positive argument. The negative argument warns us against the dangers of conventionalism and pragmatism, but since these are not forms of possible judicial practice, the warning is unnecessary. The positive argument urges us to adopt "law as integrity", but since that is the form our judicial practice already and necessarily takes, the urging is superfluous. Behind both arguments lies the ideal of inhabiting a forum where principle is pure and personal and political appeals have been eliminated, but since that ideal is either empty or already filled with everything it would exclude, a book commending it to us is finally a book with very little to say.

Of course, there are incidental pleasures along the way, chief among them an excellent ten pages in which Dworkin distinguishes sharply between internal and external skepticism. Internal skepticism is that doubt one might have about an assertion from within a position that allows (indeed demands) judgments of rightness and wrongness. Thus, one might reject a way of characterizing *Hamlet* in the conviction that some other characterization is the correct one. An external skeptic, on the other hand, would reject the whole notion of correctness, since it is his thesis that all claims to correctness about *Hamlet* or anything else are ungrounded; his doubt is not about a particular assertion, but about the status of assertion in general. Dworkin's point is that "external skepticism cannot threaten any interpretive project" (p. 82) because any interpretive project will be mounted from within some set of moral or evaluative assumptions of just the kind that external skepticism challenges. It follows then that with respect to the issues that *are* issues within those assumptions, external skepticism's challenge is irrelevant. As a stance or attitude, it is, as Dworkin says, determinedly "disengaged" (p. 80), and because it is disengaged it has nothing to say, it does not reflect on judgments pronounced or heard by already engaged agents. What those agents are engaged in are practices and within those practices judgments of correctness and incorrectness have all the traction one might desire. If

we assert *Hamlet* is about delay and that slavery is wrong, the practices within which we hazard those assertions give them "all the meaning they need or could have" (p. 83), and the reality of that meaning is in no way compromised by the "metaphysical" (wholly abstract) pronouncements of external skepticism (p. 79).

Dworkin's point is not new, but it is one that cannot be made too often. Unfortunately, it is also one that undercuts his own project in exactly the ways I have here outlined. The superfluousness of "external skepticism" is precisely the superfluousness of "law as integrity". Just as external skepticism does not touch assertions internal to a particular interpretive system, so is "law as integrity" an unnecessary (and empty) addition to a system of practice that already displays what it would provide. Both notions are standing for the general claim of philosophy to be a model of reflection that exists on a level superior to, and relevatory of, mere practice. But, in fact, "external skepticism" and "law as integrity" are themselves practices – philosophical practices, practices of speculation that emerge from the special context of academic philosophy where the constructing of a "perspective in particular" is the first order of business – and the mistake is to assume that as philosophical practices they have anything to say about practices internal to disciplines other than philosophy. It is a mistake Dworkin himself identifies and scorns when he observes that the external skeptic tries to speak from the outside and inside at once and doesn't see that the radical detachment of the one perspective wholly undermines its relevance to the other (p. 83). It is the mistake that Dworkin himself makes throughout the book. Indeed, it is the mistake that *is* the book.

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