

# *Review Essay*

## Legal Fiction†

LAW'S EMPIRE. By Ronald Dworkin.\* CAMBRIDGE, MASS.: HARVARD UNIVERSITY PRESS, 1986. Pp. 416. \$20.00.

By  
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Ronald Dworkin occupies a role midway between jurisprudential savant and liberal legal guru. (Nice work if you can get it.) His latest book, *Law's Empire* is long, heavy (about three pounds, I would guess) and well written. It has a blue cover which reminds me of the linoleum in innumerable Glasgow slum bathrooms. Having said that much I am at a bit of a loss how to continue. It is not that I suffered the fate of which all reviewers are terrified—agreeing with the author—though I came much closer than I had expected. Rather, the problem is that I could no more give an abstract explanation of what this book *means*, than I could give an abstract explanation of the irony in the fact that one of the less successful men in the Ford family was called Edsel.

If there was ever a book which positively cried out "I am a cultural artifact, bring on the visiting anthropologists," this is that book. *Law's Empire* tells us something about the liberal reaction to Meese and "original intent," it says something about the changing consciousness of that small subgroup of the legal elite who produce Jurisprudential Theories, and it has a place in the intellectual history of "the turn to interpretation," for those who are interested in such things. Along the way the book develops a sophisticated jurisprudential argument which combines literary criticism, the high theory of the equal protection clause, and an imaginary superhuman judge called Hercules. But the most interesting, and in many ways, the most moving aspect of this book-as-artifact is the

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plea for a particular, "principled and abstract" vision of politics, morality, and law—a plea which probably divides the "progressive" (weasel, weasel) community in the United States. I want to say something about all of these things but I have approximately four words for every page of Dworkin's book. Consequently, I am going to resort to the expository method of mountebanks and charlatans—the anecdote.

I was at a Law Review Dinner the other day. (Those of you who have the slightest familiarity with such an event will already be shivering, and the rest could never understand the horror this phrase conjures up.) The speaker was a prominent and widely respected ACLU lawyer. The audience was probably expecting "tales from the trenches"—accounts of battles fought, rights saved, or lost—spiced up, perhaps, by a few pieces of legal gossip about the remaining liberal members of the Supreme Court. ("Justice *X* told his clerks that if he dies they are to prop him up at the bench and keep voting." "These days the main job of the ACLU lawyers is to stand outside the court with an umbrella to stop any of the Justices from catching a chill.") What they got was something rather different.

What they got was a painstaking and respectful account of the argument made in this book, carefully attributed to Professor Dworkin and hailed as an escape from the present dilemma of liberal jurisprudence, caught as it is between Mr. Meese's "original intent" and "the legal nihilism of critical legal studies."<sup>1</sup> (Another county heard from.) This seemed a little strange, to say the least. Why should a practising civil rights lawyer be concerned with a fancy theory full of allusions to integrity, interpretation, and chain novels? Are judicial confirmation hearings going to be turned into seminars on literary theory? ("Mr. Rehnquist, will you deconstruct the law or will you function as a faithful author in a chain novel whose origins stretch back into history?") How is Dworkin's work connected to the ideology of the law, to the catch phrases that are written on the fronts of public buildings but not in the hearts of lawyers? These questions provide the best indication I can offer of the multiple realities, the Edsel Ford ironies, over which *Law's Empire* stretches. I will try and get to them all. But to our tale . . .

Every well-known author, no matter how subtle or recondite, will sooner or later acquire a two-word tag line in the minds of his readership. This isn't just a mark of fame, it's what fame is. "Right-answers Dworkin" is no exception. By arguing that there are "right answers" to hard legal questions, Dworkin gave solace to those who believed that we can really have a "rule of laws not men" and offense to those who believed that judicial objectivity was a myth, necessary to shore up the legitimacy of the liberal state. Notice what has happened. An academic argument about the possibility of constructing a correct judicial method has be-

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1. They also got the gossip and I stole the jokes.

come an argument about the ideology of law and state. If some of what follows has a "Toto, I don't think we're in Scranton any more" air to it, this is why.

In *Law's Empire*, Dworkin may have earned himself a different, and certainly a more subtle, sobriquet than "Right-answers." I have to admit that I thought the most admirable thing about his earlier work was its sheer implausibility. In an era when everyone else was playing around with relativism, pragmatism, and all the rest of the fuzzy "-isms," Dworkin was apparently relying on natural rights and eighteenth-century idealism. (There can be right answers even if nobody knows, or could ever know, what they are.) To understand what this argument means one needs to have some sense of the context in which it was put forward. The problem that legal philosophers were wrestling with was that law seemed to be too indeterminate. There were too many plausible answers to legal questions, too many arguments. There seemed to be a risk (or a hope) that law was (merely?) political argument, even when "properly" applied by conscientious judges.

Dworkin's answer seemed to be that we didn't need to worry because judges were enforcing determinate *political* rights which lay underneath the legal system. Given that it was the contentiousness and relativism of politics that made people want to separate (objective) law and (subjective) politics in the first place, this was a rather unexpected move. It was as if a group of modern philosophers of science, in the middle of a heated discussion of how best to describe the scientific method in this era of falsifiability, paradigms, and the paradoxes of probability physics, had suddenly been interrupted by a calm voice which claimed that the authority of science came directly from God. One has to admire the sheer *chutzpah* of the argument, if nothing else.

In *Law's Empire*, right answers remain but everything has become a lot more complicated. In fact, I would like to propose a label for this type of argument: inoculation theory. Dworkin's arguments have been given weakened versions of the indeterminacy disease in order to prevent them from falling victim to the disease itself. Law is presented as an interpretive activity. The distinction between what the law is and what the law should be has been erased. A judge describing what the law "is" can only do so by giving the best available interpretation of all of the strands of doctrine, principle, and policy. This collapses what the law "is" into what the law "should be" in the same way that a producer's interpretation of *Macbeth* collapses the question of what the play "is about" into the question of what the production "should be about." But the fact that the judge is making contentious choices based on interpretive criteria that are themselves contentious does not mean that she is completely free. The judge is working in an interpretive tradition and her duty is to be faithful to what *she interprets to be* the potential within that tradition. At times Dworkin's description of this vision of the "in-

tegrity of law" has overtones of an Army advertisement—the judge is going to make the law "be all that it can be."

Dworkin now confronts his argument with a number of imaginary objections. (Almost all the challenges in the book are imaginary, although Dworkin has had no shortage of real ones.) The most important one is obvious. Even given his claims about the integrity of the law, isn't his picture of interpretation actually a mask for complete judicial discretion? Dworkin responds with his now-famous analogy between legal reasoning and a chain novel. (I am not sure if there is any significance to the fact that he now gives soap operas and the Bible as examples of the possibilities of multiple authorship. They are certainly more respectable, if no less surprising, than the example he used to use, *Naked Came the Stranger*, which is a soft-porn novel.)

Dworkin's idea runs something like this. The judge interpreting a law is close to the position of one of the later authors in a chain novel. Each chapter is written by a different author. By the time the novel reaches our author, characters have been developed, and the plot has been worked out to a certain extent. Obviously our author can kill off a character, or introduce a new one. She can give the plot an unexpected turn or make us see the action through another character's eyes. What she *cannot* do (and still be recognized by her community to be "writing a novel") is turn *Romeo and Juliet* into a do-it-yourself manual on suicide, or *Around the World in Eighty Days* into a brochure for package tours. Of course each new author is not completely constrained by the intention of the first author (bang goes Meese's original intent), but neither is the new author free to do anything she wants. She is limited by the need to respect, and improve on, the integrity and wholeness of the plot as it has been developed so far (bang goes critical legal studies).

There are some fairly obvious, and not necessarily fatal, objections one can make at this point. The modernist conception of writing could be seen to make it not only acceptable, but positively desirable, to have a novel that is full of fractures, discontinuities, and shifts of genre. Dworkin says that the interpretation the new author/judge has of the plot must "fit" what has gone before. An interpretation is ruled out if the author believes that "no single author who set out to write a novel; with the various readings of character, plot, theme, and point that interpretation describes could have written substantially the text that . . . [she] has been given." (p. 230) Where does this canon of construction come from? *If we see the whole genre of novel writing as itself a chain-novel, would the injunction I have just quoted "fit" the "chapters" we have been given?* Do people actually incorporate this principle of "integrity of interpretation" into their writing or do they, on the contrary, strive for contradiction, shifts of viewpoint, the aesthetic of the unassimilated fragment? (I must admit, I would love to see *Around the World in Eighty Days* suddenly turn into a holiday brochure.) Like most people who borrow from other

disciplines in order to shore up their own, Dworkin seems to be borrowing from fifty years ago, rather than from the present.

I could carry on this criticism for the rest of the review, but, fear not, I won't. Dworkin's own discussion contains a number of possible responses, each of which, I believe, would ultimately turn out to be indefensible. He might claim that his principles of literary interpretation don't need to be turned on themselves because they are matters of form rather than substance, or that the books which don't fit his model are actually wrong and should be ignored, or that the premodernist style of novel is the only one to which we should analogize moral and legal reasoning. I am going to limit myself to this, last, idea—partly because I think it links together all of the puzzles I mentioned after my description of the Law Review dinner.

It is certainly fairly plausible to think that we should only analogize moral and legal reasoning to a premodernist idea of creation and interpretation. After all, the analogy is only an analogy. The validity of Dworkin's philosophical argument does not depend on it, even though its attractiveness may. Anyway, contradictions and fragments may be all right aesthetically, but would you want Marcel Duchamp deciding the extent of your civil rights? Dworkin argues that we feel a revulsion toward inconsistent decisions, and thus that we prefer a consistent application of a principle we disagree with to a "checkerboard" pattern of results which follows no overall principle. "Even if I thought strict liability for accidents was wrong in principle, I would prefer that manufacturers of both washing machines and automobiles be held to that standard than that only one of them be." (p. 182) He claims that it is his idea of "integrity" which explains such adverse reactions to inconsistency.

Despite the plausibility of this set of objections I want to argue that there is an irreducible *and positively good* element of modernist contradiction and genre-smashing in moral and legal thought, that this element is much in evidence in the history of the legal system, and that we should welcome it and work with it. I say this even though the "progressive community" displays conflicting feelings about contradiction, contextuality, and form-breaking, and the ideology of law does not acknowledge that such things could or should be part of our legal system. In fact I think it will turn out that this complex of conflicting feelings and implausible denial provides part of the explanation for the unexpected appearance of Dworkin's ideas at the Law Review Dinner.

Dworkin does not deny that there are sudden changes—moments when a line of cases is interpreted out of the picture, when "a property rights issue" suddenly becomes "a first amendment issue," or when "separate but equal" suddenly becomes "unequal." But I think he undervalues, or underestimates, the importance of changes in the genre, style, or

form of legal interpretation as opposed to changes in the *results* that one reaches with that interpretation. Paradigms shift in law too. A whole area of tort law which had been conceived of as a set of "hard-edged rights" may become an area for "contextual utilitarian calculation." This can be seen as a conflict between interpretations. But Dworkin's examples of interpretive conflict concern such vexed issues as whether or not to emphasize Scrooge's class origins. The shift I have just described seems more like the challenge to the traditional novel posed by surrealist automatic writing. It brings into question not only past interpretations but the criteria under which those interpretations were judged—including Dworkin's ideas of fidelity, integrity, and "fit." Can "integrity" immunize itself from reinterpretation? Dworkin does more than tip his hat to these shifts in genre—but I think that they undermine (or should I say, "give an unruly reinterpretation of") one of the main parts of his project. *Law's Empire* often mentions features of character, plot, or statutory policy that must be accounted for if one wants to produce a "competent" interpretation. Justifications of the Endangered Species Act must appeal to a policy of protecting endangered species, for example. Seems fair. But what do we do if one of the most fundamental aspects of the legal system, as seen by its community of "readers," is its iconoclastic, method-trashing, genre-breaking, tendency? What if judges, lawyers, and the rest of the legal profession seem to embrace contradiction, tangle, and opposition as legitimate, *perhaps even central parts* of what they do. What if law seems to be built on a latticework of contradictions: rights and utility, communal and individualistic visions of the social world, tort and contract images, rules as iron cages and rules as useful rhetoric, law as dispute resolution and law as social engineering, judges as "umpires, detached from society" and judges "in tune with changing mores," and so on, and so on. If all this is true, one could argue that, in order to "fit" past legal practice, Dworkin's vision of law as integrity must also include the metaprinciple that interpretive judgments should as a matter of course contradict past judgments, that Hercules should be a poststructuralist one day and a literalist the next, that not just result, not just style, but form, genre, and self-conception should be changed constantly.

I am (not trying to argue that this is the *true* interpretive metaprinciple and that Dworkin's is the false one. (Although I would be hard put to choose between them if I had to pick one.) It is more complicated than that. I think Dworkin makes a false association between "consistency according to some reasoned interpretation" and morality, justice, and the good. Similarly I think he makes a false association between contradiction and (crass interest-group) politics, biased decision-making and injustice. This leads him to deny the contradictions and inconsistencies in the legal system. Perhaps "deny" is the wrong word, unless it is used in a psychoanalytic way. It leads him to "explain away"

inconsistencies as correctable aberrations, or as things that seem to be in contradiction but which can actually be reconciled by some deeper interpretation, or as the surface confusion found in any social institution which has to reconcile complex goals, or as the inevitable shortfall between the ideal and the actual, or whatever. This process of "explaining away" contradiction is an heroic task—somewhat akin to explaining away the theme of ambition in *Macbeth*. We should honor Dworkin for it. But that does not mean we should believe him.

So far I have argued that Dworkin is wrong to exclude the modernist ideas of form-breaking, genre-smashing, and creative experiment which seek directly to contradict past principles. If we ignore this side of moral and legal thinking we condemn ourselves to a compulsive and fruitless attempt to explain away past contradiction. We would also be denying something which is more than an aesthetic. The modernist idea of constantly destabilizing the context—whether social, legal, or moral—can be portrayed as the most basic manifestation of the struggle between the infinite potential of the human spirit and the finite possibilities of a social world.<sup>2</sup> By breaking the previously settled patterns of acceptable sexual preference, or the "form" of the nuclear family, we may be asserting a freedom and a morality which is "destructively reinterpreted" by Dworkin's concern with integrity. But what could all this possibly have to do with the appearance of Dworkin's ideas at the Law Review Dinner? I think there is a connection which, though mundane, is nevertheless interesting.

There is a kind of *angst* experienced by liberals who can find no formal, qualitative distinction between the attitude towards constitutional precedent shown by today's Supreme Court and that shown by the Warren Court. It would be nice if there were some independent legal criterion that would allow us to condemn the contemporary Court for effecting a radical change in what most of the profession understand to be the law on affirmative action. It would be even nicer if this criterion turned out to *support* the Warren Court's actions on the occasions when it made similarly radical changes. Obviously the criticism can't be of "judicial activism." Dworkin is particularly effective in pointing out how little this phrase means. Must we hang our heads and admit that we just like the outcomes, that we change our formal criteria to fit the kind of substantive result we like, and that there is nothing else to it? *Law's Empire* does not set out directly to deal with this problem, but a lot of people will read it for this reason, and will draw from it the plausible, but

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2. Those who are interested in the idea of a modernist social theory and a modernist conception of the self might want to try the later work of Roberto Unger. Interestingly, Dworkin seems to be getting closer and closer to Unger's conception of law—"expanded doctrine"—while at the same time taking the opposite view of modernism. See Boyle, *Modernist Social Theory: Roberto Unger's Passion*, 98 HARV. L. REV. 1066 (1985).

mistaken, answer that liberal judicial interpretation has been faithful to the idea of "law as integrity," but that conservative interpretation has not. It was the promise of this resolution that marked the appearance of Dworkin over white wine and rubber chicken. Given Dworkin's statements in the book and elsewhere it is hard to know his own ideas on the issue. But I think that, in any event, the whole debate is misconceived. It is misconceived because there is more to the law than on the one hand liking the outcomes and, on the other hand, being "principled." What does it mean to say that law is politics? It need not mean that it is simply a matter of who wins and who loses, that it all reduces to some conception of instrumental interest. It is this impoverished conception of politics that leads people to talk about the "legal nihilism" of critical legal studies. By escaping from this impoverished conception one can find a way to distinguish between the Warren and (Rehnquist?) Courts that is more than just outcome preference, but is less than some determining principle.

Law is objectified social theory, it is a utopian lexicon, a piñata full of images of the good life. This does not mean that these images "determine" some particular result, or that liberals have their collective finger on the pulse of the true "integrity" of the legal system. It does mean that one can endorse the political visions, ideas, and emancipatory images that came out of the Warren Court, and condemn the vision of society enunciated by today's Court, without having the grubby feeling that one is supposed to associate with "mere" outcome preferences. But there is a further point. Once one has got this far it would be rather a shame if the most that one could manage was to do a patch-up job on the legalistic political vision of mainstream American liberalism.

I remember a Supreme Court ruling which shifted the boundaries of the private sphere from the outside to the inside of a plastic bag in the trunk of someone's car. It turned out that one could fit an "expectation of privacy" into a plastic bag. Recently, the Supremes (as they are known in the trade) changed their minds. It turned out that that bag was too flimsy after all. It could not hold such a metaphysical burden. This meant that a search which had discovered drugs in the bag was not unconstitutional. The thing that interested me was the degree and extent of political energy that was spent in debating this case (and "other similar erosions of the fourth amendment") at a time when profitable factories were being closed (for the tax write-off), America was bombing or invading some new country, and a million of the private oppressions of everyday life were starting up or winding to a close. A political vision fixated on drawing the boundaries between individual and state power is blind to all of these—but it need not be. The utopian lexicon of the law contains more words than those used by ACLU liberalism. Ideas of substantive equality, of reliance, of community and personal connection, of the importance of day-to-day dignity, of unjust enrichment and collective

rights in the environment—these are all part of law's empire, and perhaps even part of *Law's Empire*, though it's hard to tell. But it seems to me that the redemption of these ideas is more likely to call for a practice that is inspired by Breton, Feuerbach, and Sartre than by Dworkin's Judge Hercules.

Having taken issue with Dworkin on his attitude towards modernism, commented on the liberal *angst* over the contemporary Supreme Court, and redescribed law's empire, I feel that I must redress the balance of my remarks. There are a lot of good things about this book. While it may not turn out to be the legal equivalent of Rawls' *A Theory of Justice*,<sup>3</sup> it will undoubtedly be one of the "industry standards" for liberal legal thought for some time to come—and deservedly so. In his previous books<sup>4</sup> Dworkin seemed to have mastered the key to jurisprudential success, or at least invulnerability—to be able to write clearly on the level of paragraphs and yet obscurely over the length of a book. One could not say that about *Law's Empire*.

There are other differences between the old and the new Dworkin. He has always been fond of using hypothetical objections to move his argument forward. That pattern remains. But his old imaginary opponents could barely manage a twitch as he hacked them to pieces, straw flying everywhere. The "conventionalist" and the "pragmatist" described in *Law's Empire* are much more believable; they are interesting adversaries rather than devices to advance the argument. They too, may turn out to be straw men, but at least they are *armed*.

Dworkin's examples—the cases in which he works out the details of this method—are similarly transformed. It is not that they are all new examples. (Devotees will be happy to know that "the murdering heir" reappears in *Law's Empire*, faithful as a soap opera rerun.) It is the level and depth of the analysis that has changed. Hercules, the imaginary judge Dworkin wheels on to deal with his imaginary opponents, would always arrive in the argument with a flurry of Uriah Heep self-deprecation (" 'umble, 'umble, yer honour"). Despite the humility, we would be told a few moments later that he had solved the case using Dworkin's method. Since we never saw his opinion this procedure somehow failed to convince. "I have invented a superhuman who uses my method, so my method must be right." The new cases have some complexity of fact, they are taken apart in more detail, and Hercules reveals a little more of his judicial and stable-cleaning methods by actually pronouncing in some detail on the question of who should win and lose.

Above all, though, *Law's Empire* is simply a richer and more honest account of legal practice. In order to make the move away from formal-

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

4. R. DWORKIN, *A MATTER OF PRINCIPLE* (1985); R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

ism, Dworkin is forced to depart radically from the popular ideology of law. "The rule of laws and not men" has become the rule of men (and women, we hope) who engage in a frankly contentious attempt to tell a "good" story which preserves the integrity of the legal system. To complicate things further, the criteria for what counts as a good story and what counts as integrity are, themselves, matters of heated debate. Not only would this be harder to engrave in marble on the front of a public building (the fate of all successful ideologies), it seems to offer "interpretive integrity under judges" in the place of "Equal justice under laws." Despite Dworkin's seductive prose and his implausible insistence that this is what he meant by right answers all along, he is probably going to be on the receiving end of a few charges of nihilism, himself. Inoculations are always accused of being as bad as the disease. And *unsuccessful* inoculations, well . . .