INVENTING THE LAW
DWORKIN AND INTEGRITY

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Law's Empire[1] is a dense and challenging work. In it Ronald Dworkin proposes a theory of adjudication spanning the common law, statute and constitutional documents which he claims both fits existing judicial practice well enough to be seen as an improvement on that practice rather than an invention of a new one, and provides the best overall justification for that practice. The theory is striking in its comprehensiveness and imagination as well as in the vigour with which Dworkin pursues its consequences. Various portions of the book stand independently of the underlying theory and might well be accepted even if the latter is rejected. This is particularly true of the discussion of common law reasoning and the account of constitutional interpretation. One of the most convincing arguments in Law's Empire is that the idea of 'original intent' as providing the key to the meaning of constitutional texts is fundamentally incoherent and ought to be rejected In one sense it is unfortunate that the structure of Law's Empire presents these as the conclusions of Dworkin's total jurisprudential theory, since it suggests that any flaws in that theory must compromise his constitutional and common law claims. I am inclined to the view that the claims can be upheld in their own right and that they represent Dworkin's most interesting contribution to legal theory since Taking Rights Seriously[2]. However, given that they are the parts of Law's Empire I find most persuasive, I intend to concentrate in this paper on that area which Dworkin considers the most important and which I find the most doubtful, namely, his conception of "law as integrity".

Dworkin's aim in Law's Empire, he says, is (i) to understand theoretical disagreements about law, and (ii) to defend a theory about the proper grounds of law (p.11).[3] Dworkin begins with what he calls "propositions of law", that is, "all the various statements and claims

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1 Harvard University Press, 1986 & Fontana, 1986. All references without acknowledgement are to this book: the pagination in both editions is identical.

2 Duckworth, 1978

3 Dworkin's mania for stipulative definitions is in full flight in Law's Empire.

people make about what the law allows or prohibits or entitles them to have"(p 4) People generally believe that these propositions can be true or false (or, if one is uncomfortable with such terms, sound or unsound) and that this truth or falsity depends on other "more familiar kinds" of propositions which provide what he designates as the "grounds of law" (p.4). These grounds are "the circumstances in which particular propositions of law should be taken to be sound or true" (p.110), for instance by the passage of a bill in the appropriate way through the legislature. A disagreement about whether such a bill has actually been passed by the legislature is a disagreement about whether the grounds for a law have been satisfied and thus is an "empirical disagreement" about the law (pp.4-5). Theoretical disagreements about the grounds of law, by contrast, concern what the law "really is" on a particular topic and occur even where people are agreed that the empirical grounds for law have been satisfied. To use the examples on which Dworkin relies throughout Law's Empire, consider Riggs v Palmer[4] and the Snail Darter Case[5]. In the first a sixteen year old called Elmer had murdered his grandfather to ensure that the latter would not alter his will under which Elmer was the primary beneficiary The victim's daughters challenged the validity of the gift under the will and were upheld by a majority of the New York Court of Appeal. Both the majority and the dissentients agreed that the case was governed by the New York Wills Act (- the grounds of the law -) but disagreed about the proposition of law flowing from that statute. Similarly, in the Snail Darter Case Congress had passed the Endangered Species Act which empowered the Secretary of the Interior to nominate species as endangered, thereby requiring other government agencies to take such action as necessary to ensure that government actions did not jeopardize the continued existence of such species. A fish called the snail darter was so nominated. It had only one habitat which was about to be destroyed by the completion of a one hundred million dollar dam. Again the court agreed that whether the project should be halted or not depended on the statute, but disagreed about what the statute required. It is important to note that these disagreements were not due to the ambiguity or vagueness of the wording of the statute (see p. 351): everyone agreed that the steps "necessary" to save the snail darter were to leave a hundred million dollar dam inoperative, and everyone agreed that the wills statute in New York made no provision for murderers.

According to Dworkin positivism is unable to explain these theoretical disagreements because it is a

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4 115 N.Y. 506, 22 N.E. 188 (1889).

5 Tennesse Valley Authority v Hill, 437 U S. 153 (1978).

"semantic" theory of law For positivists law is a system of rules, and these rules govern which propositions of law are true or false Whether Elmer has a right to inherit depends on the existence of a legal rule concerning murderers taking gifts under their victim's will. Legal rules are identified by a convention shared by the members of the legal community, such as that legislative acts are to be recognised as creating legal rules. But the convention which each individual subscribes to is not identical, and hard cases arise precisely in those situations where two judges' conventions point in different directions. Easy cases are those covered by those parts of the convention to which everyone subscribes. On this view there are certain criteria (disclosed by the conventions people hold) for discovering legal rules: most criteria are shared by judges and lawyers, thereby providing a core of agreed cases, but some criteria are not - hence the penumbral, hard cases. But, Dworkin argues, the cases above show that it is quite possible for judges to agree about the convention for identifying a legal rule without agreeing about the content of that rule.

Whether or not this characterisation does justice to positivism, it does suggest that the sort of disagreements Dworkin focuses on have not been uppermost in the minds of positivists. And according to Dworkin this neglect results in theories like positivism misrepresenting the nature of law. Instead of "law" being a term which describes certain practices with essential characteristics, he suggests it is an "interpretative concept". To explain what he means by this, Dworkin draws on a number of parallels. One is from literature, where a single text (for example, a poem, or a novel, or a play) is susceptable to many different interpretations. More relevantly, he imagines a community with a practice called "courtesy". Courtesy involves such things as tipping one's hat with the left hand to a social superior or shaking hands with the left hand when visiting a property owner on their own land[6] Courtesy begins as a collection of mechanical rules for actions sharing a common label ("courtesy"). At some point in the history of the practice the members of the community take up an "interpretative attitude" towards it. They accept that courtesy is a matter of respect, that is, that the practice has some point - it has value or serves some interest or purpose or enforces some principle (p.47). The interpretation also provides a justification which "consist[s] in an argument why a practice of that general shape is worth pursuing, if it is" (p.66). Secondly, they regard the requirements of the practice as being sensitive to its point, "so that the strict rules must be understood or applied or extended or modified or qualified or limited by that

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6 These are inventions of my own but accurately parallel the examples Dworkin gives. see pp 46-69

point" (p.47) This introduces a dynamic element which responds to other changes in social attitudes. So there are three stages to an interpretive enterprise: (i) the preinterpretive stage "in which the rules and standards taken to provide the tentative content of the practice are identified" (pp.65-66); (ii) the interpretive stage "at which the interpreter settles on some general justification for the main elements of the practice" (p 66); and (iii) the postinterpretive "or reforming stage, at which he adjusts his sense of what the practice 'really' requires so as better to serve the justification he accepts at the interpretive stage" (p.66). Dworkin is thus considering the nature of courtesy from the perspective of a member of the community (the "interpreter") who is concerned with what the practice actually requires in various concrete situations. A positivist approach to courtesy would emphasize that there is a convention in the community that when visiting a property owner on their land one should shake hands with the left hand. The sort of problem Dworkin addresses arises when, for example, the first visit of a social superior to an inferior's land takes place There is no convention to cover this since it has never occurred before, but there are the two practices described above. It is not possible to simultaneously tip one's hat and shake hands, even if it was clear that both actions were required in this situation. It is the problem of how to resolve what is the right thing to do in this situation with which Law's Empire is concerned.

Dworkin asserts that law too is an interpretive concept. It interprets legal practice - which means for Dworkin the process of adjudication by judges in courts (see pp.87, 89, 91). Judges (and other legally conscious people) believe that there is some point to this practice, and that this point serves to justify the practice. At this juncture it does seem that Dworkin is arguing at cross purposes with other theorists by virtue of his adoption of the insider's perspective (see pp.14, 52, 64). Many theorists want to answer the problem of how an outsider could recognise law in our society, by which they mean the conglomeration of institutions and actions we regard as constituting the legal system Dworkin, by contrast, wants to know how we can say that a given proposition of law is true or false. Taking the practice of courtesy, for example, "semantic" theorists want some way of identifying instances of courteous behaviour as opposed to, say, religious behaviour Dworkin wants to know why it is a true proposition of courtesy that when meeting someone of superior social rank one tips one's hat. The first problem of identification Dworkin simply "finesses"[7] by asserting:

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[7] B.B. Levenbook, 'The Sustained Dworkin', 53 University of Chicago Law Review 1108 at 1113 (1986).

> In fact we have no difficulty identifying collectively the practices that count as legal practices in our own culture....Each lawyer has joined the practice of law with that furniture in place and with a shared understanding that these institutions together form our legal system.... Our culture presents us with legal institutions and with the idea that they form a system. The question which features they have, in virtue of which they combine as a distinctly legal system, is part of the interpretive problem. (p.91)

Here Dworkin is misled by his analogy. Courtesy was posited as a set of mechanical rules towards which the community later adopts an interpretive attitude. The individual practices are indeed arbitrary: there is no reason why tipping one's hat should be a mark of courtesy rather than a gross insult. These matters are settled purely by convention, and at the original stage of mechanical operation what counts as a courteous action is settled purely by the label which the community members attach to that action. Law, by contrast, involves practices which we think have individual meaning although they form part of a larger system. There is no identifiable preinterpretive stage that law has passed through: we think law has always had a point, so it is not self-evident that this point derives from our constructive interpretation of the practice rather than from the nature of the practice itself. Other theorists are concerned with identifying the set of characteristics shared (if only through family resemblance) by legal systems, and might propose that the point of law stems from the function that it fulfils within communities, rather than from any attitude adopted towards it by members of a community. Dworkin supposes that the identity of the institution we call "'law" stems from its historical continuity (pp.68-70), and that alone, but this appears to be a mistaken nominalism. The fact that English society at some point in the past designated an institution by the term "law" does not necessarily mean that that institution constituted a <u>legal</u> system , though it may be accurate to describe it as a precursor to our present legal system. We take "law" to be a general, not a particular, term which certainly describes the practice we have had for the past five hundred years, but also allows us to identify other societies with the same practice and stages in our community's history which may have lacked the practice as we currently understand it

On a subsidiary matter, while Dworkin speaks in the above passage of legal practices encompassing the whole gamut of legislation, adjudication and enforcement, the reality of <u>Law's Empire</u> is that it concentrates on judicial practice - on the process of judicial argumentation. It is true enough that we are able to identify this practice in our own community, but there is a genuine question regarding how this is achieved Thus Dworkin's dismissal of alternative theories of law

as "semantic" (as if they were solely concerned with "law'" rather than law) is not sustained by the arguments he presents More seriously, he neglects the work done by jurists more sympathetic to positivism who have attempted to address the problem of hard cases, and thus presents a more vulnerable version of positivism (which he christens "conventionalism") in his later discussion[8].

There is another misleading aspect to Dworkin's analogy of courtesy which concerns the nature of "paradigms". Paradigms in Dworkin's schema are those requirements of a practice (for instance tipping one's hat to a social superior) that "any plausible interpretation must fit". The sense of "must", however, is a weak one, for Dworkin allows:

> Paradigms anchor interpretations, but no paradigm is secure from challenge by a new interpretation that accounts for other paradigms better and leaves that one isolated as a mistake. (p.72)

In some places Dworkin speaks of paradigms in the law as being propositions, that is, statements of a person's legal rights in a specific situation (see pp.91, 93, 354), for example, that Elmer cannot take his gift under his grandfather's will. Elsewhere he seems to include statements of how a court will interpret a text as a class of paradigms, for example canons of construction (see pp.89-90, 121). In the case of courtesy there is no such distinction since courteous actions are self-contained: the practices to be interpreted are the actions of courtesy and the propositions about courtesy are merely descriptions of those actions. But the distinction is important to emphasize in the area of the fit which a theory of law must satisfy with existing paradigms to be eligible as an interpretation of the existing practice rather than the invention of a new one (see p.66). It is possible that a totally different way of construing texts and thereby deriv ing legal rights might yield the same propositions of law we currently endorse, in which case the fit with propositions would be excellent and the fit with methodological principles abysmal. This, in effect, is the claim of legal realism and more recently of the economic analysis of law - theorists represented in Dworkin's discussion as the "pragmatic" conception of law Few judges would claim to adopt the methodology that the realists and economic analysts have proposed, but if it is true that their approach would result in substantially the same legal position as currently exists there seems to be a sound reason for asking whether or not it in fact reveals the deep structure of

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8 Surprisingly there is not a single reference to Neil MacCormick's Legal Reasoning and Legal Theory (O U P , 1978) nor J W Harris' Law and Legal Science (O U P , 1979)

adjudication: the argument being that once we have recognised this deep structure we can self-consciously and more consistently pursue and criticise it For these reasons I think it is better to restrict paradigms to propositions of law, that is, statements of legal rights and duties, and to exclude principles of judicial methodology.

The structure of Law's Empire takes advantage of the running together of the two sorts of paradigms to finally dispose of pragmatism and usher in the favoured theory of "law as integrity". Dworkin notes how badly the pragmatic conception "fits" what judges actually say in their reasoning and asserts that it can only be rescued as an interpretation of law if it provides an excellent justification of judicial practice (pp.154-160). The contest has by this stage been reduced to a struggle between the justifications provided by pragmatism and Dworkin's favoured conception of law as integrity Although Dworkin implicitly argues in the balance of the book that integrity does fit judicial practice, there are only two passing references to paradigms after the chapter on the positivist conception of law ("conventionalism"). One of the curious aspects of Law's Empire is that none of the conceptions of law examined seem to fit what judges actually say in reaching their decisions. (Dworkin argues he is seeking the "best interpretation of what lawyer... and judges do and much of what they say": p.94). By implication, it can hardly be held against law as integrity that it fails to fit very well, since neither of the more popular theories fit any better. Perhaps the greatest disappointment about the book is that it fails to search out - let alone concentrate on - its most persuasive competition. The theory Dworkin dubs "soft conventionalism" is the most striking example: it is dismissed as being nothing more than an "undeveloped form of law as integrity" (p.128) and yet it is the version of positivism many philosophers would want to defend for the very reason that it fits well with what judges actually say they are doing[9].

Having clarified these points, we can proceed with Dworkin's argument. A "concept" of a practice is the abstract point of the practice which almost everyone in a community concedes to be true. The concept of courtesy is respect. But there are less abstract and more controversial "conceptions" of the concept, that is, more detailed theories of what, for example, respect might require. In the case of law, Dworkin proposes that the uncontroversial concept we endorse is:

> 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

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9 Such as MacCormick and Soper

> responsibilities flowing from past political decisions about when collective force is justified.(p.93)

So law tells us when state coercion is justified[10] Despite my criticisms of Dworkin's account of law as interpretive concept I think we can accept that this characterisation captures the general point of law. My only reservation is the link Dworkin explicitly makes between "justification" and past political decisions. A natural lawyer could agree that law is about when state coercion is justified in the sense of a moral ought, that is, "state coercion ought (morally) to be used in these situations", but would disagree that this obligation has anything to do with past political decisions. A natural lawyer might instead propose that state coercion is only justified in those situations commanded by God. I raise this point because there is a subtle equivocation throughout Law's Empire between the moral and non-moral senses of "justified" in Dworkin's concept of law Dworkin argues, for example, that if we can show that law is justified, that gives us a reason for obeying the law - albeit a reason which may in individual cases be outweighed by other considerations (see pp.108-113 on the "grounds" and the "force" of law). But such an obligation will only arise if state coercion is justified in the moral sense. To resort to one of Dworkin's examples, he doubts that a judge in Nazi Germany who shared the moral convictions of a left-liberal American could interpret the decrees of that regime in any way which would result in the legal system being justified. In that case the judge "should simply ignore the legislation and precedent altogether, if he can get away with it, or otherwise do the best he can to limit injustice through whatever means are available to him" (p.105). We might concur in this judgment but still believe that Nazi law was "justified", that is, authorised by the processes of government with the responsibility for creating the law in that regime. The Nazi law which came before the House of Lords in Oppenheimer v Cattermole[11] deprived Jewish citizens of their German nationality and appropriated their property Lord Cross described it as constituting "so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all[12]. But in all probability the statute was validly

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10 Dworkin rather mysteriously claims that "Neither jurisprudence nor my own arguments later in this book depend on finding an abstract description of that sort". (p.93) He then uses his concept to pose the problems that conceptions must answer. The rest of the book does depend on his suggestion, therefore.

11 [1975] 1 A11 E.R. 538.

12 At 567g.

enacted and constitutional in Nazi Germany, so that state coercion to effect the statute was "justified" in the sense of being "legal", however immoral it may have been. By contrast, the random arrest and murder of citizens by the authorities in Nazi Germany was not licensed by its own laws and thus was not justified in either the moral or non-moral senses. The importance of this matter surfaces also in the question of integrity, to which I shall turn below.

Dworkin considers three competing "conceptions" of the concept of law in Law's Empire: conventionalism, pragmatism, and integrity. They are each intended to answer three questions posed by the above "concept": (1) is there any point in requiring public force to be used only in ways conforming to rights and responsibilities that "flow from" past political decisions? (2) if there is such a point, what is it? and (3) what notion of consistency with past decisions best serves this point? (p.94). The architecture of the book is such that Dworkin claims the justification for conventionalism results in it collapsing into pragmatism which, as I noted earlier, is then played off against integrity. Pragmatism is really no more plausible as Dworkin presents it than realism and economic analysis are, so it comes as no surprise when integrity proves to be closer to our unreflective intuitions about the legal process. Instead of following Dworkin, I want to consider the most interesting battle which never takes place - that between conventionalism and integrity. To do this, I shall consider the two key arguments Dworkin adduces against conventionalism, since in turning these arguments around I think it becomes apparent why in fact conventionalism is more descriptively accurate and prescriptively respectable than law as integrity. But it is necessary to begin with a short sketch of law as integrity in order to see what conventionalism is being compared to.

Law as 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 ...According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness and procedural due process that provides the best constructive interpretation of the community's legal practice. (p.225)

Fairness is a question of political processes which distribute power in the right way, that is, giving all citizens a roughly equal voice; justice is concerned with the decisions that the political institutions ought to make; and procedural due process relates to laying

down proper procedures for judging whether some citizen has violated the law (pp.164-165) It is hard to summarise what this means in practice From chapter nine of Law's Empire it would seem that in the case of statutes this involves discovering the combination of principles and policies which "provides the best case for what the plain words of the statute plainly require" (p.338). When faced with a statute a judge should consider the principles which best justify all the various requirements of the law and try to construct a coherent account of all of these (see for example pp.166-167). It is against this background that the construction of the text must take place. Justice is the best principled account which can be given of all the individual political decisions which make up the law Fairness requires that in a political system such as ours attention be paid to the statements of representatives in legislatures (though not simply because they are representative by election - Dworkin has more sophisticated arguments for considering them: see pp 342-348). That is, fairness is a matter of being "sensitive to general public opinion" (p. 341), and in our political system having regard to things like legislative debates is a useful guide to this opinion Justice and fairness have to be weighed against each other in reading a statute, that is, the ideal principles underlying past political acts has to compete with the actual principles which the community subscribe to at the moment. It is the process of reading the words of a statute informed by these ideas of justice and fairness which allows us to answer questions about the propositions of law which the statute supports: so "we will not call a statute unclear unless we think there are decent arguments for each of two competing interpretations of it" (p.352). Dworkin thereby neatly disposes of the problem of hard cases - hard cases are the result of this method, not the occasion for its operation. There are no intrinsically easy cases: the appearance of clarity stems from the plain words of the statute supporting only one just and fair construction (p 354). In the end, Dworkin claims, integrity's method can be seen to produce legal rights and responsibilities very like those we would regard as paradigms - hence the fit is sufficiently close for integrity to be seen as an alternative interpretation of the judicial process rather than the creation of a different one.

It is not possible to briefly explain why Dworkin thinks that law as integrity is peculiarly attractive from a justificatory viewpoint. It concerns his idea of an associative community ("fraternity") which "makes [the] community more genuine and improves its moral justification for exercising the political power it does" (p 96; see pp.164-175 and chapter six for a full discussion). It is a suitably heroic vision which works up to the intoxicating final chapter of Law's Empire - "Law Beyond Law", - containing subtitles such as "Law Works Itself Pure" and "Law's Dreams"

Against this, conventionalism is a very pedestrian conception Legal practice is a matter of respecting and enforcing certain conventions and treating their results alone as law (p.115). The rationale for this approach is that of "protected expectations":

> Past political decisions justify coercion because, and therefore only when, they give fair warning by making the occasions of coercion depend on plain facts available to all rather than on fresh judgments of political morality which different judges might make differently (p.117)

Dworkin argues that there is an ambiguity in the idea of a "convention" between its "explicit" and "implicit" "extensions". The extension of an abstract convention is the set of judgments that parties to the convention are committed to accept: the explicit extension is the set of judgments which everyone actually accepts as part of the convention; the implicit extension is the set of judgments that follow from the best or soundest interpretation of the convention (p.123). Different people have different implicit extensions, so that, for example, the requirement that both sides to a dispute have an equal opportunity to state their case (the explicit convention) might mean both sides having equal time to present their case regardless of the differing complexity of each, or might mean having as much time as they need to fully present their case. Unfortunately this is the only example which Dworkin proffers, and unbuttressed by further instances the distinction does not seem to have the significance he claims in the area of statutory construction. Canons such as the plain meaning rule, reading a statute as a whole, avoiding manifest absurdity and the mischief rule do not seem to yield to this differentiation. Judges at appellate levels do not seem to disagree with their brethren about what plain meaning requires, not about avoiding absurdity (though they may occasionally disagree about what it absurd). To take Riggs v Palmer, Dworkin rightly notes that the majority and the dissenting judgments adopted different views of what paying attention to the subjective intention of the legislators required. But as he himself convincingly argues (at pp.317-337)[13] the whole notion of subjective intention is incoherent, and a longer look at the case suggests that the judges did not really rest their decision on that foundation. Rather, intention was the method invoked to bring into play the principles which they felt outweighed the plain wording. For the majority the "fundamental maxim of the common law" which

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13 Nor do English and Australian judges mean subjective intent of the legislators when they talk of the 'intent of the legislature'.

controlled the case was that no one should profit by their own wrong[14]; for the minority it was that the courts should not "enhance the pains, penalties, and forfeitures provided by law for the punishment of crime"[15]. It was, in reality, a classic instance of "principles" behind the law governing the "rules" set out in the plain words, as Dworkin should appreciate. While the judges did not refer to each others' judgments, it is apparent that each of the sides felt that more weight had to be given to the principle they relied on than that favoured by the other. All in all therefore, Dworkin fails to sustain his charge that conventions divide neatly into explicit and implicit extensions.

Another point which Dworkin presses is that it is misleading to say that judicial practice is a matter of "convention": it would be more accurate to describe it as a consensus (pp.135-139). He contrasts a consensus of conviction and a consensus of convention. The latter is best exemplified by games such as chess where it is purely the acceptance of an arbitrary series of rules which establishes the consensus. Conviction on the other hand can be seen in certain moral prohibitions: there is a consensus (at least in our society) that murder is wrong, but not as a result of any convention Instead we each have substantive reasons for thinking murder wrong which we could appeal to in justifying our conviction, and we would not point to everyone else's acceptance of the prohibition as a reason for holding it. Similarly, although there is a consensus among lawyers and judges regarding the proper approach to the law, it is not simply a matter of everyone subscribing to a convention. We think there are reasons which can be adduced to justify the "conventions" - which shows that they are really convictions.

In truth the justifying reasons for these convictions are precisely the same as those that justify the conventionalist approach to the law. They include the ideal of protected expectations, but, as Dworkin notes, if avoiding the surprise which results from an unanticipated reading of a statute were the only reason for conventionalism then it would be better achieved by "unilateral conventionalism", that is, the sort of narrow construction adopted in relation to the criminal law (pp.142-3). If someone could not be absolutely sure that a statute conferred a right on them then they would not be entitled to insist on succeeding in a case. Clearly the courts do not engage in such a restricted reading of civil statutes, so there must be some other factor at play. The one Dworkin examines is the idea that where there are gaps in the law the courts should fill them on pragmatic grounds (what is best for the community's

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14 22 N E. 188 at 190 (1889).

15 Ibid at 193

goals), but where the law is clear they should defer to the judgment already made in the legislature of what is best since these clear rules provide a framework for co-ordinated action within society. Dworkin has little trouble in showing that if the rationale for the constraints of conventionalism is to allow the clear words of the legislature to facilitate co-ordinated activity, it would be more rational to become a pragmatist. As he notes, it is not clear that the mixture of rigidity and flexibility conventionalism provides <u>is</u> the best, and even if it was, pragmatists could act <u>as-if</u> they accepted this in order to maximise the goals of society (just as the realists argued that judges would continue to act as-if legislation and precedent were the sources of legal rights). Given the unpredictability of societal change, it is probable that in the long run pragmatism would be a more successful strategy for a society since it would allow the judges to become fully pragmatic should the conditions be conducive (pp.144-150).

But it is not necessary for a conventionalist to take this road. The distinction between criminal and civil statutes points in another direction. When state coercion is being licensed on its own behalf, as in the criminal law (and also in areas such as taxation), the courts construe it as being permissable only within the clearly authorised terms of an act because the state is an interested party and because there is an underlying political ideology averse to the extension of state power. By contrast, a civil statute involves a redistribution of rights between members of the community, and if state coercion is called upon it will be at the behest of one of the parties. This fact alone might not justify the distinction but it leads to the other major rationale of the canons of construction - giving effect to the will of the legislature. While the notion of the legislative authority of parliament (or congress) may be a crude piece of political philosophy, it explains why judges go about their task as they do The law today is increasingly the work of the legislature, and the perceived duty of the judiciary is to give effect to the statutes passed by the legislature. Such statutes are in the form of instructions which must be interpreted, ultimately by the courts. When judges speak of the legislative intent behind an enactment they are well aware that there is no single mind issuing commands. Instead, they are grappling with the everyday problem of meaning, that is, how to determine what is meant by the text before them. No one (outside of analytic philosophers) believes that the meaning of any statement can be ascertained in isolation: the key to understanding a statement is to appreciate the <u>context</u> in which it occurs. Not simply the context of a section within an act, but the context provided by the total legal system subsisting at the time the statement is made. Every living legal system is a historical system Individuals join the system by being trained by existing

members who pass on the current understanding of the system and its parts At any time a consensus (of conviction) prevails as to the nature of the institution of law: there are points of contention everywhere but the general shape of the law is relatively settled. It is in rare moments of societal crisis, such as that in Russia in 1917, that the whole system disintegrates and has to be rebuilt.

The relative stability of legal meaning enables communication within the system. Those drafting legislation share a common understanding of law with those authoritatively interpreting it and those relying upon it. Ultimately, it does not matter very much what that understanding consists in so long as it is shared. The political process as Dworkin presents it is over-simplified. Politicians may know what they want to achieve through legislation but they will refer to draftspeople to work out how (and whether) those ends can be achieved. The people drafting legislation are cognizant of the means by which they can modify or add to the existing law in order to give effect to certain plans, and endeavour to do this. Since they speak a common language with the judges they can get their meaning across.

Hence judges do not need to justify law by interpreting plain language in the manner which best accords with ideal justice and practical fairness. What justifies the use of force is not that it accords with the (best) justification for the explicit terms of an enactment, but that the legislature passing the enactment is legitimate in the eyes of the judge. Dworkin regards his conception of law as "law as integrity", but it is a strange sort of integrity to which he subscribes. When giving another an instruction, one does not expect to have that instruction interpreted in the most charitable fashion which accords with the values and beliefs the listener thinks one ought to hold. One wants the listener to do what one has instructed, based on the values and beliefs one does hold. Having integrity involves trying to understand what someone meant, not what one would have liked them to have meant.

Of course this is precisely why Dworkin's proposal is more attractive in the case of constitutional interpretation in the United States. The legitimacy of any Constitution is an enduring problem of legal and political philosophy. Witness Kelsen's grundnorm and Hart's rule of recognition As a foundational document it is not read in the same way as a piece of legislation Its interpretation is more free-floating, because it serves to limit the legitimacy of legislative action, and what Dworkin has been engaged in for the past twenty years is an attempt to replace one mode of interpretive tradition with another Legislation may be legitimate to English judges if it is passed by the parliament in England, but what justifies a simple majority vote

binding those who do not support the legislation? A constitution may enshrine democratic processes, but such entrenched processes cannot justify the adoption of the constitution itself This is the crucial flaw in a rule of recognition: however descriptively accurate it may be of how legal rules are identified, it does not supply any justification - any normative foundation - for those rules. Dworkin is suggesting (- and it is a very interesting suggestion -) that law as integrity provides judges with a means of reading the U.S. Constitution which also justifies its authority. The reading provides a reason for obeying, rather than pretending that the document can be approached and justified like any other statute.

It is at this plane of legal philosophy that Dworkin has pitched his work. He is seeking a new consensus of constitutional interpretation in the United States How applicable the theory is to countries which lack a Bill of Rights, or even to the interpretation of U S legislation, is questionable. The project that Dworkin has attempted in Law's Empire can only be described in his own terms as an invention of the law. Soft conventionalism is a better description of how the law is determined today and can be defended on the basis that it allows legislators to issue instructions with a reasonable assurance that they will be understood by the courts. In the case of the Constitution, however, Dworkin is on firmer ground, since there are no legislators with the authority to speak to the Courts across two centuries. What would be fascinating would be a direct comparison between constitutional interpretation as it is practised today and as Dworkin would have it practised. As it stands, "law as integrity" fails to convince as an account of the law practised in common law countries today.