Dworkin and Legal Pragmatism

ROBERT WESTMORELAND*

Law as integrity, Ronald Dworkin's theory of jurisprudence, often requires judges to make highly controversial decisions that have no roots either in popular morality or in the understanding of the authors of the black-letter law which judges are pledged to interpret. Yet Dworkin contrasts law as integrity sharply with pragmatism, a rogue 'activist'[1] jurisprudence that gives judges a free hand to make rather than interpret law. Part I of this article sets out and endorses part of the general understanding of legal theory that grounds law as integrity. Part II sketches pragmatism and law as integrity. Integrity is said to be a political virtue that grounds a commitment to equal treatment deeper even than that required by justice. Part III tests and rejects the claim that only integrity condemns the sort of unequal treatment exemplified by 'checkerboard' statutes intended to avert the total defeat of justice by partially enacting conflicting principles of justice. The failure of this claim threatens the distinction, at least in cases about constitutional rights, between law as integrity and the sort of pragmatism that demands that courts do justice unmediated by institutional history. The distinction collapses in Part IV where it is shown that no institutional constraints impede Hercules, law as integrity's mythical superjudge, in the pursuit of justice *simpliciter* in constitutional rights cases. I concentrate on such cases because of their importance—for Dworkin and many others, constitutional rights trump all other legal claims—and because they most clearly reveal the problems of law as integrity, though I refer occasionally to statutory law. Part V argues against the view that integrity best accounts for prevalent ideas about political legitimacy and the general obligation to obey the law within Anglo-American political culture. I defend the argument from fair play as the better account of these features of political life, and suggest that Dworkin's portrait of obligation within the community of integrity fits the pragmatism of justice better than it fits any legal theory that takes fidelity to law seriously.

I Interpretation

One of Dworkin's important contributions to philosophy of law is the insight that legal theory is 'interpretive' not semantic (chs 1–3). A philosophically significant

* Assistant Professor of Philosophy, University of Mississippi, USA. I am grateful to Gerald J. Postema and a referee of this journal for their comments on earlier drafts of this article.

[1] *Law's Empire* (Cambridge: Harvard University Press, 1986), 378. All page and chapter references in parentheses in the text are to this book.

legal theory is not an empirical exercise that uncovers linguistic criteria governing the use of legal terms. Those who think it is wrongly assume that unless we all apply the same semantic rules to our legal terms we will talk past each other, as we would in 'an argument about banks when one person has in mind savings banks and the other riverbanks' (44). Lawyers perennially disagree about the nature of law and legal interpretation: some for instance say that what the law requires is always an empirical question; others insist that discerning (not creating) the law's requirements engages moral principles as well as institutional history. Yet their disagreement seems real.

It *is* real, argues Dworkin. Unlike the 'banks' case, the disputants give competing interpretations of roughly 'the same objects and events'—the Constitution, federal and state statutes, judicial decisions, etc (46). Furthermore, disputes about what makes these law are ultimately substantive moral and political disagreements about the point and function of law. The positivist view that discovering legal rights and obligations is an empirical activity usually relies, not on linguistic considerations, but rather on the conception of law as (in Joseph Raz's words) 'a public measure by which one can measure one's own as well as other people's behaviour'[2] without reference to endlessly contested moral principles. Dworkin's brand of 'natural law' theory rejects positivism out of a commitment to individual rights rather than on linguistic or purely conceptual grounds. Now if such normative judgments were only (eg) disguised statements of or expressions (in the emotivist sense) of speakers' feelings about the law, their disagreement would not be real. But Dworkin the moral realist thinks that these judgments concern something that can be got right or wrong—namely, the question of which normative theory puts the history of the institution in its best light. Legal philosophy is a dialectical process aimed at approximating such a conception of law.

Dworkin calls the attempt to frame the substantively best conception of law that fits the institutional record *interpretation*. Two points need emphasis here. First, sound interpretation is said to succeed along the dimension of fit as well as substance, for it interprets an existing legal system. Second—I shall attack law as integrity on this point in Part IV—for Dworkin interpretation is a 'constructive' (52) not a 'conversational' (50) process. You do not discover the point or function of law by polling participants—judges, lawmakers, or citizens. Beyond the most primitive stages of 'runic' traditionalism participants themselves assume an interpretive attitude toward law and disagree about law's purpose (47). Law no less than art, though a product of its authors, is 'an entity distinct from them', so their views about its point are not decisive. Though authors' intent 'provides the *formal* structure for all interpretive claims' (58), the purposes an interpreter ascribes to the law are those he or she considers sound, 'not (fundamentally) those of some author' (52). But again, these purposes must fit the pre-interpretive data. Thus, presumably, no interpretation that posited aesthetic advancement as the main purpose

[2] *The Authority of Law* (New York: Oxford University Press, 1979), 51.

of US law could pass muster, because it could not make sense of enough of that data.

For Dworkin the judge's task no less than the legal philosopher's is 'constructive'. The question for law as integrity is whether this makes institutional history so protean that fit and thus the distinction between legislation and interpretation become meaningless. To answer that question I must first set out Dworkin's account of pragmatism and law as integrity.

II Theories of Legal Interpretation

A. Pragmatism

Pragmatism is said to be law as integrity's fiercest competitor. It denies that 'past political decisions in themselves provide any justification for either using or withholding the state's coercive power' (151). With no duty of fidelity to law, the judge pursues some political virtue like justice or utility 'liberated from the dead hand of the past and the fetish of consistency for its own sake' (ibid).

> Pragmatism . . . denies that people ever have legal rights; it takes the bracing view that they are never entitled to what would otherwise be worse for the community just because some legislature said so or a long string of judges decided other people were. (152)

There are as many kinds of legal pragmatism as there are moral theories: eg, a pragmatism of justice, various utilitarian pragmatisms, eudaimonistic pragmatism. I am most interested in the pragmatism of justice because of its appeal to aggressive neo-Kantian rights liberals like Dworkin.

Pragmatism of any kind would seem to misdescribe our legal practice, since judges labour to fit their decisions to the black-letter law. But the wise pragmatist will recognize more than one political virtue, even if the others are only instrumental to the pursuit of some ultimate value like justice. A pragmatist of justice who enforced only those statutes he approved of would defeat himself by undermining the social co-ordination and stability that are preconditions of justice. So he will act *as if* people have legal rights flowing from past political decisions—perhaps nearly as often as some non-pragmatist judges—if those decisions are clear enough to raise definite expectations among citizens. But if the only good reason for 'respecting' statutes and precedents is this instrumental one, there is no point in as-if rights when the scope and meaning of these decisions is unclear. Here 'the right rule is whichever rule is best for the future' and the judge could have only 'an indirect, noble-lie reason' for pretending to divine the '"true" ground' of past decisions (158).

Now judges typically show a 'constant and relentless concern . . . for explicating the "true" force of a statute or precedent decision when that force is problematical' (157–8). Even if they are pragmatists they have no noble-lie reasons for dissembling in such cases, for 'the public will not be outraged if it is told that precedents will be confined to their facts' (159). So pragmatism may not describe legal practice

very well after all, says Dworkin. It is a sound legal theory only if its political attractiveness offsets its weakness along the dimension of fit.

Dworkin finds it *quite* attractive. When the black-letter law loses its coordinative value, why should justice yield to some notion of doctrinal consistency? A persistent theme of Dworkin's is his aggressive advocacy of rights of justice even when these seriously hinder the pursuit of collective goals, and even when there is strong and principled popular opposition to the idea that the particular rights (eg to abort even for trivial reasons) exist. Especially in constitutional cases, Dworkin thinks the task of the courts is to enforce the rights of individuals *against* the majority. Dworkin finds the claim that judges should simply do justice seductive (see 153).

Nevertheless Dworkin holds that the descriptive failure of pragmatism suggests a deep interpretive failure: disregard for a political virtue said to ground 'distinctively legal rights [understood] as trumps over what would otherwise be the best future [even from the standpoint of *justice*] properly understood' (160). *Integrity* is said to be the virtue that makes judges responsible to legal history as well as justice. I turn now to Dworkin's account of this virtue and its attendant legal theory.

B. Law as Integrity

Integrity is said to be a warmer, more communitarian virtue than justice that secures 'a kind of equality among citizens that makes their community more genuine and improves its moral justification for exercising the political power it does' (96). Integrity secures this deep kind of equality by requiring that 'government speak with one voice' and 'extend to everyone the substantive grounds of justice or fairness it uses for some' even if the resulting legal standards are less than ideal (165).[3] Thus it supposedly restrains the pursuit of justice by judges and lawmakers. It forbids the application by courts of principles of justice (such as one requiring the rich to share their wealth), however attractive, that are ungrounded in the black-letter law, for this would manifest less than equal concern for plaintiffs in similar cases to whom the principle is not applied. Integrity condemns as well both 'different laws each of which is coherent in itself, but which cannot be defended together as expressing a coherent ranking of different principles of justice or fairness or procedural due process' (184), and individual statutes which express conflicting principles of justice.

What if anything integrity keeps judges from doing in the way of justice is a question for Part IV. First I want to explore the claim, important to Dworkin, that integrity alone forbids legislation which in the name of justice speaks with two voices.

[3] Though integrity is said to regulate the application of principles of fairness and 'procedural' due process as well as justice, I focus on its alleged impact on justice.

III Checkerboard Statutes and Equal Treatment

Dworkin calls the two-voiced laws which split the difference between competing conceptions of justice 'checkerboard statutes'. If for instance the community were evenly divided about abortion, a checkerboard statute might prohibit only abortions for women born in odd-numbered years. Such a statute would be *fair*, says Dworkin, because it accurately reflects the community's division of opinion, and fairness recommends 'that each person or group in the community should have a roughly equal share of control over the decisions made by Parliament or Congress or the state legislature' (178). Dworkin thinks justice too would be served in that each side thinks that fewer injustices would be done under the checkerboard statute than if the opposition prevailed. A group has sound reasons of *justice* for condemning all such compromises only if it is a perduring majority of opinion that can count on winning most or all winner-take-all votes. Dworkin denies that discrimination based on birthdate in the abortion case is arbitrary from the standpoint of justice, for its point is precisely to minimize the number of injustices committed (see 180–1).

Since most of us would rule out such compromises in principle even if we thought them just and fair (in Dworkin's sense of those terms), it is supposedly *integrity* that moves us to hold

> that a state that adopts these internal compromises is acting in an unprincipled way, even though no single official who voted for or enforces the compromise has done anything which, judging his individual actions by the ordinary standards of personal morality, he ought not to have done. The state lacks integrity because it must endorse principles to justify part of what it has done that it must reject to justify the rest. (183–4)

Integrity for Dworkin is an emergent political virtue that 'commands that no one be left out, that we are all in politics together for better or worse, that no one may be sacrificed, like wounded on the battlefield, to the crusade for justice overall' (213).

The idea that justice does not condemn checkerboard statutes depends on a curious maximizing view of justice which appears nowhere else in Dworkin's work, is inimical to his Rawlsian conception of justice as bound up with a foundational right to 'equal concern and respect',[4] and shows up here I think only to give integrity some work to do. This maximizing conception says that if (eg) abortion is unjust, the number of abortions should be minimized, by checkerboard statute if necessary. It is an example of what Robert Nozick calls a 'utilitarianism of justice' that replaces happiness with 'some condition about minimizing the total "weighted" [according to seriousness] amount of violations of rights'[5] as the desirable end state. It would in some circumstances require the state to convict the innocent when doing so would prevent more injustices overall than it would produce. Even worse for Dworkin is the fact that *integrity* would condone and even *require* such a policy if the state embraces a maximizing conception of justice. For

[4] See *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), chs 6, 12.
[5] *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 28.

in that case the policy represents the application of a single maximizing principle of justice rather than a checkerboard compromise between two inconsistent principles of justice. Assuming again a maximizing conception of justice, the checkerboard abortion statute honours integrity for similar reasons. If justice demands the maximization of just outcomes, and if political circumstances are such that the alternative to the checkerboard statute is one that would maximize injustice where abortion is concerned, then *one* principle of justice endorses the different treatment of women born in odd- and even-numbered years. Where a maximizing conception fits the existing law best, the state would *violate* integrity by giving voice to a non-maximizing principle of justice that forbids checkerboard statutes. Now if the state embraces a non-maximizing conception of justice—as Hercules' neo-Kantian state surely does—it will condemn the checkerboard statute on the ground that it makes us use ourselves as well as others in ways that offend the inviolability of persons. But whether or not the state accepts a maximizing conception of justice, it is justice, not 'integrity', that determines whether or not such unequal treatment is condoned. All this means that as yet we have no evidence that integrity restrains Hercules' pursuit of justice, since justice by itself explains his rejection of checkerboard statutes. But might not Hercules' bold rights-oriented ideal of adjudication prevail even if it loses this particular battle? After all, the best interpretation of the black-letter law engages the soundest conception of justice, which for Hercules the neo-Kantian is a non-maximizing one. So does not law as integrity in the end endorse the kind of equality that condemns checkerboard compromises?

Maybe it does; but it in no way follows that law as integrity requires fidelity to institutional history, which is supposed to be the crucial difference between law as integrity and the pragmatism of justice. Justice demands consistency, but of a different sort from that demanded by fidelity to law. It is tempting to conflate the two, for practical reason, to which justice is basic, 'transcends tenses as well as persons';[6] an action required by justice yesterday is required today and tomorrow, assuming sufficiently similar circumstances. But the similarity among these duties is not due to fidelity to any history analogous to the black-letter law; justice today requires an action similar to yesterday's simply because that sort of action is correct from the perspective of justice, not because of any moral analogue of precedent. This is respect for reason and for persons, not for history. It gives us no reason to think that the respect for equality and consistency that inspires Hercules' rejection of checkerboard statutes springs from respect for institutional history rather than background justice.

IV Making Legal History

A closer look at Hercules' attitude toward institutional restraints on the pursuit of justice further undermines law as integrity's claims of fidelity to law. I consider his

[6] J. R. Lucas, *On Justice* (New York: Oxford University Press, 1980), 42.

approach to several traditional restraints, and then close Part IV with an examination of first his general views about the role of legal history in constitutional rights cases, and then what I take to be his odd notion of respect for constitutional language.

A. Original Intent

The intent of the framers, ratifiers, and/or authors of constitutional precedents does not constrain Hercules even when it is clear. (I focus on framers' intent.) The main case for original intent is the relative predictability and certainty it affords. These are important not just for the sake of efficiency, but also as part of the classical liberal ideal of law as placing strict and well-defined limits on the power of officials (including judges) as well as of private citizens and groups. Dworkin thinks that certainty and fixity, though important in, eg, rules of the road, are 'relatively unimportant' in constitutional cases where fundamental *rights* are at stake (367); in such cases 'Fitting what judges [and lawmakers] did is more important than fitting what they said' (248). What they did and what they *think* they did may have only the most tenuous relation, though the *words* of the Constitution (and statutes) they frame are said to be canonical. (We shall see about that in IV E.)

Original intent as usually understood concerns what they thought they did. This can be taken several ways. The first is that judges may only make decisions shown by the historical record to have been explicitly endorsed by the framers. A less restrictive variation of this view allows decisions based on defensible counterfactual statements about how the framers would have decided cases they did not actually envisage. Dworkin dismisses these views; original intent cannot refer, he says, to 'some particular conscious thought wielding its baton in an author's mind when he said or wrote or did what he did' (55). The framers of the equal protection clause of the fourteenth amendment, for instance, could have had in mind only a few of the sorts of cases falling within its ambit, so original intent in this sense cannot exhaust the meaning of the clause.

Important proponents of original intent agree. Robert Bork thinks that 'In such a narrow form the philosophy is useless . . . no intentionalist of any sophistication employs the narrow version just described'.[7] Bork summarizes his own conception of original intent as follows:

> all an intentionalist requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a major premise. That premise states a core value that the framers intended to protect. The intentionalist judge must then supply the minor premise in order to protect the constitutional freedom in circumstances the Framers could not foresee . . . we are usually able to understand the liberties that were intended to be protected. We are able to apply the first amendment's Free Press Clause to the electronic media and to the changing impact of libel litigation upon all the media; we are able to apply the fourth amendment's prohibition on unreasonable searches and

[7] 'The Constitution, Original Intent, and Economic Rights', (1986) 23 *San Diego L Rev* 823, 826.

seizures to electronic surveillance; we apply the Commerce Clause to state regulations of interstate trucking.[8]

On this approach courts 'must not hesitate to apply old values to new circumstances', and in doing so are not confined to probabilistic statements about what the framers would have decided. But Bork's approach is said to place 'Entire ranges of problems . . . off-limits to judges' by confining them to application of 'the principles the Framers put into the Constitution'.[9] Does it? The question arises because this approach requires *some* constructive interpretation of the Constitution: the problem before the court in the electronic media case is not how the framers would have decided the case, but whether the best interpretation of the free press clause covers those media. Though the major premise is said to be provided by the framers, the rest of the syllogism is the court's. Where does constructive interpretation stop, once *some* reasons and standards not derived from the framers' intent are deemed *constitutional*? If the first version of original intent is 'so narrow' as to be 'useless', what non-constructive way is there to know whether and how a premise put into the Constitution by the framers applies? And since the rest of the syllogism is constructive, what becomes of original intent? Bork acknowledges in addition that constitutional 'values and principles can be stated at different levels of abstraction';[10] the equal protection clause, for instance, might be understood to condemn far more than racial discrimination. It could be understood to forbid any statute—say, one that prohibits private consensual homosexual acts—taken by the court to violate something like a Rawlsian right to equal concern and respect. Were it objected that the fourteenth amendment was framed in full knowledge of the existence of sodomy statutes, the court could appeal to Bork's determination to 'apply old values to new circumstances' and claim that those circumstances include a new and more sympathetic understanding of homosexuality. The court might even use Bork's appeal to sensitivity to the structure and history of the Constitution to glean a privacy right from the rights explicit in the text as well as from various constitutional precedents, as the Supreme Court in fact did in *Griswold* v *Connecticut*.[11]

These are just the sorts of judicial cadenzas Bork wants to avert. I think he would do so as follows. He would block the ascent to the privacy right by restricting courts to the application of rights explicitly enacted in the Constitution. Extension of provisions like the equal protection clause to overturn homosexual sodomy statutes would be possible only if the historical record showed that the framers understood the clause to apply to matters of sexual orientation.[12] If they did then presumably the court could apply the clause in a controversial way only if the court is genuinely unsure about what the framers would have said. But that seems to be the only sort of case where Bork would allow constructive interpretation.

[8] Ibid.
[9] Ibid, 827.
[10] Ibid.
[11] 381 US 479 (1965).
[12] Robert H. Bork, op cit, above, n 7, 828.

There is no question that law as integrity rejects Bork's as well as more restrictive versions of original intent. For Hercules even the framers' beliefs about the sorts of cases they *did* have in mind are not decisive. Neither their expectations nor their hopes about how the courts will interpret, say, the equal protection clause determines its meaning: their expectations, because they might *fear* or *regret* what they think judges will do; their hopes, because these might spring from illicit concerns. (They might oppose extending the clause to discrimination based on national origin because they are xenophobes.)

What about their *legitimate* hopes? Suppose Hercules thinks their concrete convictions about what equal protection means in particular cases are respectable though in his view less than the best? Dworkin makes two points here. First he argues that if we are to respect the words of the clause we must assume that the framers' *dominant* intention was that justice be done, ie, that courts apply the best interpretation of equal protection, which (they must admit if they were moral realists) is not necessarily the one they think best. Thus *to honour the intent of the framers* Hercules must depart from their convictions about equal protection when his are different. But what if it is clear that the framers thought these concrete convictions decisive? To enforce them for that reason 'would beg the question' whether constitutional interpretation is constructive or conversational (364).

Hercules' answer to this question is that interpretation is constructive, and that he must enforce what he considers the best conception of equal protection even if the framers would think he misunderstands what they did in drafting the clause. Hercules regards framers' statements about what equal protection means as 'political events' that are no more decisive than the views of others, officials (eg authors of constitutional precedents) or non-officials (316). Consider here Hercules' understanding of statutes:

> Hercules interprets not just the statute's text but its life, the process that begins before it becomes law and extends far beyond that moment. He aims to make the best he can of this continuing story, and his interpretation therefore changes as the story develops. He does not identify particular people as the exclusive 'framers' of a statute and then attend only to their hopes or expectations or concrete convictions . . . (348)

This goes doubly for constitutional provisions like the equal protection clause, which are especially 'sensitive . . . to time' (365) because they were framed 'long ago, when popular morality . . . and almost everything else was very different' (364). Constructive interpretation in the service of justice is not restrained by original intent.

B. Protected Expectations

Another way to restrain courts is where possible to bind them to established interpretations of the law. Though the extent to which such settled interpretations exist is subject to dispute (see ch 4), there is no doubt that this doctrine can curb judicial power: it would stop the Supreme Court from finding the death penalty

unconstitutional, for instance. There is also no doubt that law as integrity dismisses such expectations in constitutional rights cases: it rejects this sort of 'conversational' interpretation as much as it does the others, and, as seen above, it virtually denies the importance of fixity and certainty where fundamental rights (constructively defined) are in play.

C. Popular Morality

The view that popular morality should govern the interpretation of constitutional provisions containing abstract moral language is influential and represents a potentially substantial discipline on the courts. The strictest version of this view would allow courts, eg, to overturn a death penalty statute on the ground that it is cruel and unusual, if but only if that punishment utterly offended contemporary standards. A less restrictive version, accepted by the Supreme Court in *Gregg* v *Georgia*,[13] directs judges to place great but not conclusive weight on contemporary standards. Law as integrity entirely rejects even this second, qualified requirement of deference to popular morality. Since it understands constitutional rights to be rights against the majority, the case for fairness, ie, for deferring to majority opinion, 'disappears when serious constitutional rights are in question' (257).

D. Fit and Justice

Law as integrity edges toward the pragmatism of justice when it dismisses the particular restraints on judicial power discussed above. But could there be others it *does* recognize? Dworkin's general remarks about legal history emphatically suggest not.

A decision judged superior from the standpoint of justice can hardly fail to meet the demands of constructive interpretation in hard constitutional rights cases. How does Hercules distinguish a decision that best justifies institutional history from one that has 'no purchase in American history and culture' but reflects only 'the views of a local and transient political majority'? (337). We know that he cannot appeal to the idea that the latter decision clashes with the concrete convictions of the authors of the black-letter law (which law includes constitutional provisions, statutes, and precedents) the decision supposedly must fit. We know too that he cannot appeal to its inconsistency with popular morality. The meaning of the tradition Hercules interprets is determined by his background theory of justice. Law as integrity

> begins in the present and pursues the past only so far as and in the way its contemporary focus dictates . . . It does not aim to recapture, even for present law, the ideals or practical purposes of the politicians who first created it. (227)

Hercules has a heads-I-win-tails-you-lose approach to history:

[13] See 428 US 153 (1976), 179–87.

> His arguments embrace popular conviction and national tradition whenever these are pertinent to the sovereign question, which reading of constitutional history shows that history overall in its best light. (398)

Tradition matters when it supports the interpretation deemed best by Hercules' background conception of justice.

Constitutional history is especially malleable; since the Constitution is foundational, its 'interpretation . . . must be foundational as well . . . [It] must be drawn from the most philosophical reaches of political theory' (380). And since the Constitution 'must fit and justify the most basic arrangements of political power in the community', institutional support for bold new interpretations of abstract constitutional clauses can come from the far reaches of the law. The purposes disclosed by legal history are Hercules' own, so any contemporary trend that fits his conception of justice can claim institutional support. Fit is in thrall to justice.

Justice Stephen Field's dissent in *Munn* v *Illinois*, which anticipated the *laissez-faire* era of the Supreme Court early this century, is instructive here. In language strikingly like that of Justices Blackmun and (in a concurring opinion) Douglas in *Roe* v *Wade*, Justice Field wrote that state regulation of freight and grain monopolies violated principles expressed—constructively—in the equal protection clause, as well as in every statute and court decision protecting property rights and 'freedom to go where one may choose . . . as his judgment may dictate for the promotion of his happiness'.[14] In *Lochner* v *New York*,[15] an equally broad array of law was taken to support the principle that struck down regulations of the working hours of bakery employees. In his *Lochner* dissent Justice Holmes charged that the Court ignored much established law that seemed perfectly consistent with such regulations. But law as integrity's rejection of any 'conversational' interpretation of legal history, and its reconstruction of that history to meet the present demands of justice, guaranteed for the *Lochner* principles that purchase in constitutional tradition needed to pass the threshold of fit; their substantive attractiveness did the rest.

E. Canonical Language and Justice

Even if Hercules' reading of a given constitutional clause is not responsible to a substantial part of institutional history, it might at least be responsible to the language of the clause itself. Perhaps the language of, eg, the due process clause of the fourteenth amendment forces Hercules to restrict the application of the clause to cases about procedural issues even though its meaning is not influenced even in part by any other aspects of the institutional record. If law as integrity does consider constitutional language canonical in this way it salvages a rump conception of fit and so a semblance of a distinction between itself and pragmatism.

Whether or not it does respect constitutional language is debatable. Justice—non-maximizing justice—is the foundational value of Hercules' background

[14] 94 US 113 (1877), 142.
[15] 198 US 45 (1905).

political theory. Since that theory already recognizes the various rights specified by the Constitution, Hercules is never tempted not to enforce them. And we have seen that law as integrity's protean conception of fit lets Hercules discover in the Constitution whatever background rights his theory of justice endorses. If constitutional rights language requires nothing that justice forbids, and if that language forbids the discovery in the Constitution of nothing that justice requires, what duties does it really impose? What in the way of justice does it force Hercules to sacrifice in the name of fidelity to law?

Hercules would protest that this argument rests on the flawed view that a duty exists only if it requires actual sacrifices, only if you are seriously tempted to violate it. If this notion of duty were sound, one whose sentiments and sense of duty both recommended, say, truth-telling would have no *duty*[16] to do so. That is a bizarre conception of duty. Hercules would argue that constitutional language *is* canonical, since it demands enforcement of explicit constitutional rights *because* they are in the constitution, not (solely) because they are background moral rights. Thus on his view even a judge whose background morality placed little weight on the rights enshrined in the words of the Constitution would be duty-bound to enforce those rights.

But how potentially confining *is* this duty for such a judge? Suppose Max is an act-utilitarian judge who accepts law as integrity. (His reasons for doing so will not be Hercules' neo-Kantian ones, but it is open to him to 'interpret' integrity differently.) How would the individual rights explicit in the Constitution slow his pursuit of utility maximization?

Law as integrity might force Max to deploy *some* conception of rights in his interpretive theory, since the Constitution contains explicit rights and since law as integrity allegedly respects constitutional language. But law as integrity is constructive and does not demand an interpretation of those rights as foundational[17] in the Kantian sense endorsed by Hercules' background conception of justice. Max would consider the rights explicit in the Constitution as rules of thumb of considerable weight because of their conduciveness to utility maximization.[18] But when he is convinced in a particular case that the enforcement of the free speech right would hinder the pursuit of utility then that collective goal will prevail.

If the duty to respect constitutional rights language burdens not even the act-utilitarian, is it a duty at all? Maybe. Utilitarianism is, after all, within the mainstream of the Anglo-American political tradition; perhaps then it should come as no surprise that it could be constructively incorporated into the foundations of the constitution. So long as law as integrity excludes eg Nazi and Marxist interpretations of the Constitution, perhaps it can claim some measure of fidelity to constitutional language.

[16] I ignore here the distinction sometimes made between duty and obligation according to which obligations but not duties involve an element of consent.

[17] They are foundational for a Kantian in that they are trumps against collective goals like utility maximization rather than instruments for the pursuit of such goals.

[18] In *Taking Rights Seriously* Dworkin suggests an understanding of the concept of rights latitudinarian enough to embrace 'an act-utilitarian theory that holds that everyone has a duty to act on every occasion, so as to produce the best

continued on page 186

It is a wan conception of canonical language that allows constitutional rights to be interpreted in accordance with Hercules' and Max's background political principles. But even this skeletal conception is threatened by Hercules' apparent reading of the due process clause. His creator Dworkin shares with many lawyers a commitment to 'substantive' due process,[19] which directs courts to judge the reasonableness of the burdens placed on citizens by the law rather than on the fairness of the procedures by which those burdens are created and imposed. Now the clause does admit interpretation. A narrow reading says a person has a right to whatever legal processes the black-letter law elsewhere specifies; a broader interpretation has it that in depriving citizens of liberty or other basic goods the state must meet standards of *procedural* fairness not necessarily spelled out by law.[20] Both these interpretations are variations on the theme of due *process*. Substantive due process is not; John Hart Ely is correct that 'There is simply no avoiding the fact that the word that follows "due" is "process" . . . "substantive due process" is a contradiction in terms—sort of like "green pastel redness"'.[21] If law as integrity allows for the 'substantive' reading of the due process clause it seems to respect constitutional language no more than pragmatism does.

One way around this problem might be to say that Dworkin's impersonation of Hercules interpreting the due process clause is a bad one, and so irrelevant to law as integrity's commitment to honour constitutional language. But it is not so easy to dismiss this attempt to apply law as integrity as an aberration. Substantive due process has had important advocates, some on the Supreme Court, for decades, and the criticism that it is flatly untrue to the language of the clause is a standard one. Since *Roe* v *Wade* substantive due process has made a comeback and is once again an important part of constitutional debate. So Dworkin's endorsement of it cannot be dismissed as an unfortunate but irrelevant detail. There are other instances where Dworkin among others has in the pursuit of what they see as fundamental rights countenanced what on any traditional understanding is the violation of canonical language. Consider Dworkin's (and many judges') treatment of the Civil Rights Act of 1964 which, though not a constitutional provision, addresses important individual rights. Dworkin apparently endorses many of the famous busing decisions (see 221, 392), all of which came after the Civil Rights Act became law, even though the Act defines desegregation as the assignment of public school pupils 'without regard to their race . . . "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance'.[22] It would be difficult to find a more flagrant example of what most people would consider disregard for statutory language.[23]

continued from page 185

results, as a utilitarian would define these, and that those who would benefit from such acts from time to time have a "right" to them'. (Ronald Dworkin, op cit, above, n 4, 313.)

[19] Dworkin's frequent references to 'procedural' due process suggest that he accepts 'substantive' due process.

[20] See Christopher Wolfe, *The Rise of Modern Judicial Review* (New York: Basic Books, 1986), 131–2.

[21] *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1985), 178.

[22] Act of 2 July 1964, 78 Stat 241, Title IV Sec 401(b), 246.

[23] It might be objected that the busing cases interpret the Constitution, not the Civil Rights Act. But this would mean that the Act's proscription of quotas in pupil assignment is in effect unconstitutional, a position no one I know of has taken.

If the examples above evidence disregard for canonical language, and if law as integrity is wedded to them, then the contrast between law as integrity and the pragmatism of justice would seem lost where fundamental rights are concerned. Furthermore, law as integrity would have to forfeit its claim to fit legal practice, assuming the canonical status of constitutional and statutory language is among the indisputable pre-interpretive data of law if anything is. But law as integrity is nothing if not resourceful, and it might be able to reinterpret the idea of canonical language in a way that shows that the substantive due process and busing decisions really respect canonical language.

Here is how it might do so. The question of what respect for statutory or constitutional language means is, like all questions within law as integrity, normative as well as descriptive; it is as much a matter of substance as fit. The conception of canonical language embraced by law as integrity is thus determined by the most morally attractive account of law that adequately fits legal history. That account will be sensitive to the different functions of different kinds of law. There are several examples of this: eg, certainty is important in interpreting rules of the road and rules governing negotiable instruments, but not in interpreting constitutional rights; popular morality can play a substantial part in cases at common law, but not in constitutional rights cases. It is the importance of the value of respect for persons expressed by constitutional rights that makes these other values pale by comparison in such cases.

The supreme importance of these rights will also influence what it means to respect constitutional language. We know that Hercules operates on the general principle that, where such rights are concerned, what the framers (and later interpreters) *did* is more important than what they *said* or what they *thought* they did. The framing of a constitutional provision is but the beginning of a long story in which the framers have little say; the authors of the eighth amendment might have prohibited capital punishment even if they thought the death penalty was outside the extension of 'cruel punishment', and those who wrote the laws and precedents cited in *Griswold* might have effected a privacy right even if they had no inkling they had done so, and were quite sure they had not. Especially in the privacy cases Hercules ascends far above the words and concrete convictions of the authors of the black-letter law to construct a highly abstract principle that supposedly justifies bold new interpretations of that law. All it takes to justify the substantive reading of the due process clause is to ascend a bit farther and take the framers' *words* as well as their concrete convictions about those words to mean that justice *simpliciter* be done. Understood this way, the clause could mean *inter alia* that anti-abortion and anti-contraception statutes are unconstitutional.

This interpretation of the notion of canonical language is well within the spirit of law as integrity, and if accepted saves Hercules, albeit in an eccentric way, from the charge that he, like the pragmatist of justice, has no principled commitment to constitutional language. But salvation is expensive. As is the case with its doctrine of fit with institutional history, law as integrity's conception of respect for constitutional rights language leaves it extensionally equivalent to the pragmatism

of justice. If that is so, the citizens of the community of integrity have reason to lose interest in the arcane intentional distinctions between the two theories of law, and to conclude that where fundamental rights are concerned they are ruled by pragmatist judges.

V Legitimacy and Obligation

I have denied that integrity explains our commitment to a certain kind of equality before the law that puts constraints on Hercules' pursuit of justice in constitutional rights cases. It is time now to explore the claim that integrity explains better than its rivals fundamental intuitions about political legitimacy and the general obligation to obey the law. I contend that Dworkin's portrait of the community of integrity, and especially of the conception of legal obligation that prevails there, supports the view that law as integrity demands the open-ended enforcement of justice. I close by suggesting that Dworkin rejects the argument from fair play as the best account of political legitimacy and obligation because it does not entail that kind of commitment.

A. Legitimacy, Obligation, and Integrity

Dworkin thinks that

> the best defense of political legitimacy—the right of a political community to treat its members as having obligations in virtue of collective community decisions—is to be found not in the hard terrain of contracts or duties of justice or obligations of fair play that might hold among strangers . . . but in the more fertile ground of fraternity, community, and their attendant obligations. (206)

The argument for this claim is serpentine, but it goes like this. A striking feature of political obligation is its non-contractual or non-consensual nature. In a reasonably just state citizens cannot escape the general obligation to obey the law by claiming that it was not voluntarily assumed. Dworkin's explanation of this is that political obligation is a species of 'associative' obligation (see ch 6), a type of obligation said to arise only in communities that exhibit *integrity*.

Dworkin says that the obligations a community generates are associative under the following conditions: (1) the obligations its practices create are *special*, 'holding distinctly within the group, rather than as general duties its members owe equally to persons outside it'; (2) these obligations are *personal*, running 'directly from each member to each other member, not just to the group as a whole in some collective sense' (199); and (3) the practices of the group exhibit a general *concern* members have for one another which is (4) *equal* concern, such that even if the group is hierarchical its 'structure and hierarchy must reflect the group's assumption that its roles and rules are equally in the interests of all' (200). Members of a group that meets these conditions do not *assume* obligations; rather, the practices of the group '*attract* obligations, and we are rarely even aware that we are entering upon any

special status as the story unfolds' (197). Such is said to be true of family and friendship, whose obligations are strong and 'sustained among people who share a general and diffuse sense of members' special rights and responsibilities from or toward one another' (199) even when (as in the case of family) they 'are matters of the least choice' (198).

A state whose laws individually and collectively 'speak with one voice' is the only state that generates associative obligations, says Dworkin. That state exhibits unity in its principles of justice, fairness, and 'procedural' due process, and so 'expresses a concern by each for all that is sufficiently special, personal, pervasive, and egalitarian to ground communal obligations according to standards for communal obligation we elsewhere accept' (216). The citizen of a state thus committed to equal concern has a general though not absolute obligation to obey its laws even though he has never consented to do so, and even though those laws are less than perfectly just. The other side of the coin is supposedly that judges must for similar reasons interpret existing law rather than simply do justice.

I have already rejected the claim that integrity restrains rather than demands the pursuit of justice in constitutional rights cases. Dworkin's attempt to ground political legitimacy and obligation on integrity undermines that claim in two additional ways. The first concerns the previously sketched argument that the state whose practices constructively manifest less than *equal* concern for its citizens relative to whatever conception of justice it deploys is illegitimate. It follows that, even if the state displays some level of concern for targets of invidious discrimination sufficient to pass some minimum threshold of justice, it is illegitimate unless it passes the equal concern test. Now this test of legitimacy does *not* seem as stringent as it could be: it demands that the state consistently enforce principles of justice that are adequate, not *sub specie aeternitatis*, but rather from the perspective of social morality, though a state that *grossly* violates ideal justice is said to be illegitimate no matter what (203). If, however, the arguments in Part IV above are sound, this test is more stringent than it sounds, for in constitutional rights cases the deference of courts to institutional history is illusory. But even if this test is less than absolutely stringent, in denying legitimacy to systems which regard some groups as less worthy than others even if some important rights of those groups are respected, law as integrity underestimates (in Alexander Bickel's words) 'how much is human activity a random confusion',[24] and the implications of this for political theory. Integrity fails to recognize that knowing and doing what justice requires—whether we speak of ideal justice or a society's conception of justice—is an arduous achievement, and that the overzealous pursuit of justice can promote the *summum malum* of civil strife or totalist government. And if I am correct so far integrity does restrain the pursuit of background justice.

The second way that law as integrity's idea of legitimacy undermines the claim that it imposes restraints is this. Dworkin says that the conditions of associative obligation sketched above are conditions of the communitarian virtue of fraternity.

[24] *The Morality of Consent* (New Haven: Yale University Press, 1975), 77.

He hastens to add that these conditions 'do not themselves demand' that members of the community 'actually feel some emotional bond with one another'; they are not '"psychological" conditions' (201). This means that 'associative communities can be larger and more anonymous than they could be if it were a necessary condition that each member love all others, or even that they know them or know who they are' (ibid). In other words, though political society lacks the 'psychological conditions' of intimacy, such as the affection born of personal ties characteristic of face-to-face communities like families, law as integrity 'constructively' ascribes these properties to political society. Affective properties are on this view mere epiphenomena that have no bearing on what kinds of obligations are generated by the practices of a group.

That is a recipe for the smothering pursuit of justice which I have said law as integrity requires, as Dworkin's own portrait of associative obligations attests. Dworkin depicts such obligations as typically informal and non-legalistic. They are not in the central family-type case legislated or governed by formal standards of identification and application. The history of an associative community is said to generate a quite abstract obligation of care and concern; as mentioned earlier, members have 'a general and diffuse sense of their rights and responsibilities', which suggests that those rights and responsibilities are pervasive rather than carefully delimited. All this makes sense in the context of a family; the obligations of their members can be open-ended and informally applied because they grow out of a real mutual concern possessed only by those who share a history and know each other as flesh-and-blood individuals. Formal, arm's-length methods of determining such obligations are inappropriate and offend fraternity; a couple whose pre-nuptial agreement goes into effect is finished as a community in Dworkin's sense.

Such formal methods find their home in political society. It is useful briefly to 'interpret' certain fundamental features of law to point up the contrast between political society and real associations. Law's often elaborate and explicit law-determining procedures, its demand for fully articulated grounds for judicial decisions, and its coercive apparatus spring from the peculiar needs of groups most unlike what Dworkin calls associations. This structure reflects the concern that, if the larger society were treated as an association, if rights and responsibilities of citizens were pervasive, we might well face what public choice theorists call '*a legal war of all against all*'[25] in which individuals and groups organize to get whatever they can, not necessarily from selfishness, but to pre-empt the open-ended claims of anonymous others driven to do the same for similar reasons. That is the likely result of the attempt to graft onto political society the sort of open-ended concern for others typical of intimate associations. Integrity, which was supposed to take us off the hard, adversarial terrain of justice, really beckons us there.

[25] John Gray, *Hayek on Liberty* (New York: Basil Blackwell, 1984), 120.

B. Legitimacy, Obligation, and Fair Play

I have said that law as integrity's views about political legitimacy and obligation fit the pragmatism of justice better than they fit a theory that really demands fidelity to law. I conclude this article by defending the thesis that the argument from fair play gives a better account of these fundamental political concepts, and by suggesting that law as integrity rejects the argument because it is less conducive to pragmatism.

The argument from fair play says that the benefits a political community confers on its members create obligations on their part to obey the laws of that particular community. Dworkin concedes that the argument has one attractive feature: it explains the 'special' character of political obligation; it ties 'political obligation sufficiently tightly to the particular community to which those who have the obligation belong . . .' (193). But he thinks the argument fails in two respects. It is said to assume that we incur obligations just by receiving unsolicited benefits which we might reject had we the choice. And it is supposedly ambiguous: it assumes either that citizens are better off under their present government than they would be under any system that might replace it—an impossibly stringent test—or else that they are better off than they would be with no social or political organization—an absurdly permissive test (see 193–5).

Each of these weaknesses is only apparent. Apropos the first, Dworkin accepts Nozick's view that the fair play argument no more grounds political legitimacy than it justifies an obligation to pay a philosopher who broadcasts an edifying but unsolicited lecture from a sound truck outside your house (see 194). I think this argument is inseparable from Nozick's radical libertarianism, which denies any 'positive' right—a right correlative to a duty of others actively to aid its bearer in some way—that is not the product of agreement. From this libertarian perspective an obligation to obey the law in virtue of the benefits derived from political society can be lumped together with an obligation to pay for an unwanted lecture. But the two cases are different. Philosophy is a significant good, but even good philosophy lectures cannot be assumed to be requirements of a minimally decent life. In contrast, the benefits provided by law and political society, at least in complex industrial nations, *are* requirements of such a life. Liberals warn us that what some see as needs which government should satisfy—say, religious instruction or universal day care—are seen by others as nuisances or even threats. But even in a 'pluralistic'—fragmented—society like our own, we can assume that each person needs certain basic goods that only political society is likely to provide, and we have reason to doubt severely the protests of those who deny the need for these things. Now to be effective political authority requires general compliance by those subject to it; even those who accept it for non-selfish reasons need assurance that most of those who do not accept it will be forced to comply. It is reasonable, then, to demand compliance as the price of living in political society even when its benefits are unrequested, and even if expecting payment for a splendid but unsolicited lecture on meaning and reference is unreasonable.

Dworkin's second argument poses a false dilemma. There is a middle way

between the extreme that citizens have a general obligation to obey the law because they are better off than they would be under any other system, on the one hand, or because they are better off than they would be without a legal system, on the other. Dworkin himself shows that way in *Taking Rights Seriously*, in a discussion of how a judge might frame an interpretive theory that justifies the practices of his legal system:

> The constitution sets out a general political scheme that is sufficiently just to be taken as settled for reasons of fairness. Citizens take the benefit of living in a society whose institutions are arranged and governed in accordance with that scheme, and they must take the burdens as well, at least until a new scheme is put into force either by discrete amendment or general revolution.[26]

This is of course an argument from fair play, and it is a more moderate basis for political obligation than the integrity argument. It demands only that the law achieve some minimum level of justice; it does not assimilate political society to the category of 'associations' such that the conditions of political legitimacy include the recognition of open-ended associative obligations implicit in the black-letter law. Fair play is thus consistent with a significantly 'conversational' conception of law on which even constitutional law should 'make it possible to foresee with fair certainty how the [legal] authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge'.[27] Though this conception of the rule of law lacks certain inspirational qualities, it at least accommodates the insight that

> The small society, as the milieu in which man is first found, retains for him an infinite attraction; he undoubtedly goes to it to renew his strength; but . . . any attempt to graft the same features on a large society is utopian and leads to tyranny. With that admitted, it is clear that as social relations become wider and more various, the common good conceived as reciprocal trustfulness cannot be sought in methods which the model of the small, closed society inspires; such a model is, on the contrary, entirely misleading.[28]

No wonder law as integrity abandons fair play.

[26] Ronald Dworkin, op cit, above, n 4, 106.
[27] Friedrich A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1972), 72.
[28] Bertrand de Jouvenel, *Sovereignty* (Chicago: University of Chicago Press, 1957), 136, quoted in Friedrich A. Hayek, *Law, Legislation and Liberty*, Vol 2, *The Mirage of Social Justice*, 182 n 38.