Destabilizing the Conceptual Foundations of *Law's Empire*

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1 Introduction

In this critical review of Ronald Dworkin's *Law's Empire*,[1] I deliver a two-pronged critique of Dworkin's theory of "Law as Integrity." By focusing on the constitutive elements of the theory, namely the concept of *constructive interpretation* and the concept of *integrity*, I aim to surface their inherent and problematic idiosynchrasies. I begin by comparing Dworkin's understanding of interpretation with the cultural hermeneutics of Clifford Geertz. From this comparative analysis I outline how interpretation need neither (1) require the author's participation, (2) construe social practice as a collective and purposive activity, nor (3) construe said practice in its best light. I then transition to a critique of Dworkin's treatment of history underlying the concept of integrity. I show that "Law as Integrity" forwards a curiously static understanding of history, and that given the inherent dynamism of political time even a Whiggish interpretation of a legal system's history would struggle to derive from it a coherent, transcendental theory of political morality. I conclude that the foregoing critiques cast doubt on the meta-theoretical objectivism of Dworkin's legal theory, in the sense that we have good reason to doubt that history and contemporary practice are a testament to the empirical embeddedness of "Law as Integrity."

[1] Dworkin, Ronald. 1986. *Law's Empire.* Cambridge, MA: Harvard University Press.

2 A Geertzian Interlude: "Law as Integrity" and the Concept of Interpretation

Dworkin argues that adjudication is fundamentally an interpretive enterprise. H. L. A. Hart may have laid the foundation for such a conclusion via his exposition of law's "internal point of view,"[2] but he was frustratingly vague with regards to its constitutive nature and character. For Dworkin, interpretation endows the internal point of view with its form and substance, and the positivist neglect of this activity suffices to reject it as a theory of law. "[L]aw is an interpretive concept," Dworkin declares, and therefore "any jurisprudence worth having must be built on some view of what interpretation is" (Dworkin 1986: 50).

"Law as Integrity" posits that the interpretation of social practice, as with the interpretation of a work of art, is a constructive interpretation: it "is indeed essentially concerned with purpose not cause. But the purposes in play are not (fundamentally) those of some author but of the interpreter. Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong" (Ibid: 52). Yet unlike the interpretation of art or the scientific interpretation of empirical data, "a social scientist must participate in a social practice if he hopes to understand it, as distinguished from understanding its members," and indeed "judges think about law... within society, not apart from it" (Ibid: 55). In other words, interpretation is not reducible to aggregating individual intentions; rather, it is about abstracting from individual intent and treating the social whole as endowed with a collective will meritorious of interpretation. Thus a social practice "assumes a crucial distinction between interpreting the acts and thoughts of participants one by one, in that way, and interpreting the practice itself ... It assumes that distinction because the claims and arguments participants make, licensed and encouraged by the practice, are about what *it* means, not what *they* mean" (Ibid: 63).

In short, "Law as Integrity" posits that the interpretation of a social practice requires (1) the author's participation in the practice itself; (2) a treatment of the practice as a collective, purposive activity; and (3) a constructive orientation meant to showcase the practice in its best light. Since, in Dworkin's own words, this concept of interpretation "is the foundation of the rest of the book" (Ibid: 50), we would do well to dwell on it and to assess its robustness.

It is helpful to contrast Dworkin's understanding of interpretation with that of perhaps the 20th century's greatest theorist of cultural hermeneutics: Clifford Geertz. *Prima facie*, one is struck by the congruence

[2]Hart, H.L.A. 2012 [1961]. *The Concept of Law, 3rd ed.* New York, NY: Oxford University Press.

between the two approaches. Like Dworkin's Judge Hercules who seeks to interpret legal precedent in the constructive light of a congruent theory of political morality, for Geertz both the lawyer and the anthropologist face the challenge of concatenating moral abstraction with empirical specificity: "Between the skeletonization of fact so as to narrow moral issues to the point where determinate rules can be employed to decide them (to my mind, the defining feature of legal process) and the schematization of social action so that its meaning can be construed in cultural terms (the defining feature, also to my mind, of ethnographic analysis) there is more than a passing family resemblance" (Geertz 2000: 170).[3] Specifically for law, this relationship is conceptualized as the "is/ought, sein/sollen problem," or how to "imagine the real" in such a way as to transform "what happens" into something justiciable - a moral declaration or rationalized judgment (Ibid: 170; 174-175). Law is thus an enterprise not unlike what Geertz famously perceived in the cockfights of Bali: "[I]t provides a metasocial commentary upon the whole matter of assorting human beings into fixed hierarchical ranks and then organizing the major part of collective existence around that assortment. Its function, if you want to call it that, is interpretive . . . a story they tell themselves about themselves" (Geertz 1972: 26).[4] For Geertz, as for Dworkin, law is a semiotically-driven construction.

Scratch the surface, however, and Geertzian cultural hermeneutics starts to look very different from Dworkinian "Law as Integrity." First, does Geertz believe that the interpretation of a social practice requires the author's participation? The answer is a resounding *no.* Geertz stresses that interpretation does not require one to "become natives (a compromised word in any case) or to mimic them. . . We are seeking . . . to converse with them" (Geertz 1973: 13).[5] For the lawyer, as for the social scientist, a level of detachment, or critical distance, becomes crucial for valuable interpretation, for the objective is not to describe a social practice in which one participates with everyone else. Rather, the aspiration to interpretive neutrality, which Dworkin is so quick to dismiss by requiring that the interpreter swim in the same soup as those whose collective actions he interprets, is alive and well in Geertz's hermeneutics. A Wechsler-esque[6] quest for "neutral principles of social interpretation," Geertz's interpretivism does not collapse the scholar, the judge, and social actors within a single category: it recognizes that the scholar and the judge's form of interpretation is qualitatively distinct and much more proximate to the scientist's interpretation of empirical

[3]Geertz, Clifford. 2000 [1983]. *Local Knowledge: Further Essays in Interpretive Anthropology.* New York, NY: Basic Books.

[4]Geertz, Clifford. 1972. "Deep Play: Notes on the Balinese Cockfight." *Daedalus* 101 (1): 1-37.

[5]Geertz, Clifford. 1973. *The Interpretation of Cultures: Selected Essays.* New York, NY: Basic Books.

[6]Wechsler, Herbert. 1959. "Toward Neutral Principles of Constitutional Law." *The Harvard Law Review* 73: 1-35.

data than Dworkin would like to admit.

Second, does Geertz believe that social practice needs to be construed as a collective, purposive activity? Certainly Geertz embraces the view that social practice is not reducible to the actions of automatons, but the interpretive referent remains the individual. "The notion that one can find the essence of national socities, civilizations, great religions," Geertz writes, "is palpable nonsense," for "what generality [interpretation] contrives to achieve grows out of the delicacy of its distinctions, not the sweep of its abstractions" (Geertz 1973: 22). Collective identity is a powerful symbolic form, but for Geertz, as for Benedict Anderson,[7] it is *imagined* - a myth, a false consciousness, an ideology - not a purposive entity. Interpretation is not, as for Dworkin, abstracting away from *they* (individuals) to focus instead on *it* (social practice); it is about understanding how *they* imagine *it*. And the way they imagine it is not always as a purposive activity. In Morocco and within the framework of Islamic *kadi* adjudication, the central interpretive frame is *haqq*, which means "truth" or "normative essence;" in the Indic legal tradition, the interpretive referent is *dharma*, which means "duty or "cosmic obligation;" and in the Malaysian legal tradition law is constructed upon the concept of *adat*, which means "practice" or, to put it in a way that would make Dworkin cringe, "conventionalism" (Geertz 2000: 183). In short, there is nothing within the concept or practice of interpretation that requires it to be organized around the discernment of collective intent.

Finally, does Geertz believe that interpretation is constructive, aiming to cast its object of social inquiry in its best light? Much turns on what we understand 'best' to mean, but if best means "the most principled, liberal interpretation of a given social practice" then this element is thoroughly absent from Geertzian cultural hermeneutics. In fact, Dworkin's attempts to recast collective intentions in their best light might strike Geertz as thoroughly dishonest. Geertzian interpretation is fundamentally originalist: the interpreter's duty is not to take it upon himself to "answer our deepest questions," but rather to "make available to us answers that others . . . have given, and thus to include them in the consultable record of what man has said" (Geertz 1973: 30). It is a form of *descriptive interpretivism* rather than the *revisionist moral interpretivism* of "Law as Integrity." Individuals might derive meaning from interpreting a social practice favorably, but a Jew witnessing a Nazi march or discussing with his fellows a law requiring them to wear the Star of David need not derive meaning from these social institutions by construing them in their best light - in fact, he might interpret them in a way that magnifies their rotten essence. If interpretation is about describing

[7] Anderson, Benedict. 1981. *Imagined Communities: Reflections on the Origin and Spread of Nationalism.* New York, NY: Verso.

semiotically cathartic social practices, then the Geertzian judge should not cast them in their best light. Rather, he should remain faithful to the meaning assigned to them by their participants, whether they be promulgators or subjects, benefittors or victims.

In short, what Dworkin wants us to treat as a *description* of the concept of interpretation emerges instead as his own rather idiosyncratic *reconceptualization* of it - his interpretation of interpretation, if you will. Dworkin would like us to think that "Law as Integrity" derives from this shared conceptual foundation because individuals, whether they be judges, citizens, or legislators, already practice constructive interpretation and understand it in the same way he does. But if there is doubt about whether individuals actually interpret social institutions in the same *way* (even if not with the same results) as Judge Hercules, or if Dworkin's concept of interpretation is somewhat *sui generis*, then his theoretical foundations begin to tremble. For while Dworkin's theory accomodates theoretical disagreement amongst constructive interpretations, it does not accomodate theoretical disagreement emerging from the failure to follow the constructive model.

3 A Historicist Interlude: "Law as Integrity" and Historical Change

From Dworkin's concept of "interpretation" we now move to probing his concept of "integrity." For Dworkin, this political virtue has its origins in the fraternal bonds of community. Assuming that individuals (1) interpret their social responsibilities as "*special*, holding distinctly within the group, rather than as general duties;" that they (2) deem these responsibilities to be "*personal*: that they run directly from each member to each other member;" that they (3) perceive these responsibilities to be ground in the "*concern* for the well-being of others in the group;" and that they (4) demonstrate "an *equal* concern for all members," then individuals form part of a "genuine" community of principle wherein the virtue of integrity emerges alongside fairness and justice as the foundation of political morality (Dworkin 1986: 199-200; 202).

What integrity demands is that "the public standards of the community be both made and seen, so far as this is possible, to express a single, coherent scheme of justice and fairness in the right relation," namely a coherent set of principles "fundamental to the scheme as a whole" (Ibid: 219). Integrity requires judges to assume that legal rights and duties "were all created by a single author - the community personified - expressing a coherent conception of justice and fairness" (Ibid: 225). The Herculean judge proceeds as if he is the author of a chain novel - a multi-authored, incomplete, yet fundamentally coherent epic to which he must now contribute and remain faithful (Ibid: 228-232). Hence in discerning the political morality

that underlies the chain of the law, "Law as Integrity" constrains the judge via precedent to a community's political history: "[A]nyone who accepts law as integrity must accept that the actual political history of his community will sometimes check his other political convictions in his overall interpretive judgement. If he does not ... then he cannot claim in good faith to be interpreting his legal practice at all" (Ibid: 255).

We might not be surprised, given Dworkin's rather idiosynchratic concept of interpretation outlined in the previous section, to come across a rather idiosynchratic understanding of history within Dworkin's framework. For "Law as Integrity," history is *static* history, a dusty repertoire of decisions struck and institutions forged, from which a single political morality can be derived as a theoretical foundation for adjudication in the here and now. But history, commonly understood, is about *change*. Its essence is captured by what Daniel Lerner, the great comparativist scholar of the modernization of the Middle East, found in a Turkish village when the local grocer complained about the static complacency of village localism and conveyed his dream of traveling abroad. The grocer's neighbors had "seen this as vulgar social climbing," Lerner writes, "but there was something in this sentence that sounded to me like History. Maybe it was the 18th century field-hand of England who had left the manor to find a better life in London ... Maybe it was the 20th century Polish peasant crossing continent and ocean to Detroit, looking for a "better 'ole" in the new land" (Lerner 1958: 36).[8] What Lerner underscores and Dworkin underplays is that history is inherently dynamic: change, as the *cliche* goes, is its only constant.

The dynamism of history, and the prospect of recurrent legal change, is of great consequence and discomfort to Judge Hercules. As Hercules' "judgements of fit expand out from the immediate case before him in a series of concentric circles" to latch onto precedent, it seeks to uncover within historical empirics a single political morality (Dworkin 1986: 250). Hercules' interpretation of the legal system as the "community personified" that "created" legal rights collapses political time and gradual institutional change within a single, temporally compressed (if not ahistorical) choice. If it is history at all, "Law as Integrity" is Whiggish history: in Dworkin's own words, it "begins in the present and pursues the past only so far as and in the way its contemporary focus dictates" (Ibid: 227). Yet even Bruce Ackerman, who in this light appears to be the closest thing to a flesh-and-blood Hercules, cannot derive within American constitutional history a single set of political principles. Rather, in *We The People*[9] Ackerman acknowledges that three fundamental

[8] Lerner, Daniel. 1958. *The Passing of Traditional Society: Modernizing the Middle East.* New York, NY: MacMillan.

[9] Ackerman, Bruce. 1991. *We the People: Foundations.* Cambridge, MA: Harvard University Press.

"constitutional moments," namely the founding, reconstruction, and the New Deal, reoriented the principles underlying American political community. But Dworkin seems to assume that every political community has its resilient Kelsenian *grundnorm*, such that the Herculean judge's discretion is eliminated by the pull of a transcendental political morality.

The fact is that although Dworkin accomodates synchronic variation by positing that political morality is contingent upon its fit with a given political community's legal framework, he fails to outline how Judge Hercules is to derive a coherent political morality for his legal system when it is shifting - as it always has been - under his feet. And since, as Dworkin acknowledges, law is an interpretive social practice, institutional change and interpretive (i.e. moral) change are likely to treck with the current of political time hand-in-hand. But the transcendental coherence of Herculean political morality seems ill-suited to deal with fundamental yet incremental shifts in its fit with institutional empirics and social mores. At what point would Judge Hercules determine that the statute before him is not unconstitutional because it deviates from the best historically-grounded interpretation of the legal system but is rather representative of a fundamental moral shift? Is the incremental tweaking of political morality even possible within the framework of "Law as Integrity"? Would the Herculean judge have to suddenly, and arbitrarily, replace his political morality with an alternative framework that coheres better with the evolving legal system it is meant to constructively interpret? These are fundamental jurisprudential questions, particularly in contexts outside the Anglo-American world where history has proven to be far more turbulent and unpredictable. Yet on such critical matters "Law as Integrity" falls silent.

4 Reinterpreting "Law as Integrity"

What conclusions can we derive from the two foregoing critiques? How are we to interpret Dworkin's theory of "Law as Integrity"? I suggest that while this critical interjection does not diminish the normative appeal of "Law as Integrity," it should cast doubt upon its claim to meta-theoretical objectivity. It is not that the particular *conceptions* of Judge Hercules are objective - Dworkin most certainly does not claim them to be - but that the notion of law as constructive interpretation and integrity as the emergence of a coherent set of principles from the empirics of history are meant to provide an objective foundation for Dworkin's normative project. "You may disagree with me with respect to which constructive interpretation showcases our legal system in the best light," Dworkin might say, "but you cannot deny that judges, nay, *we*, constructively

interpret, and that we can derive a political morality from the annals of our community's history. We may disagree about particular conceptions, but in this disagreement we both accept the conceptual foundations of "Law as Integrity."" What I have tried to show is that there is good reason to doubt that history and contemporary practice are a testament to the empirical embeddedness of "Law as Integrity." As a consequence, we need not accept the meta-theoretical objectivism that underlies Dworkin's theory. We may be drawn to the Herculean Judge and to his constructive interpretations because we find them normatively appealing, but we should not be drawn to them under the illusion that, previously unbeknownst to us, their essence has always constituted the normative fabric of our sociolegal world.