Dworkin on Judicial Discretion: A Critical Analysis

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INTRODUCTION

At the beginning of the twentieth century, the American legal philosopher John Chipman Gray defined the law as "the rules laid down by judges."[1] Gray was impressed by the achievement of the great British jurist, John Austin, who gave a systematic account of the nature of positive law, but differed with him over the *locus* of sovereignty. For Austin, the law consisted of the aggregate of the rules established by the commands of the Sovereign State. However, American judges have discretion to decide difficult cases in one way or the other, and Gray argued that it would be a strained interpretation of language to suggest that they were commanded by a superior to choose in a particular way.

There was a further difficulty. When a person acts without express orders from a superior, she may or may not have her master's wishes directly in mind. It depends upon the task. In the performance of a menial service, such as cooking or cleaning, the servant may consciously hope to please her principal. The case is different with more important works. A painter commissioned to create a mural does not constantly keep in mind what will please the pastor. She seeks her inspiration elsewhere. For Gray, this was the appropriate image for understanding judicial power. When exercising discretion, a judge is not expected to directly consider what would please the State. He thinks, rather, of what other judges and jurists have said about the same question that he is considering, and relies upon other sources considered appropriate to his office.[2]

As the century progressed, it became necessary to probe further into

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[1] J. GRAY, THE NATURE AND SOURCES OF THE LAW 84-112 (1909).

[2] *Id.*

the phenomenon of discretion and to understand its influence upon the administration of justice. Mr. Justice Holmes stressed the reality of antagonistic values. In doubtful cases there is a conflict between two social desires, each of which seeks to dominate the resolution of the controversy. Since both desires cannot succeed, a choice must be made. If prior cases express a preference for one interest over the other, the force of logic may require its extension. However, in truly difficult cases, there is no decisive precedent. A genuine decision is required. In these cases when logic is insufficient, the judge, according to Holmes, must "exercise the sovereign prerogative of choice."[3]

The writings of Mr. Justice Cardozo were also directed toward the nature of judicial discretion. Cardozo was profoundly aware of the antinomies which pervade the legal process: the antitheses between rest and motion, stability and progress, and the tension between the individual and the community. He had a high regard for liberty, particularly those freedoms of the spirit which the first amendment to the Constitution guarantees against the intrusions of the State. However, as a sociological jurist, Cardozo was acutely aware of the need to strike a balance between the individual and the social interest.

Cardozo, like Holmes, was conscious of the deeper antagonisms embedded in litigation which presented the most severe challenges to the judicial office. The most serious cases involved profound conflicts between irreconcilable values and interests. Justice Cardozo expressed the agonizing interplay between personal conviction and external reality that is the experience of the conscientious judge:

> [T]he distinction between the subjective or individual and the objective or general conscience . . . where the judge is not limited by established rules is shadowy and evanescent . . . the perception of objective right takes the color of the subjective mind. . . . There is constant and subtle interaction between what is without and what is within. . . . [W]hether the impulse spreads from the individual or from society . . . neither . . . can work in independence of each other. . . .[4]

Following the beliefs of Roscoe Pound, Cardozo believed that the jurist, in dealing with difficult cases, must consider a wide range of moral, social, and jural values and should strive to discover the origins of the values outside of himself. Cardozo suggested the existence of an obligation to read the "social mind," by which he meant the principal ideas operative in society rather than a mystical common will.

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[3] O.W. HOLMES, COLLECTED LEGAL PAPERS 239 (1920).

[4] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 110-11 (1921).

While Cardozo warned against the use of a scale of values personal to the individual justice, he was also aware of the difficulties of objective judgment. When objective tests fail, the judge must do his best to place himself "within the hearts and minds of others, and frame his estimate of values by the truth as thus revealed." Such an approach is, at best, imperfect. When all else fails, the judge must "look within himself."[5]

For the Legal Realists, this inwardness of judicial discretion was a proof of its arbitrary character. Attacking myths surrounding the objective impartiality of the judicial office, they reinforced Gray's observation that judges did not *discover* law: they made it. Further, according to the Realists, judges did not make it in a principled, coherent way. For the Realists, the exercise of the "sovereign prerogative of choice" was a supreme expression of the prejudices of individual justices. Rules and principles and the whole panoply of legal reasoning were authoritarian pegs upon which judges hung conclusions that they had already reached by irrational means.[6]

The iconoclastic critiques of the Legal Realists paralleled important developments in philosophy. In 1936 A.J. Ayer published an influential work that denied the possibility of objective moral judgments. Ayer and his followers, known as Emotivists, held that evaluative statements are the expression of individual emotional preferences or aversions.[7] The refusal of the American Legal Realists to attach moral significance to judicial decisions was similar to the Emotivist claim that evaluation statements were effusions of sentiment rather than meaningful moral utterances.

Meanwhile, on the jurisprudential front, scholars had begun to respond to Realism. Pound argued that, in spite of its valuable insights, Realism fails to represent the whole of legal experience. Received ideals, and authoritative means of applying them, were part of the everyday phenomena of the legal order. The question was whether a faithful representative of juridic reality should give them primacy or whether attention should be concentrated upon the subjective features of the behavior of individual judges. Pound believed that, by and large, judges try to do what they ought to do. Their own picture of what they should

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[5] B. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 55-56 (1928).

[6] For general discussions of the Realist Movement, see G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 97-103 (1978); E. PATTERSON, JURISPRUDENCE §§ 4.63-4.64 (1953).

[7] A. AYER, LANGUAGE, TRUTH, AND LOGIC (2d ed. 1962); C. STEVENSON, FACTS AND VALUES: STUDIES IN ETHICAL ANALYSIS (1963).

do often determines how they exercise their discretion.[8]

Since the Realists emphasized the nonrational elements of judicial behavior, they generally held to the view that the reasons offered in judicial opinions to justify judgments were "rationalizations" for actions having emotional or intuitive grounds. Like the Emotivists, they could not accept the possibility that reasons coming before actions could influence or direct choices. But the field of moral philosophy was undergoing a reaction against Emotivism, and these developments would have important jurisprudential ramifications.

Following the second world war a revival of interest in ethical theory developed. The revival was characterized by a desire to place moral philosophy upon a more secure basis. One of the most influential developments was that of Moral Prescriptivism. Adherents believed that moral statements prescribe courses of action which have prescriptive force because they entail an imperative. For example, if I say that an act ought not to be done, I am obliged to abstain from doing it. Imperatives also command consistency. If I say that a particular action should be performed, I am morally committed to the position that another act just like it ought to be done.

Proponents of Moral Prescriptivism insisted that value judgments are universalizable. If I ask how I should act in a particular case, the question is explicated by an appeal to a higher, more universal norm. In such generalized regression we ultimately reach a goal that is not a means to any higher goal. We are at a point of ultimate principles; principles that we have because we have chosen them. They represent values which we ourselves are able to believe are fundamental. According to Prescriptivism, one acts rationally by standing consistently by one's principles.[9]

These changes in the field of moral philosophy were reflected in the jurisprudential literature, particularly in the scholarship devoted to judicial discretion. In 1959 Herbert Weschler published an article entitled *Toward Neutral Principles of Constitutional Law*,[10] in which he emphasized the importance of generalization. At a critical point in the decisional process, the judge must relate the case before him to other

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[8] Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931).

[9] R. HARE, THE LANGUAGE ON MORALS (1952); W. HUDSON, MODERN MORAL PHILOSOPHY (1983); *see* Mclerney, *The Poverty of Prescriptivism*, 17 AM. J. JURIS. 80 (1983).

[10] Weschler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), *reprinted in* PRINCIPLES, POLICIES AND FUNDAMENTAL LAW (1961); *see also* Hazard, *Rising Above Principle*, 135 U. PA. L. REV. 153 (1987).

cases. While the related cases contain a wide variety of factual situations, they may also appeal to common principles. Weschler believed that the perception of these principles is essential to constitutional adjudication because they guide the judge in the exercise of his discretion. These principles must be taken seriously by judges and restated with adequate generality and neutrality so that they may govern future situations falling within their scope.

I. LIBERALISM AND THE PHENOMENOLOGY OF ADJUDICATION

The reflections of Pound and Cardozo took for granted that tensions between the individual and the community were an integral part of modern life. This was, in large measure, because of the influence of sociology upon their thinking. While Austin and his successors were establishing a science of positive law, Comte and his followers were establishing a science of society. The objective of sociology was the study of man in society. Legal Positivism had tried to understand law in isolation from social phenomenon, for the sociologist, the state, and positive law, could not reasonably be considered as self-sufficient entities. They were integral parts of intelligible social realities.[11]

Influenced by these developments, Pound and Cardozo became known as sociological jurists. The actualities of social life and the facts of political organization were an integral part of their understanding of law. Pound's theory of social interests was illustrative. Studying legal phenomena as social phenomena, he sought to ascertain the complex range of claims and demands that exerted pressure upon the fabric of social life. The principles that Pound employed to evaluate these public and private interests went beyond the standards of individual conduct. He saw Law as upholding values which were derived as much from the necessities of civilized existence as from the imperatives of ethical theory.[12]

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[11] *See* C. MURPHY, MODERN LEGAL PHILOSOPHY 46-81 (1978).

[12] Pound's Theory of Interests is explained in R. POUND, OUTLINES OF LECTURES ON JURISPRUDENCE 9-11 (5th ed. 1943); Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943); 3 JURISPRUDENCE ch. 14, §§ 80-99 (1959). Pound adopted William James' view that the good consisted in recognizing demands. Thus, the recognition of interests was a matter of moral obligation as well as social necessity. For a critical study of the theory of interests, see Allen, *Justice and Expediency*, in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 15 (P. Sayre ed. 1947); Stone, *A Critique of Pound's Theory of Justice*, 20 IOWA L. REV. 531 (1935); Stone, *The Golden Age of Pound*, 4 SYDNEY L. REV. 1 (1962). A general evaluation can be found in E. PATTERSON, JURISPRUDENCE, MEN AND IDEAS OF THE LAW 509-558 (1953) and H. REUSCHLEIN, JURISPRUDENCE, ITS AMERICAN PROPHETS 103-54 (1951); *see also* D. WIGDOR, ROSCOE POUND (1974).

For sociological jurists, social phenomena were different from the psychological attitudes of individuals. Rather than being an aggregate of isolated desires, social phenomena reflected the prevailing conceptions derived from life in association. For these jurists, law, as a part of social life, became intelligible within a context of human interaction.

The work of these jurists also reflected a confidence that a variety of individual, public, and general interests could be accommodated with the legal fabric and that the conflicts among them could be wisely and harmoniously balanced. A similar optimism would be evident in the later sociologically grounded policy science jurisprudence to be developed by Lasswell and McDougal.[13] But the general trend of life and thought was moving away from the *telos* of collective existence towards an emphasis upon the realization of personal ends. This trend was manifest in a revival of the ideals of Liberalism.

In the Liberal tradition, the purpose of law is to prevent abuses of power and advance the rights of the individual. The essential importance of these ends was made tragically clear in the events that led to global conflict and the onset of the so-called "Cold War." Totalitarianism, feeding upon the passions of mass society, had shown contempt for the individual person. It had treated human beings as means to the ends of power rather than as ends in themselves. Liberalism was a valuable antidote.[14]

When Liberal values prevailed, minorities had rights that they could assert against the tyranny of majorities as well as the power of the state. A free society, which fully respects the rights of its citizens, was now the object of creative aspirations. Interest in the writings of the great liberal thinkers such as John Stuart Mill was renewed and philosophers such as Kant, whose ethical precepts could be used to promote a liberal agenda, were becoming attractive. The neo-Kantian theory of justice, developed by the American philosopher John Rawls, gave expression to these liberal values.

According to Rawls, in a pluralistic democracy the basic governing principles cannot be based upon teleological conceptions of the good life; rather they must respect the right of each individual to choose his or her own ends. Justice, then, is a matter of rights rather than the good. Behind a "veil of ignorance," Rawls argues, rational persons

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[13] For an extensive bibliography and defense of this approach, see Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 VA. L. REV. 662 (1968).

[14] *See generally* D. MANNING, LIBERALISM (1976).

would choose foundational principles of justice that treated every life as worthy of equal respect.[15] Ronald Dworkin's writings on judicial discretion draw inspiration from Rawls' liberal theory. Like Rawls, Dworkin reflects the Kantian ideas of autonomy and the categorical necessity of treating each person with equal concern and respect.

From the time of his 1975 article, *Hard Cases*, to the recent publication of *Law's Empire*, Dworkin has sought to advance a theory of law and adjudication centered upon the rights of the individual.[16] Like the jurists who have preceded him, Dworkin is sensitive to discretion as an integral aspect of judicial power. He has sought to articulate a liberal conception of that power which can be reconciled with the ideal of the rule of law. Further, he seeks to refute the claim that a controversy which is not governed by precise legal rules can only be resolved by the subjective preferences of individual judges.

Dworkin's thinking on judicial discretion has gone through several stages. Originally, he sought to articulate a theory of adjudication that would justify an institutional preference for personal rights in constitutional litigation. For this purpose he used a model of decision that highlighted the process of self-conscious reflection which a judge must engage in to resolve a "hard" case. In significant controversies, past decisions, while not decisive, reflect fundamental values rooted in the Constitution. An ideal judge — whom Dworkin called Hercules — would try to understand the meaning of the rights implicit in the precedents. Perceiving, for example, that the value of human dignity was embedded in a certain pattern of past decisions, Hercules would try to place himself within the frame of mind of those who value the ideal. Suspending his own "background" morality, he would try to develop a personal understanding of the institutional value of human dignity. He would construct in his own mind a political theory of the value that the

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[15] J. RAWLS, A THEORY OF JUSTICE (1971). More recent refinements can be found in Rawls, *The Basic Liberties and Their Priority*, in LIBERTY, EQUALITY, AND LAW (S. McMurrin ed. 1987); Rawls, *The Idea of An Overlapping Consensus*, 7 OXFORD J. LEGAL STUDIES 1 (1987), and Rawls, *Justice As Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFFAIRS 223 (1985).

[16] Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975), in R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977) [hereafter R. DWORKIN, TAKING RIGHTS]; *see also* R. DWORKIN, A MATTER OF PRINCIPLE (1985). Book reviews of *Law's Empire* include Soper, *Dworkin's Domain*, 100 HARV. L. REV. 1166 (1987); Abranson, *Ronald Dworkin and the Convergence of Law and Political Philosophy*, 65 TEX. L. REV. 1173 (1987); Wasserstrom, *The Empire's New Clothes*, 75 GEO. L.J. 199 (1986). Recognition of the Neo-Kantian contributions of Rawls is made in R. DWORKIN, TAKING RIGHTS *supra*, at 150-185; RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE (M. Cohen ed. 1983) (collection of essays).

Constitution was designed to protect and then verify his construct against the institutional detail of precedential development. If there was a fit, rights would "trump." They would take precedence over most conceivable public policies which might be advanced to limit, or defeat, the claimed right.[17]

Dworkin insisted that the exercise of discretion envisioned by the Herculean model was not arbitrary. In trying to reach his best judgment as to what the Constitution requires, the judge is working within the institutional structure of text and precedent. The deeper morality is not drawn from a transcendental source nor does it exist solely as the personal standard of the judge. Hercules is not relying upon his own preferences even though he is, admittedly, relying upon his own convictions. But these convictions are the best guide that he has to an understanding of Constitutional rights. The significance of the Herculean model can be best appreciated against the background of other developments in modern philosophy, particularly those concerned with phenomenological investigation.

As a general movement in modern philosophy, phenomenology seeks to disprove the contention that only the sciences, which establish predictive and causal explanations, are entitled to lay claim to the truth. Phenomenology asserts that in the humanistic disciplines the subject is the bearer of meaning. It assumes an objective world which is experientially understood. When a conscious subject encounters an object in thought, imagination, or feeling, meaning appears.[18]

As a descriptive account of constitutional adjudication, Dworkin's early theory of discretion reflected these phenomenological principles. In the Herculean reflections of the model justice, it is assumed that the Constitution exists. However, the meaning of this reality depends upon the understanding that the judge develops as he self-consciously tries to decide the "hard" case. From a phenomenological perspective, the reflective process leads to authentic personal understanding.[19]

The phenomenological thrust of the Rights Thesis made it a distinctive improvement over the cruder psychology of the Legal Realists. Recall that, for the Legal Realists, the irrational biases and aversions of the individual judge were the critical element of judicial discretion. Dworkin's original formulation of judicial discretion also had qualities

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[17] *See* R. DWORKIN, TAKING RIGHTS, *supra* note 16, at 81-130.

[18] EDMUND HUSSERL, LOGICAL INVESTIGATIONS (J. Findlay trans. 1970). There are good explanations of phenomenology in H. JUNG, THE CRISIS OF POLITICAL UNDERSTANDING (1979) and M. FARBER, PHENOMENOLOGY AND EXISTENCE (1967).

[19] *See* Murphy, *Liberalism and Judicial Authority*, 21 DUQ. L. REV. 1 (1982).

of Neo-Kantian prescriptivism. In his self-conscious reflection, Hercules turns away from the concrete realities of the "hard" case and reasons, in a juridical ascension, back to some single conception of right. The normative generalization which the judge constructs in his own mind then has a decisive influence upon his discretionary judgment.

As Dworkin's pursuit of liberal discretion has matured, his thinking has retained its phenomenological basis. It has continued to seek an understanding of judge-made law from a subjective, experiential perspective and it continues to reflect the influence of Prescriptivism. As Dworkin's work has developed, it has also been increasingly influenced by theories of interpretation.

II. Adjudication as Creative Interpretation

In *Law's Empire* Dworkin argues that debates about the nature of law suffer from a "semantic sting." He claims that there is a striving to establish a common meaning that can determine the conditions under which we can properly use the expression "law." According to Dworkin, the effort is misplaced because the pursuit of shared understanding cannot make sense of cases calling for the exercise of judicial discretion. When lawyers argue about hard cases, their disagreements are not about legal definitions; they are disputes about whether to add to, or change, existing law. These disagreements reveal that at the level of practical experience law is an interpretive concept.[20]

Legal Positivism is one form of jurisprudence that suffers from a semantic or definitional preoccupation. It treats law as a phenomenon which can be grasped in a finished form. If we see the truth of the Positivist's definition, we have grasped the meaning of the nature of human law. There is a once and for all determination that establishes the boundaries of the legal. Thus, for Positivism, law refers to the collective use of force. Whether or not the force is justified is not a part of the definition. Indeed, for a Legal Positivist, legal validity entails an obligation of obedience.

Dworkin finds this insufficient. For him, there must be a moral obligation to obey the law that can be connected with adequate justifications for the use of state power. Those justifications must satisfy a liberal view of individual life. He argues that force should not be used, or withheld, except to the extent that it is required by personal rights and responsibilities. These entitlements and obligations can only flow from past collective precedents or other relevant political decisions. The in-

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[20] R. Dworkin, Law's Empire 1-86 (1986).

terpretation of these past decisions lies at the heart of judicial discretion.[21]

For Dworkin, adjudication, as a social practice, can be assimilated to artistic interpretation. While they aim at interpreting something distinct from themselves, both artistic and legal interpretation are forms of creative activity. That is because interpretation is a constructive practice. It has more to do with the purposes of the interpreter than with the author of the work being interpreted. In constructive interpretation one imposes a purpose on an object or a practice to make it the best possible example of the *genre* to which it belongs.[22]

Creative interpretation carries to a deeper level the contrast between objective and subjective understanding which we noted as a characteristic of phenomenological method. For the scientist, truth corresponds to something in the world outside herself. Those who participate in the scientific enterprise must submit their perceptions to the judgment of others. The artist, by contrast, searches for what is true for her; for what is good within the artificial universe she has constructed for herself. The same is true for the social practice of law. However, the judge who must decide difficult cases is more like the artist than the scientist.

When a judge interprets past decisions, he is not trying to define something which exists outside of himself. Like the creative artist, he does not act subject to an external constraint. As with the artist, he is engaged in constructive interpretation; aiming to make the best of what is being interpreted. The judge's materials are the past decisions which he is trying to bring forward to make them the best they can be as expressions of rights and duties. He must participate in this practice to understand it. As a creative participant, he must always distinguish between what other members of his professional community think the practice requires and deciding for himself what it really is.

Creative interpretation in adjudication is legitimated by the expectations of the wider community on whose behalf the judge functions. In his earlier writings Dworkin tended to isolate the judicial process from the political community. He did this by emphasizing the special role of courts in a democracy. The purpose of courts was to give citizens engaged in litigation a determination of their rights.[23] That responsibility persists in *Law's Empire*, but it is tied to a broader sense of social

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[21] *Id.* at 87-113.

[22] *Id.* at 45-86. *See* chapter entitled *The Nature of Phenomenological Thinking*, in H. JUNG, *supra* note 18, at 3.

[23] This is the theme that introduces the seminal essay, *Hard Cases* in R. DWORKIN, *supra* note 20.

obligation. There is a responsibility to the society that is logically prior to the separate duties of public officials.

Judges, like other participants in the legal enterprise, are agents of the community. As such, they must carry out the community's obligation to treat all citizens equally. Social practice defines the groups to which we belong and the obligations that attach to them. Citizens are not obliged, as Legal Positivists claim, by the force of the state. Dworkin argues that obligations in a democracy are associative. They are not established by force but rather grow through complex relationships based upon a fraternal attitude towards others. These obligations are personal, running from each to each, rather than to the group as a collectivity.[24]

While these ties express a mutual concern and respect, they cannot be set down in detail. They require interpretation. Like friendship, these reciprocities are developed over time through encounters and events that attract obligation. These considerations affect the legitimacy of legal institutions and the justifications which can be advanced to sustain the enforcement of judicial decisions. They lead to Dworkin's central proposition that law must be understood in terms of Integrity.

Integrity is an important aspect of personal morality. However we may disagree with another person's judgments, we afford those persons respect if they act upon principles which they honestly hold. And, in general, we understand ourselves to be rational to the degree that we consistently stand upon values we believe to be right. Dworkin transforms these aspects of personal ethics within the public realm. Integrity is personified as a quality of the community, a quality that judges should manifest in the exercise of their discretionary authority. In that way, judges will further the community's obligation to treat citizens impartially.[25]

Dworkin contrasts law as integrity with two other models of discretion. One, which he calls Conventionalism, has its roots in Legal Positivism. The Conventionalist premises that the decision of a judge in a difficult case is, in a strong sense, discretionary. When he lacks definite guidance from statutes and precedents, the gaps must be filled. Since the circumstances are beyond the law's warrant, the judge must make new law, as would a legislator. Whatever the ground, it is the forward-looking aspect of the discretion which Dworkin finds particularly objectionable. The Conventionalist model lacks integrity because it does not

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[24] R. DWORKIN, *supra* note 20, at 1-86.

[25] *Id.* at 87-113, 176-224.

require consistency with past decisions. Pragmatism, the second model, has the same deficiency to a deeper degree.

Pragmatist judges faced with a hard case do the best they can for the future. Their discretion also is not limited by a need to respect what past judges or other lawmakers have done. If rights are recognized it is only for strategic purposes. Moreover, Pragmatism is based upon the false idea that judges have been empowered to exercise their discretion in whatever way they think is in the best interests of the community as a whole.[26]

In comparison with these two models, law as integrity provides the best explanation of how judges actually decide difficult cases. It recognizes that personal rights and responsibilities flow from past decisions. These entitlements and obligations are anchored in previous statutes and precedents. They are present not only explicitly, but also when they follow from the principles of personal and political morality that these prior decisions presuppose.

Hercules is an appropriate figure to exemplify the ideal of law as integrity. He understands that law's constraints provide more than predictability and fairness. When judicial discretion is personified as integrity it increases the moral justifications for the uses of power. Legal rights must be derived from past political decisions according to the best interpretation of their meaning. Hercules gives the best constructive interpretation he can of those prior decisions, considering not only their content but the principles necessary to justify them.

Law as integrity does not try to recapture the ideal principles of those who created the prior law; it tries to justify what they did in an overall story. The judge is like a person working on a chain novel. Contributing to a work in progress, the judge, like the novelist, must carry forward the intentions of the original authors rather than try to reconstruct a past mental state. Since both aim at making the best of what is being interpreted, the work necessarily engages the interpreter's own convictions. In trying to improve upon the unfinished text, the present interpreters may presume the consent of the authors since they, as creative persons, would want their own ambitions to be better realized.[27]

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[26] *Id.* at 114-150; *see also* Soper, *supra* note 16, at 1177-82 (discussing Dworkin's views on "soft" conventionalism).

[27] R. DWORKIN, *supra* note 20, at 45-86, 228-344. The degree to which the author in a chain novel is either free or constrained by the text is a question which provoked a lively debate between Dworkin and Stanley Fish. *Compare* R. DWORKIN, LAW AS INTERPRETATION *with* Fish, *Working on the Chain Gang: Interpretation in the Law and Literary Criticism*, in THE POLITICS OF INTERPRETATION (W.T. Mitchell ed. 1983). Dworkin's reply to Fish's criticism appears in the same volume. A more compel-

One who interprets past decisions assumes that the law is structured by a coherent set of principles of justice, fairness, and due process. Integrity appears in adjudication when judges identify rights and duties as though they were created by a single personified community. Because law aspires to be a community of principle, Hercules must test his interpretation of the decisions of the community by asking if it could form part of a coherent theory justifying the legal network as a whole. In new cases, each person's situation must be judged according to coherent principles about legal rights that Hercules develops in discharging the task of constructive interpretation.

III. Value Conflict and Dialectic Reasoning

In *Law's Empire* Dworkin tries to demonstrate the explanatory power of law as integrity by illustrating its application to separate areas of common law judgment, statutory interpretation, and constitutional adjudication.[28] Thus, in the field of torts, Hercules must decide whether one who is negligent should be liable for foreseeable emotional harm to persons who are not in the immediate range of danger but who suffer as a direct consequence of the defendant's carelessness. To decide this question, Hercules must give his best constructive interpretation of the past decisions which bear on the issue. Reviewing the precedents, he sees that they are susceptible to conflicting interpretations. Two are of paramount importance. One would insist that people have a right to compensation in such circumstances; the other would restrict compensation when liability would impose financial burdens upon the defendant out of proportion to her moral fault. Since law is sensitive to justice in the way that Hercules recognizes, the best interpretation favor the plaintiff 's claim. It would fit more coherently with the principles of the legal system as a whole, since the primary standard is that individuals should be responsible for harms to others. Dworkin concedes that liability might not be extended to the circumstances of the illustrative case but he argues that Hercules's decision has precedential support[29] and is

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ling criticism of Dworkin's views appear, indirectly, in Charles Fried's excellent essay. *See* Fried, *Sonnet LXV and the Black Ink of the Framers' Intention*, 100 Harv. L. Rev. 751 (1987).

[28] They appear in R. Dworkin, *supra* note 16, at 276-399 (chapters eight, nine, and ten deal with the common law, statutes, and the Constitution, respectively).

[29] Dworkin uses the decision of the House of Lords in McLoughlin v. O'Brian (1983) 1 A.C. 410. For a similar result in American law, see Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979). The courts are divided. *See also* the Annotation in 19 A.L.R. 3d 1337 (1970).

the one which more completely realizes the ideal of law as a community of principle. If one turns to the scholarship of torts, however, the problem becomes more complicated.

The law of torts is directed toward providing remedies for invasions of rights but the administration of justice reveals a comparable need to avoid unlimited liability. The development of tort law in this area involves more than the coherent extension of principle. There is also an effort to assure a reasonably close connection between the conduct of the defendant and the plaintiff 's injury. At a deeper level, the problematic nature of tort liability turns on choices between conflicting values and the need to determine which of the two parties should bear the loss. There is, in other words, a dialectic component to difficult cases of tort liability that eludes Dworkin's understanding of adjudication.[30]

In every field of law the most difficult cases of adjudication involve conflicts of values. As we have noted, Justices Holmes and Cardozo emphasized the presence of antagonistic values in the most important cases. Professor Bodenheimer has shown how the resolution of such cases involves the use of dialectic reasoning rather than the unilateral extension of principle. Drawing upon representative cases from constitutional as well as tort law, Bodenheimer has shown how dialectic reasoning, and the powers of deliberation it requires, provides a better explanation of how judges actually decide hard cases.[31]

When dialectic reasoning is operative, the judge debates within himself the relative merits of adverse contentions. In this inward conversation he weighs the merits of opposing viewpoints and considers the practical consequences of the possible choices of decision. He attempts to discern the correct course of action and undertakes it with the knowl-

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[30] *See generally* W. PROSSER & W.P. KEETON, THE LAW OF TORTS § 43 (5th ed. 1984). "The real problem . . . would seem to be one of social policy: whether the defendants in such cases should bear the heavy negligence losses of a complex civilization, rather than the individual plaintiff." *Id.* § 43, at 287. The most important reflective essay on this problem continues to be Jaffee, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219 (1953). Dworkin would contend that considerations of social policy that tort litigation raises — such as risk distribution within an insurance system — are matters for legislative rather than judicial concern. However, this is an oversimplification. Whether or not as a matter of justice one should be required to pay for emotional damages to one whose injuries are remotely connected with a careless action is too controversial to admit of a jurisprudentially certain answer. Furthermore, various issues connected with the administration of justice must be taken into account in these cases that are not reducible to questions of right. *See, e.g.*, *Sinn*, 486 Pa. at 175, 404 A.2d at 687-92 (Roberts, J., dissenting).

[31] Bodenheimer, *A Neglected Theory of Legal Reasoning*, 21 J. LEGAL. EDUC. 373 (1969).

edge that a choice must be made between several normative possibilities.

One may object that the possibilities of dialectic reasoning do not undermine the value of Dworkin's thesis. Throughout his writing, Dworkin has emphasized that the presence of discretion makes infinite variations of choice possible. When the interpretative dimensions of law are understood, the possibilities of legitimate differences are intensified. Hercules simply strives to give the legal texts an interpretation which makes them, *as he sees it*, the best that they can be. Which readings of the prior cases will fulfill that purpose will depend upon which themes in the precedents are most likely to fulfill the ideal of law as integrity and promote that community of principle that is the moral justification for legal coercion. The determination of what will make the unfinished story of law substantially better is internal to the overall beliefs of the judge. In the end, it depends upon what he judges to be right. Others may disagree with his interpretation, but the disagreement concerns what the legal materials *mean*. He cannot be accused of ignoring the existing law and arbitrarily asserting what he thinks is right.[32]

The difficulty with this argument lies with the conception of adjudication upon which the argument is based. It erroneously assumes that the art of judging involves the relentless search for a singular value. In fact, as we have seen, judging is a more complicated activity. When a legal controversy cannot be resolved by straightforward reference to prior law, it presents a complexity grounded upon a conflict of values. It is this antagonism of claims that gives the controversy its bipolarity. To fairly resolve the dispute, the judge must address the opposition of values that lies at the heart of the litigation.[33]

To exercise choice in these circumstances one must do more than seek coherence of principle. One cannot have an *a priori* commitment to a particular normative standard. These "hard" cases test the personal resources of a judge because the direction of the decision cannot be known in advance. It is the indeterminate quality of difficult cases that explains the potential range of discretion rather than the variations of interpretative strategies that may be deployed to resolve the cases according to a preferred scheme of individualistic values.

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[32] *See* R. DWORKIN, *supra* note 20, at 225-75; R. DWORKIN, *supra* note 27.

[33] *Cf.* Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991 (1977), *reprinted in* RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 88 (M. Cohen ed. 1983).

IV. From a Morality of Principle to a Morality of Judgment

Dworkin's studies of judicial discretion have enhanced our understanding of its interpretive dimension. By concentrating on the consciousness of the participants, he has revealed some of the more profound aspects of the pursuit of justice. However, he fails to reach the genuine difficulties inherent in the office of adjudication, particularly in cases characterized by an antagonism of values. While several reasons for this failure exist, the primary obstacle is the ideological quality of the scholarship.

Liberalism, like all ideologies, attempts to confer upon academic disciplines a meaning that the discipline would not develop within its own methodology. When an ideology becomes influential, it strives to attribute to appropriate subjects an explanation that will have desirable political effects. There is an effort to prescribe or justify preferred action while ostensibly dealing with an impartial explanation of a field of study.[34] Dworkin's work, while it exhibits immense creativity and compassion, is essentially a form of ideological argument.

The transformation of discretion into interpretation reveals deeper aspects of personal responsibility but it also subjects the phenomenon of law to the will to power. There is a conscious effort to orient jurisprudence in the direction of liberal values. This does not mean that the theory lacks all descriptive merit. The conception of judge-made law as a process of advancing rights that flow from past decisions emphasizes the traditional truth that the administration of law by judges evokes principles of commutative justice. Moreover, judges normally justify their decisions in terms of a determination of rights because personal liberty is a paramount value in our culture. But the Rights Thesis is also meant to advance a Neo-Kantian ideal.

The duty to obey the law is rooted in the moral duty to treat others with mutual concern and respect. For Dworkin, the domain of law and adjudication is limited to the promotion of the autonomy of each human person.[35] Because the exercise of discretion is directed toward this absolute standard, the full intricacy of adjudication is excluded from the liberal theory. Dworkin's theory also fails to account for the range of moral deliberation that is the personal responsibility of the one called to decide hard cases.

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[34] *Cf.* D. Manning, Liberalism ch. 4 (1976).

[35] For a discussion of the ambiguities surrounding the ideal, see Soper, *supra* note 16, at 1177-85.

Dworkin defends his explanation of discretion as an authentic account of how this power is experienced by those who participate in the judicial process. From the point of view of the interpreter, the text is felt to be a real constraint, although what readings of the text will make them better must ultimately depend on his convictions. The standards of better or worse are internal to his own overall beliefs. In one sense, this phenomenological description of personal duty repeats a truism that has been part of the traditional understanding of judicial discretion. It recalls Holmes' observations on "the sovereign prerogative of choice" as well as Cardozo's recognition that when all other indices of meaning fail, the judge necessarily falls back upon his own personal resources. However, there are significant differences between these jurists and Dworkin's theory with respect to the *range* of values which a responsible judge should take into account. Holmes and the sociological jurists understood that in difficult cases there is a tension between the personal conscience of the judge and the values inherent in a general or social conscience. For Hercules, the problematic of values is purely inward and personal. This phenomenology of values is an experiential expression of Kantian ethics.

In Kant's ethical subjectivism, values are postulated as ideal objects within an abstract structure that is immune from a particular cultural situation. The individual subject, living in the form of consciousness, establishes an ethical world. He does so from a self-contained field of inquiry and judges particular situations from a normative viewpoint which is personal to him. His ethical choices are made in detachment from the problems of human values that arise in real situations of social interaction. The ethical subject is both a value-experiencing and value-realizing person. He must act according to an interior system of values that has ethical freedom as its primary object. He must seek the best possible realization of this value and act according to his own best powers to achieve it.[36]

Dworkin's theory of law as integrity incorporates much of this Kantian phenomenology of values. Basic postulates of equal dignity and respect are normatively applied to the discretionary dimensions of law. Upon the occasion of a difficult case, Hercules exercises his powers of interpretation. He establishes his own juridico-ethical world by making past collective decisions the best that they can be as coherent and principled expressions of right. This Herculean inwardness is not solipsistic. While in the last analysis the judge decides what is right for him,

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[36] For a brief overview of subjectivism, see M. FARBER, *supra* note 18, at 196-97.

he is also establishing what is of true value for others. Personified as the agent of the community, he is carrying out the community's obligation of impartiality toward all its members. While acting upon his personal conviction, he is also creating that community of principle which is grounded in fraternity. The question, however, is whether the emphasis upon principle accurately reflects the nature of discretion.

Law as an integrity is linked with the ideal of principled behavior. When we act according to principles that shape our life as a whole, we fulfill a standard of moral character which has always had a strong influence upon Western thought and action. It has particularly useful applications to the problematic nature of discretion. To avoid the charge that discretion is arbitrary, one may try to demonstrate that the exercise of discretion is based upon reasons that precede personal judgment. If a judicial decision embodies or applies a general rule or principle, it can be said to involve something more than a particular response to a singular issue. In Dworkin's theory, principle is personified. The judge, in fulfilling his discretion, is governed by the general ideal of equal concern and respect. Therefore, he interprets past decisions in a manner that will make of them the best expression of that principle. In so acting, he promotes a community based on that ideal and reduces the degree to which, by exercising judgment, he could be accused of acting arbitrarily.

As we have noted throughout this Essay, modern jurisprudence has been influenced significantly by developments in the related fields of sociology and ethics. In contemporary moral philosophy, reliance upon principle as a measure of moral action is being criticized. In moral theory it is increasingly recognized that dependence upon principle as a standard of behavior has a decisive effect in only a limited range of circumstances.[37] These developments significantly weaken Dworkin's thesis.

In most cases of moral action, pre-existing principle is of limited utility. Courage, for example, is a moral ideal; whether particular circumstances require its exercise, or what it should consist of in operation, are matters that can only be decided by individual moral judgment. When one deliberates over how to satisfy a moral principle in particular circumstances, that concern does not exhaust the range of judgment.

Moral judgment may also go beyond the content of the principle to which it applies. Complex problems implicate more than a single gen-

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[37] *See, e.g.*, C. LARMORE, PATTERNS OF MORAL COMPLEXITY (1987); E. PINCOFFS, QUANDARIES AND VIRTUES (1986); N. RESCHER, ETHICAL IDEALISM (1987).

eral rule. The reasons that I have for judging these problems depend upon my appraisal of the full complexity of the situation in which the problems arise. The judgments we make in such circumstances appeal to reasons but not by virtue of general rules that make them reasons. We may act for reasons which imply principles or standards, but they do not have to be reasons given in advance.

The flaw in Dworkin's conception lies in its assumption that a core principle, that of equal respect, can provide a sufficient justification for the exercise of judicial discretion. As with ethics, so with lawmaking: the error lies in the belief that major legal conflicts can be regulated by a single higher order principle. To act morally in given circumstances requires the exercise of judgment. To properly exercise this judgment one must address the moral conflicts inherent in the problem situation: similarly, with judicial discretion. To adjudicate, one must exercise judgment rather than coherently extend a principle. The judgment must address the conflict of values that have made the case one which cannot be resolved by direct reference to earlier decisions.

In a morality of principle it is assumed that rationality consists of maximizing a predominate value. In Kantian terms, the concept of duty expresses the practical necessity of particular norms of action. As applied to jurisprudence, it demands that in hard cases judges must exercise their discretion in a certain direction. They must interpret the relevant precedents in a way that will make them part of the continuing story of the law's commitment to the ideal of equal rights. The ends of the political and legal order are fused together into a single, all embracing legal value.

In the world of social interaction, however, the range of human values is complex and pluralistically diverse. These values include, but are not limited to, standards of individual conduct. While some of the values may be drawn within an enlarged conception of freedom, it is clear that many social interests do not advance, and may even restrict, classical ideals of liberty. The values are not mutually convertible, nor are they susceptible of appraisal in terms of a single homogeneous value. The good, at large, is multidimensional:

> The kingdom of interests is large and diversified. No one type of good and no single preponderant value rules the realm of appropriate ends. Their character is diversified, their bearing variegated, their character heterogeneous, their weight incommensurable. We must recognize the reality of a diversified spectrum of legitimate ends. No one, all predominant summum bonum is in operation. No single uniform good making factor is

> uniformly present throughout all goods in a way that leads them to differ merely in degree rather than in kind.[38]

Rational choice, in the exercise of discretion, cannot be conceived in terms of an all pervasive standard of rights. In certain areas of a legal system, a preference for rights is warranted. However, this limited priority cannot be generalized into an inclusive standard for judging. Having a certain duty of equal respect does not automatically constitute a decisive reason for the general exercise of judicial authority.

A morality of principle does not provide an adequate explanation for the exercise of discretion. If the measure is human reason, it cannot be conceived in Kantian terms because rational choice is not a choice between mutually exclusive alternatives. The preferences are never unqualified or independent of real circumstances. The needs and wants of an existing political community are diverse and the goods at issue in a difficult case have substantially different qualities. This calls for decisions that do not unilaterally assert an isolated reason but which manifest a comprehensive balance of reasons. Difficult cases suggest a need for diversified optimization. They should yield decisions in which everything is taken into due account. Discretion can be used reasonably even when it does not give unconditional priority to certain values.

Given his acute consciousness of individuality, Dworkin's conception of discretion is not hospitable to these broader themes of choice. Describing an inner world of feeling, his desire for an ideal world of freedom and fraternity is expressed through the personification of Herculean integrity. To achieve these noble ends, Hercules must carry his standards of action within himself.[39] This romantic dimension of Dworkin's jurisprudence draws it towards artistic metaphors. Law as interpretation makes jurisprudence, like art, constructive. But the likening of a judge to an artist means something quite different for Dworkin than it did for John Chipman Gray. Gray simply sought to distinguish the judge as one not in service to the state. Dworkin's ideal jurist searches for what is true for him; for what holds good within the artificial universe he has constructed for himself. The standards of choice can only be defined in terms of the individual conscience.[40]

An adequate theory of judicial discretion must be open to the diversity of values that makes difficult cases refractory to legal regulation.

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[38] N. RESCHER, *supra* note 37, at 67.

[39] A comparable aspiration for freedom and the rights of man appears in the music of Mozart and Beethoven. *See* P. BEKKER, THE STORY OF MUSIC: AN HISTORICAL SKETCH OF THE CHANGES IN MUSICAL FORM (1927).

[40] See the discussion of moral nihilism connected with artistic sensibility in Joseph Wood Krutch, *Life Art and Peace*, in THE MODERN TEMPER ch. 16 (1956).

Discretion cannot be based completely upon self-discovery; it must be grounded in a social, as well as an inner, world. Judges must correct injustice, but they must also establish harmonious relations among people who have diverse interests and reconcile those interests with some conceptions of a public good.

A full comprehension of adjudication cannot exclude the phenomenology of inward experience. Neither can it exclude the world around us. To give guidance to those who must exercise discretion, legal philosophy cannot neglect any important aspect of that experience. It must account not only for the subjective dimensions of meaning, but also the broader requirements of what it means to hold a judicial office.

Divergence is the Life of Law as well as the Law of Life. On both levels it must be met with moral and personal resources commensurate with the challenge. Law is permeated by opposites and the complex problems this presents can only be resolved by use of the highest powers of reason, will, and imagination. In the future these juristic perplexities will increase as we struggle to establish the conditions of a civilized existence in an increasingly interdependent world. As Professor Bodenheimer so aptly observed,[41] the resolution of these difficulties will require those qualities of understanding, wisdom, and maturity of judgment that have always been the ideal of western jurisprudence.

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[41] E. BODENHEIMER, *Compromise in the Realization of Ideas and Values*, in COMPROMISE IN ETHICS, LAW, AND POLITICS (J. Pennock & J. Chapman eds. 1979).