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# Race, Rights, and Justice

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In reply to Mackie's second concern with Dworkin's theory, it might be argued that even rival theories can at times end up espousing similar conclusions. What makes them rivals is that a significant number of claims crucial to the respective theories conflict in important ways. Thus it does not count against Dworkin's theory that the use of principles might lead one to the same conclusion reached by the positivist. Thus Mackie's second criticism misses the point.

Mackie's third concern with Dworkin's view begs the question as to the settled nature of law. Simply because positivism construes law in a more certain and determinate way, this does nothing to count against Dworkin's theory that the law is less certain and less determinate. Nor does it discount Dworkin's "right answer thesis," which states that most, if not all, cases have right answers as a matter of law, that as a matter of principle there is a right or best answer for judges to conflicting claims in a courtroom, all relevant things considered. Mackie's objection here amounts to a simple denial of Dworkin's theory, not a refutation of it. The fact that judges have, on Dworkin's theory, much more discretion than they do on the rival theory does nothing to show that Dworkin's position is wrong. In fact, Dworkin would be glad to have judges possess such discretion!

Mackie's threefold criticism of Dworkin's third (Cardozian) theory of law represents a mere denial of the Dworkinian hypothesis in regards to the nature of law. But there is no reason, for all Mackie says, why one ought to conclude that the third theory is problematic in a fatal way. What Mackie needs to show is that Dworkin's account entails significant inconsistencies, not merely that it is juxtaposed to positivism (or any other theory of law). Absent its positivist (and question-begging) presuppositions, in other words, Mackie's objections to Dworkin's theory have no significance one way or another for the overall plausibility of Dworkin's analysis of the nature of law.[81]

Thus Mackie's concerns with Dworkin's third theory do not point to any important worry one ought to have about law as integrity. Let us, then, turn to Altman's criticisms of Dworkin's theory and see if the critical legal studies criticisms of Dworkin's theory can be plausibly rebutted.

According to Altman, then, the critical legal studies thinkers deny Dworkin's claim that there is any soundest theory of law because of the

[81] For a reconsideration of part of Mackie's critique of Dworkin's Cardozian theory of law, see Brian Leiter, "Objectivity, Morality, and Adjudication," in Brian Leiter, Editor, *Objectivity in Law and Morality* (Cambridge: Cambridge University Press, 2001), pp. 66–98. It is noteworthy, however, that Leiter's discussion is predicated on a somewhat subjectivist account of morality without which Mackie's criticism carries little weight.

internal contradictions present in the fundamental doctrines of law. The concept of the soundest theory, critical legal studies scholars argue, really has more than one referent.

Dworkin's reply to this critical legal studies objection is twofold. First, he argues that there is a very low probability that in the complex U.S. system of law several theories of law would fit the settled law sufficiently. Second, he argues, even if there were several theories that fit well enough, that fact does not defeat his claim that the soundest theory would be the one from among the several which meets the condition of political morality as well.

Altman responds to Dworkin's reply by arguing that the critical legal studies objection is not that there are several soundest theories of law, but that there are none. Thus Dworkin's reply misses the critical legal studies point. The indeterminacy thesis (i.e., the thesis that in most cases the law fails to determine a specific outcome) holds precisely because there just is no soundest theory of law.

A similar skeptical point is made by Stanley Fish when he argues, "I believe neutral principles to be the empty vehicles of partisan manipulation."[82] Fish is opposed to the use of principles by judges because even neutral ones are problematic for at least two reasons. First, they do not exist as value neutral as value neutrality is an illusion. Second, they often lead to bad results in the courts.[83] But surely Fish's argument, like all skeptical ones, is self-defeating (a caution to which Cardozo alerts us, above). Fish himself utilizes various principles in order to persuade his readers. Are we to think that his principles somehow escape his own apparent radical skepticism toward principles? It may be true that Fish's skeptical antifoundationalism[84] regarding legal norms stands as a refutation of the foundationalism found in constitutional originalism. But does it follow from the supposition that absolute basic legal norms do not exist that there are no legitimate legal norms? Fish saves himself from committing this hyperskeptical error by adopting a

[82] Stanley Fish, *The Trouble With Principle* (Cambridge: Harvard University Press, 1999), p. 8.

[83] Fish, *The Trouble With Principle*, 2f.

[84] See Fish, *The Trouble With Principle*, p. 279, where Fish writes: "There is nothing that undergirds our beliefs, nothing to which our beliefs might be referred for either confirmation or correction." The problem with this kind of skepticism is that it fails to recognize the self-defeating nature of its broad epistemological claims. For philosophical assessments of this sort of skepticism, see Alvin I. Goldman, *Epistemology and Cognition* (Cambridge: Harvard University Press, 1986), Chapter 2; Alvin I. Goldman, *Pathways to Knowledge* (Oxford: Oxford University Press, 2002); Keith Lehrer, *Theory of Knowledge*, 2nd Edition (Boulder: Westview Press, 2000), Chapter 9.

form of coherentism,[85] a legal version of which I shall defend below. To be an antifoundationalist as Fish is does not commit him to a strong skepticism into which less thinking persons would fall: "Foundations have to be sought," he argues, "and as pragmatism tells us, they are never found."[86]

As to his second criticism of principles, it does not follow, logically or otherwise, from the fact that principles can be misused that they always will be: abuse does not negate the value of proper use. The real question here is, contrary to Fish, not whether principles ought to be used in legal decision-making, but precisely which ones, when, and why. It might be right that principles are "politics all the way down" and that principled neutrality, as the critical legal studies scholars argue, is a myth. By this, Fish means that "politics is everywhere" and has no normative or antinormative implications.[87] And to those liberals who rant about the "politics of hegemony," Fish argues, "all politics is the politics of hegemony."[88] However, this fails to discount the attempt of Dworkin and other liberals to arrive at those that are most reasonable, all things considered, for this or that legal purpose. Once this modest but reasonable aim of Dworkin's and other liberals is recognized and accepted, the sting of the critical legal studies and Fish's skepticism loses its force. Liberals need not, then, be stymied by Fish's cynical remarks: "Principles and abstractions don't exist except as the rhetorical accompaniments of practices in search of good public relations."[89]

On behalf of Dworkin against the critical legal studies line of criticism in particular, one might reply that the claim that there is no soundest theory is nonsense. Given that there is an array of theories of law, there must be one, which, *ceteris paribus*, is the soundest. Now by this it is not meant that such a theory is adequate or truly sound, but that such a theory competes with and beats each and every one of its competitors.[90] So it simply does not make sense to say that there is no soundest theory of law. What the critical legal studies thinkers likely mean is that there is no adequate or sound theory of law, which amounts to a skeptical stance toward legal theory as a whole. For indeterminacy in the law suggests the fundamentally open-textured nature of law, implying that positive theories of legal interpretation are implausible insofar as they hold, as Dworkin's does, to the possibility of legal interpretation. Now this is a quite different claim, one that is far from being

[85] Fish, *The Trouble With Principle*, pp. 280–281.

[86] Fish, *The Trouble With Principle*, p. 296.

[87] Fish, *The Trouble With Principle*, p. 126.

[88] Fish, *The Trouble With Principle*, p. 136.

[89] Fish, *The Trouble With Principle*, p. 45.

[90] For a philosophical analysis of theory soundness, see Lehrer, *Theory of Knowledge*.

nonsensical. But it is incumbent on the critical legal studies thinkers to show why such a theory is, in principle, impossible. Altman gives us no help on this point, nor do I expect anyone else to do so. For such a strong skeptical stance in legal theory fails for the same reasons it fails in epistemology: it is self-defeating and internally contradictory.[91] Thus the first critical legal studies objection to Dworkin's view is not telling.

Furthermore, in *Law's Empire* Dworkin argues that one problem with the critical legal studies criticism of his theory is that it conflates competing theories with conflicting ones.[92] Just because there are several competing soundest theories of law does not mean they all conflict. And even if the soundest theory contains internal conflict, such conflicts may not be fundamentally damaging to that theory. For there are varying degrees to which a theory might contain internal inconsistencies or other sorts of weaknesses.

As we saw, the second critical legal studies criticism of Dworkin's theory is that there is a range of ideological conflict effecting legal doctrine. Even if there were a soundest theory of law, it would impose no practical constraints on judges whose preferred ideology is in conflict with the soundest theory. Thus the soundest theory would have no effect on judges who fail to share its view.

This objection does not rest on the nonsensical claim that there is no soundest theory of law, but argues that fundamental ideological conflict inevitably precludes consensus on the nature of settled law. This poses practical problems for judges, who—even on Dworkin's theory—need settled law to decide hard cases.

In reply to this objection, it might be argued that it is unlikely that the ideologies of lawmakers and judges are so polarized that some agreement on the nature of law is precluded. But for the sake of argument, let us assume that this is true, as the critical legal studies thinkers argue. Does this pose a threat to Dworkin's theory? It is a skeptical view in regards to a shared meaning of law, as Dworkin states in *Law's Empire*. But Dworkin admits, "we cannot ignore the possibility that some globally skeptical view about the value of legal institutions is, in the end, the most powerful and persuasive view."[93] Moreover, the critical legal studies criticism seems not to be incompatible with a fundamental tenet of Dworkin's theory, namely that judicial discretion often means that judges will use principles to interpret

[91] Lehrer, *Theory of Knowledge*, Chapter 9. For an argument against open-textured theories of legal interpretation, see David Lyons, "Open Texture and the Possibility of Legal Interpretation," *Law and Philosophy*, 18 (1999), pp. 297–309.

[92] Dworkin, *Law's Empire*, pp. 274–275.

[93] Dworkin, *Law's Empire*, p. 79.

the law in hard cases. There is nothing in Dworkin's theory, especially in *Law's Empire*, which implies that judges will not decide cases without being influenced by their respective and often conflicting ideologies. As he argues, "Interpretive claims are interpretive, that is, and so dependent on aesthetic or political theory all the way down."[94] Dworkin never denies this as a basic feature of a judge's human cognitive architecture. In fact, he argues that "... legal practice in an exercise in interpretation not only when lawyers interpret documents or statutes but generally. Law so conceived is deeply and thoroughly political. Lawyers and judges cannot avoid politics in the broad sense of political theory."[95]

What is important about this critical legal studies criticism is that it admits that judges often utilize such principles in making decisions in hard cases. What the critical legal studies thinker does not see, however, is that such a point does nothing to count against Dworkin's view. For Dworkin never denies the obvious point that judges will, as a matter of cognitive decision-making, decide cases based on principles that are influenced to some extent by their respective ideologies. Indeed, he argues that

> ... We must insist, instead, on a general principle of genuine power: the idea, instinct in the concept of law itself, that whatever their views of justice and fairness, judges must also accept an independent and superior constraint of *integrity* in the decisions they make.
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> Integrity in law has several dimensions. First, it insists that judicial decision be a matter of principle, not compromise or strategy or political accommodation. ... Second, ... integrity holds vertically: a judge who claims that a particular liberty is fundamental must show that his claim is consistent with principles embedded in Supreme Court precedent and with the main structures of our constitutional arrangement. Third, integrity holds horizontally: a judge who adopts a principle in one case must give full weight to it in other cases he decides or endorses, even in apparently unrelated fields of law.
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> ... The point of integrity is principle, not uniformity: ... [96]
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> Integrity does not, of course, require that judges respect principles embedded in past decisions that they and others regard as *mistakes*. It permits the Supreme Court to declare, as it has several times in the past, that a given decision or string of decisions was in error, because the principles underlying it are inconsistent with more fundamental principles embedded in the Constitution's structure and history. The Court cannot declare everything in the past a mistake; that would destroy integrity under the pretext of serving it. It must exercise its power to disregard past decisions modestly, and it must exercise it in good faith.[97]

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[94] Dworkin, *A Matter of Principle*, p. 168.

[95] Dworkin, *A Matter of Principle*, p. 146.

[96] Ronald Dworkin, *Life's Dominion* (New York: Alfred A. Knopf, 1993), p. 146.

[97] Dworkin, *Life's Dominion*, p. 158.

Thus neither of the critical legal studies criticisms Altman discusses poses a problem for Dworkin's third (Cardozian) theory, and as we saw earlier, neither do Mackie's concerns.[98] We have been given, therefore, inadequate reason by these philosophers to think that Dworkin's theory is seriously flawed. However, there might be a genuine reason why Dworkin's otherwise insightful theory of law needs rethinking.

## Constitutional Coherentism

Dworkin argues in favor of a theory of judicial interpretation, which he calls "Law as Integrity."[99] According to this theory, there are two relevant principles: "We have two principles of political integrity: a legislative principle, which asks lawmakers to try to make the total set of laws morally coherent, and an adjudicative principle, which instructs that the law has been seen as coherent in that way, so far as possible."[100] What this means is that the laws must be made as coherent as possible, and that they must be interpreted in such a way that the law remains coherent.[101] It also means that laws express a coherent scheme of justice and fairness:[102] "According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."[103] Finally, Dworkin's theory entails that the coherence test is appropriate for hard or new cases. He writes, Law as integrity asks judges to assume ... that the law is structured by a coherent set of principles about justice and fairness and procedural due

[98] Indeed, there are other noted concerns with Dworkin's theory of law as integrity that seem also to miss the mark of legitimate criticism. Richard H. Fallon, Jr., for instance, argues for an "implementation" theory that is meant to supplement Dworkin's where the "function of putting the Constitution effectively into practice is a necessarily collaborative one, which often requires compromise and accommodation" (Fallon, *Implementing the Constitution*, p. 5). But Fallon's description of Dworkin's theory is far from generous and rather overstated (Fallon, *Implementing the Constitution*, pp. 3–12; 26–36), casting doubt on the veracity of his claims despite Fallon's attempts to not overstate his case. Nothing in Fallon's theory of constitutional implementation (Fallon, *Implementing the Constitution*, pp. 37–44) seems to run counter to, nor discount, Dworkin's theory of law, properly understood.

[99] Dworkin, *Law's Empire*, 176f.

[100] Dworkin, *Law's Empire*, p. 176.

[101] Dworkin, *Law's Empire*, p. 219.

[102] Dworkin, *Law's Empire*, p. 221.

[103] Dworkin, *Law's Empire*, p. 225.

process, and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just, according to the same standards.[104]

These aspects of Dworkin's theory of legal interpretation are unproblematic. Some of what he goes on to propound, however, is in need of rethinking. For Dworkin also states, "Law as integrity, then, requires a judge to test his interpretation of any part of the great network of political structures and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole."[105]

Just what *is* coherence for Dworkin? It is logical consistency between legal propositions or claims, which constitute laws. It concerns what he refers to as "questions of fit."[106] It requires judges to make legal decisions in hard cases that bring the least amount of incoherence to the legal system of rules than any rival decision would.[107] "Convictions about fit will provide a rough threshold requirement that an interpretation of some part of the law must meet if is to be eligible at all."[108]

Dworkin recognizes that fit or coherence is not a sufficient condition of judicial interpretation. It is not enough that the laws with which a judge has to decide cases contains propositions, which are logically consistent. Such laws must be justified.[109] Although Dworkin does not give a detailed account of what justification amounts to in this context, it is clear that more than mere coherence is required for judicial decision-making, which is in accordance with law as integrity.

This is Dworkin's Cardozian theory of legal interpretation, which he calls "Law as Integrity." It is a twofold view. First, it requires that laws be enacted such that they are logically coherent and interpreted as being a logically consistent set of legal claims. Second, it states that such laws must be justified.

But is Dworkin's theory of law as integrity theoretically adequate? I shall argue that it is not, and then sketch an alternative theory of judicial interpretation, which I refer to as "constitutional coherentism."

There is at least one fundamental problem with Dworkin's theory. Recall that he holds that judges should interpret the law in hard cases so that inconsistency within the law is minimized. But nowhere in his account does Dworkin explicitly describe the justificatory status of established law. What

[104] Dworkin, *Law's Empire*, p. 243.
[105] Dworkin, *Law's Empire*, p. 245.
[106] Dworkin, *Law's Empire*, p. 246.
[107] Dworkin, *Law's Empire*, pp. 246–247, 255.
[108] Dworkin, *Law's Empire*, p. 255.
[109] Dworkin, *Law's Empire*, p. 255.

he writes in some places seems to imply that established and justified laws are to be utilized by a judge in a coherent manner to decide hard cases.

However, cannot the "hardness" of a case render some "established" laws reversible or null and void? Dworkin implies that the answer to this question is "yes" in that coherence, which is a matter of degree, can be attained by the judge by the reversing of a decision that was, for instance, part of a "bad chapter" of law. The difficulty with this view is that its plausibility is contingent on a view of whether or not established law is foundational or beyond reproach. But even in a Rawlsian well-ordered society,[110] there is imperfect legislative decision-making. So one can expect that there will always be a certain amount of conflict or incoherence among laws. On Dworkin's account, the answer to this problem is to minimize such inconsistency. But why not rid the law of inconsistency altogether? Why not argue that *no* law is, in principle, beyond justificatory reproach? Thus in hard cases, it might be that certain long-established laws are in need of rethinking or are simply reversible due to their lack of ultimate (non-question-begging) justification.

"Constitutional coherentism," as I call it, is a version of constitutional constructivism, which sees the *law as a dynamic set of justified legal rules or propositions which should be made and interpreted as coherent with one another and with the most plausible set of moral and other extra-legal principles*. This much it shares with law as integrity, and hence constitutional coherentism is intended to be a friendly amendment to Dworkin's position. But constitutional coherentism goes on to state that *any law, in principle, can justifiably be rejected if rejecting it preserves the overall integrity of law and the most reasonable moral principles. The law as a whole must be made as perfectly coherent as can reasonably be expected by humans, even if that means some (previously) established laws—even constitutional amendments—must be rejected by judges interpreting them if reason and circumstance dictate as much*. It draws part of its inspiration from the following statement:

> Justice, empirically viewed, assumes the appearance of a collective concept open at both ends with a membership list of rights and pressures that is constantly changing. Law is not, nor ought it to be, ever completely sure of the character of any one member. Membership therein is always on good behavior. Old members sometimes stay long after they have served their usefulness and the grounds which made them members have long departed. New members fail of admittance

[110] For an understanding of this concept, see John Rawls, *A Theory of Justice*, 2nd Edition (Cambridge: Harvard University Press, 1999); *Political Liberalism* (New York: Columbia University Press, 1993); *Collected Papers*, Samuel Freeman, Editor (Cambridge: Harvard University Press, 1999); *The Law of Peoples*; *Justice as Fairness: A Restatement* (Cambridge: Harvard University Press, 2001).

> frequently because of cliques of old members who oppose them. But membership is never absolute, neither in time nor in authority. No member is a member except in the perspective and context which made it a member. This is the character of justice in its empirical content as we meet it in the courts.[111]

Constitutional coherentism, then, runs contrary to Antonin Scalia's conservative idea that "It certainly cannot be said that a constitution naturally suggests changeability: to the contrary, its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away."[112] It is a view that Scalia pejoratively refers to as "constitutional evolutionism"[113] in that " ... the record of history refutes the proposition that the evolving Constitution will invariably enlarge individual rights."[114] Perhaps, it might be argued, not "invariably" so, but it can effectively protect such rights from the class, racist, and sexist intentions underlying both the framers and ratifiers, as well as those contemporaries of ours whose intentions emulate, however unfortunately, those framers' and ratifiers' intentions.

It might be objected that constitutional coherentism provides no way by which to decide which established laws are candidates for rejection under circumstances where rejection of a law to retain or attain coherence is necessary. This is an objection that must be answered adequately if constitutional coherentism is to become a plausible theory.

In reply to this objection, it might be said that there are at least two sets of laws: "long-established laws" and "recently established laws." The former are those laws within a community established prior to the community's current generations of citizens. The latter are those laws of a community established during the community's current generations. Constitutional coherentism states that where there is a clear logical inconsistency between laws in hard cases and other things being equal insofar as the general plausibility of the competing laws is concerned, recently established laws take precedence over long-established laws because a community is more directly bound to the rules which it itself adopts freely than those which it inherits

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[111] Garlan, *Legal Realism and Justice*, p. 53.

[112] Scalia, "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws," p. 40.

[113] Scalia, "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws," p. 42. Dworkin exposes the straw man fallaciousness of Scalia's "chameleon" portrait of what Dworkin refers to as a "moral and principled reading of the Constitution" (Ronald Dworkin, "Comment," in Amy Gutmann, Editor, *A Matter of Interpretation* (Princeton: Princeton University Press, 1997), p. 123.

[114] Scalia, "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws," p. 43.

from a previous generation. In either case, however, no law is "established" in a strong sense of its being foundational or beyond revision or rejection if reason demands it.

This aspect of constitutional coherentism is based on a principle of textual criticism. For instance, if one wants to answer the question, "What does Immanuel Kant think about punishment?" one faces a decision. One might attempt to answer this question by studying Kant's entire corpus of writings for textual clues, seeking to provide a generally coherent set of Kant's views about punishment. Or, one might consult only the most recent works by Kant (*The Metaphysical Elements of Justice*, for example) in order to give an adequate reply to the question, recognizing that the use of older texts precludes (whenever inconsistency arises) the possibility that Kant might change his mind about punishment from one text to the next and for good reasons. Thus it is best to interpret historical philosophers, as with contemporary ones, in such a way that later works take precedence over earlier ones when there is conflict between them. Yet no single statement by such a philosopher would serve as "the" guide to the interpretation of that philosopher's ideas. It would be one claim among many that the philosopher makes, and the interpreter ought not to assign it special significance unless instructed to do so by the philosopher being interpreted.

The same principle ought to hold for legal interpretation. Judges should, when it is necessary, give precedence to recently established laws over long-established laws (except, of course, those long-established laws that are affirmed by the current generations) because recently established laws represent (presumably) society's most considered legal views at that time and because there is a stronger obligation to obey the law that is binding on a society and laws that it adopts as opposed to laws it simply inherits. Thus in a hard case where there is significant and logically irreconcilable conflict between some recently established laws and some long-established laws, the judge should decide the case in light of recently established laws should the balance of human reason justify it.

Constitutional coherentism has the benefit, then, of evading the charge that established laws are beyond rejection or justificatory doubt. It reduces the difficulty of legislative intent and judicial decision-making in that it is the content, coherence, and justification of a law that matter for judges in deciding hard cases, not the intent of inaccessible framers of a law. The basic reason why original intent holds no privileged position in constitutional coherentism is that legal legitimacy is not somehow inherited from one generation to the next. In a democratic society, legitimacy derives from the free and informed consent of the people wherein the constitution or law of the land is something the contents of which are approved by the majority of citizens.