HOW RIGHT IS DWORKIN'S "RIGHT ANSWER THESIS" AND HIS "LAW AS INTEGRITY THEORY"?

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Introduction

The classical debate between positivists and naturalists about 'what the law is' and 'what the law ought to be' is easily decided in favour of positivists by reference to professional practice. Because when lawyers apply a 'law' they only talk about its contents without mentioning the moral basis on which it exists. They cite case law, statutes and reason to emphasize their point of view.

In contrast, if a philosopher were asked about a legal question, his answer would be more about the 'ought of law' instead of the 'is of law'. Even though the lower courts judges are bound by the decisions of higher courts; there is no 'mathematical procedure' for deriving a specific rule from any case. Deciding a case in line with a previously established authority, or distinguishing or overruling seems like practical manifestations of what these judges think the 'law ought to be'. It is, therefore, apparent that in a controversial case where a judge uses his discretion, he actually presents a challenge to the positivist claim about the 'is' and 'ought' of law. Moreover, a legal rule could be very precise and clear but simultaneously impractical due to its effects and therefore, need to be changed. In other cases where a particular law is vague, the courts may reach a solution on the basis of what, in their expert opinion, it 'ought to be'.

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The American legal realists[1] in accord with the critical legal studies movement[2] have presented their own solutions. However, these proposals cannot be accepted because rules are not created only for the purpose of adjudication; too many rules are followed by people because they serve to guide everyday life and behaviour. Adjudication only comes into question when a rule is breached. Moreover, if the law is only what a judge will decide, then what purpose does parliament serve in the first place? And exactly what would a lawyer argue in a court of law? Any clear piece of legislation on a particular issue can be either 'good' or 'bad'. But exactly how can a law be judged as 'good' or 'bad'? It is 'good' if it is application is practical and the results achieved are beneficial to the injured parties. But how do judges adjudicate in such cases?

Professor Ronald M. Dworkin seems to have an answer to this question by way of his 'rights thesis'. He argues that "constructive interpretation" is necessary for the discovery of law.

Dworkin's Anti-Positivist Theory

Dworkin's anti-positivist theory has emerged in three stages. The target of his first sustained attack was H.L.A. Hart's 'theory of rules'.[3] According to Hart law is the union of primary and secondary rules[4] and judges use their discretion when a question is not covered by a legal rule. Dworkin, however, denounces this by asserting that law contains standards other than rules such as principles and policies. He has given the example of *Riggs V Palmer*,[5] a New York case, in which a man had made a valid will in favour of his grandson. According to the will the grandson would inherit his grandfather's property after the latter's death. However, the grandson killed the grandfather and claimed his property under the will. The court ruled that the

grandson could not inherit any more which meant that the otherwise valid will could not be upheld. The court decided that since no one could benefit from his own crime, therefore, the killer could not, under any circumstances, inherit anymore.

Dworkin argues that the court applied a "legal principle"[6] to decide the case instead of a using valid legal rule. If so, this proves that apart from specific legal rules, other standards such as "principles" do exist and, that judges not only use their discretion when a case is not covered by a legal rule, they also decide it according to various other standards excluding legal rules. In Dworkin's opinion, HLA Hart only says that judges use their discretion because Hart was aware that the answer to every legal question is not available in strict, codified rules.

At this point, Dworkin distinguishes between rules and principles. Rules are applicable in an all-or-nothing fashion. If the facts covered by a particular rule are given, then either it is valid, which means that the solution it entails must be accepted; or, it is not, in which case it contributes nothing to the decision accepted.[7]

Principles, on the other hand, have a dimension of "weight".[8] For instance, a case may be governed by two or more principles. When this is the case only one will be applicable to the case in hand because of some other considerations. This will mean that principles outweigh each other but unlike rules they do not supersede each other. Similarly, Dworkin has discovered another difference between rules and principles. He asserts that rules are interdependent on each other while principles are independent of each other.[9] Thus rules link together while principles 'hang' together.

Hart confesses in his postscript to the second edition of *The Concept of Law* that he has, in fact, as Dworkin has pointed out,

overlooked the importance of principles. He explicitly mentions, "It is a defect of this book *(The Concept of Law)* that principles are touched upon only in passing".[10] However, he argues that their membership of a legal system should be tested by his master rule (Pedigree) or Rule of Recognition; or else they would threaten the distinction between law and morality.[11]

Nevertheless, Hart rejects the differences between rules and principles espoused by Dworkin. To Hart the difference is one of degree.[12] If there is a valid rule applicable to a case then it will have to be more conclusive than a principle. He further argues that both rules as well as principles may be overridden.

Hart defends himself by saying that Dworkin's thesis suggests that there can be no clash between a rule and a principle, whereas in *Riggs v Palmer* there was one.[13] Meanwhile, Dworkin denies Hart's proposition by arguing that in *Riggs V Palmer* there was a clash, but it was between two principles which are that "no one shall benefit from his own wrong" and "the valid rules of a legal system must be applied by judges". The dimension of outweighing or importance went in favour of the former and not the latter.

Dworkin's biggest attack was against Hart's 'Rule of Recognition', which for Hart is the most fundamental rule of the legal system and recognises and validates the criteria of any other rule of the legal system. In other words, Hart considers it the 'touchstone' of the legal system. Dworkin however argues that there cannot be any 'master rule' or Rule of Recognition in Hart's legal system because Hart himself has criticised Austin's command theory[14] for excluding custom from the definition of law. Dworkin states that Hart's Master Rule does not mention the criteria for the validity of custom. Instead, he suggests that for Hart there are two rules of Recognition custom and the

Master Rule.[15] This proposition undermines Hart's Rule of Recognition completely.

The second phase of Dworkin's attack on positivism was originally published in 1975[16] in his essay *'Hard Cases'* [17]. In this phase he introduced a super-human judge named Hercules[18] who appears to be very much a straightforward moral/political philosopher while deciding 'Hard Cases'. Hercules must take into account standards other than rules; even those derived from substantive morality whenever necessary. He must construct a political theory to enable him to find the "right answer" to any "Hard Case". On the whole, this theory seems the most suitable for the entire body of law. Hercules's political theory is very comprehensive and includes all statutes, the constitution as well as all the case law of his jurisdiction. Hercules must make sure that his judgment fits according to what has happened in the past. "Fit" is another key theme of Dworkin's *'Law's Empire'* and according to Stephen Guest "Fit" is something people would understand. The reason is simply the brute rational pull of bare consistency.[19] However, one would think that Dworkin could have used the more suitable term "consistency" instead of fit.

The third stage of Dworkin's anti-positivist theory came to light in his book *Law's Empire* which was published in 1986. This book thoroughly examines the role of judge Hercules regarding what Dworkin calls "Constructive Interpretation". But his "constructive interpretation" perspective is totally different from that of a typical lawyer. For lawyers, interpretation always means the interpretation of statutes, the constitution, and the intention of the parties to a contract and so on.

For Dworkin, however, interpretation encompasses none of the above. For him there are different stages of interpretation, which he has analogously eluded to the writing of a chain novel.

He compares 'statutory interpretation' with other forms of interpretation. For example, if novelists are engaged for a particular novel or project, one will write a chapter and send it on to another to write the second chapter. The second novelist must then read the first chapter to write the second and therefore, will not be beginning a new one. He will then send the first two chapters to the next novelist and so on.

Dworkin argues that every author but especially the first one has two duties: to interpret another person's work and, then to create a piece of writing because he must read all that has been written before in order to pen something new. Each one of them must know who the characters really are; what motivates and guides them; and so on. Dworkin contends that this is absolutely necessary for novelists to create a single, unified novel; otherwise, a series of independent short stories would result.

However, according to Richard Posner there are 'institutional differences' and 'differences of purpose' which imply that law has little to learn from literary theory.[20] He argues that a text may consist of good literature because it is subject to many possible interpretations; a statute, on the other hand, which is subject to many equally tenable interpretations, may, nevertheless, be considered 'bad law'. Dworkin agrees by giving the example of a judge when deciding a new case, must look at past cases in order to make his contribution to the enterprise of law.

Practically of course, most ordinary judges do not possess Hercules' superhuman skill, patience and knowledge of how to interpret law, and are, therefore, unable to provide these exhaustive justifications for their decisions in "hard cases" every time they adjudicate. Dworkin argues that legal theorists must

build upon the interpretive[21] attitude exhibited by judges. A judge therefore, may be considered similar to a writer trying to continue a story started by earlier writers.

According to Dworkin there are three stages of interpretation; first, the "pre–interpretive" stage; second, the "interpretive stage"; and finally, the "post–interpretive" stage. Supposing there is a social practice in a society that people may not think about initially; this would be described as the 'pre-interpretive' attitude. Secondly, the interpretive attitude is one in which people question accepted practices and the reasons for conforming to them. In the third post-interpretative stage, Dworkin argues that interpretation 'folds back into itself' and thus has the effect of changing the original rule. Some people might come to a different or altered perception of a social practice and this may ultimately lead them to change or modify it. Eventually the practice at this stage might be withdrawn, changed or extended to cover new situations. What Dworkin is trying to say is that mere 'description' of a rule is not enough because there is much more to it than understanding.

Hercules, the superhuman judge, expands the above process while interpreting. Hercules's approach to "hard cases" provides tremendous support to Dworkin's assertion that law exhibits the interpretive attitude. However it is important to understand the point Dworkin is trying to make. He is simply telling the positivists that reliance on the notion of judicial discretion would imply that judges specifically justify their decisions in 'hard cases', while in other cases such justifications do exist, irrespective of whether a judge has specifically pointed them out or not.

CONSTRUCTIVE INTERPRETATION AND LEGAL THEORY

Dworkin argues that generally humans are either judges who reach conclusions about the outcome of a particular case, or lawyers/ legal theorists who assert more general propositions of law. However, political convictions inevitably influence the outcome at one level or another. As a consequence, Dworkin asserts, legal theory is almost always politically flavoured. He argues that the concept of law is more of a kind of 'justified coercion' than anything else.

But how is such 'state coercion' justified in the first place? Dworkin puts three alternative answers to this question: 'Conventionalism', 'pragmatism', and (his own favoured theory) 'law as integrity'. It is obvious that Dworkin has used new terminology instead of relying on obsolete connotations. "Conventionalism" broadly resembles 'legal positivism', while "pragmatism" seems comparable to 'rule-scepticism' (American Legal Realism). Conventionalism aims to present law in its morally most appealing light by describing the conduct of judges and citizens. The area of agreement might be said to amount to a generally shared "concept of law, while the rival theories constitute differing "conceptions" of this concept.

Dworkin considers the most fundamental point of legal practice as the guidance and constraint of the power of government by iterating that force may either be withheld or used only when required by individual rights, and those responsibilities flowing from past political decisions when use of collective force was justified. Rival theories of law may then be presented as providing different viewpoints of what this constraint might be and what precisely it signifies.[22]

Among the three conceptions mentioned above Dworkin states that "conventionalism" is the weakest; the second "pragmatism" is more powerful and can be defeated only when our theatre of argument expands to include political philosophy, and the third (law as integrity) is the best interpretation of what lawyers, law teachers, and judges actually do and encompasses much of what they say.[23]

Under conventionalism, Dworkin states that judges focus more on the so-called conventional sources of law like statutes and precedents than they should. The advantage of this method of interpretation is that citizens know in advance the rules about everyday dealings and transactions, or where legal sanctions may be used against them. This enables citizens to fashion their behaviour accordingly. Moreover, they may also easily predict the outcome in a particular situation.

However, where there is no clear rule, a court may then create a remedy through considerations of "flexibility". According to this method, in such a situation judges do inevitably 'legislate'. A judge may, therefore, be confronted by two competing values: predictability, if a rule exists, and flexibility, if it does not, and even where it does exist but is not clear. A judge ruling in favour of flexibility over rules will be considered a 'pragmatist'. In such cases therefore, conventionalism seems to be 'collapsing' into pragmatism.

Simmonds however disagrees with such a proposition and says that it does not.[24] Nevertheless, a judge may lose interest in legislation as well as in a precedent when he or she does not find an appropriate solution in them. Such a judge may also have no interest in the past. He or she may take a decision in such a case according to either the policy of the state or what he or she thinks is in the best interest of the people.

Dworkin also rejects pragmatism[25] which states that judges decide cases according to what will best achieve social goals such as efficiency or utility. They maintain that there is no intrinsic value in maintaining any consistency with the past.[26] However, this will amount to a denial of citizens having genuine legal rights.[27] Pragmatism, therefore, is unsuccessful. This is why Dworkin introduces his own method of interpretation which he named "law as integrity".

LAW AS INTEGRITY

Dworkin has been using the phrase, "law as integrity" so often in his book, *Law's Empire*, that the book could have been titled, "law as integrity". However, he does not give a definition of the phrase. He mentions that "law as integrity demands...", "integrity insists...."[28] "law as integrity asks...," "law as integrity requires...," and so on. Since this term is a key phrase of his work, Dworkin should have given a precise definition of it.

Nevertheless, his picture of 'law as integrity' may be grasped by imagining "a person of integrity". A person of integrity must stick to a consistent set of principles; he must not invoke one principle when it serves his interest, and then deny the same principle when it goes against him. If a person does this he shall not be called a "person of integrity", in fact, he will have no integrity at all.

But in Dworkin's scheme, "integrity" is attributed to the system of law as a whole and not to an individual or a person. Dworkin's judge Hercules must look for that very special theory of legal order, in the form of an organized set of moral principles and values that encompass existing statutes, precedents and other legal doctrines. Once judge Hercules selects "law as integrity" as

a theory, its application to the case at hand will be the natural outcome.

In Dworkin's parlance judge Hercules will start with the process of "constructive interpretation". If Hercules chooses conventionalism in the first stage, he will be applying rules identified by the Rule of Recognition. However, if he chooses Dworkin's favourite theory (Law as Integrity) he will take the law to be identified by a set of moral principles fitting into the existing statutes and cases.

But what exactly will determine whether the interpretation of judge Hercules leads to the best possible result? If it shows previous contributions as well as his own interpretation as an integrated whole; if it is consistent and rich in meaning and clear in development, then it will be considered the best possible interpretation. Nevertheless, whilst making his own contribution Hercules is constrained by the need to 'fit' with existing legal materials. When one comes across the phrases, "law as integrity requires... law as integrity assumes..., law as integrity demands", Dworkin is stating that this is what 'judges ought to do....'

Dworkin divides 'integrity' into two practical principles. The first is the principle of integrity in 'legislation', which asks those who legislate to keep that law 'coherent' in principle. The second is the principle of integrity in 'adjudication'; it asks those responsible for deciding what the law is to see and enforce it as coherent in that way.[29]

Dworkin's judge Hercules is, therefore, not a legislator, like the positivistic judge who has got judicial discretion. He is constrained by a set of principles and values as well as the existing statutes, case law and the question of what is the most appropriate answer given the circumstances. Hercules rejects

back-ward looking 'conventionalism' as well as forward looking 'pragmatism'; he instead follows the "law as an integrated whole" to reach the best decision.

But should law be represented as embodying a coherent moral or political theory? Or why should law exhibit "integrity" in Dworkin's sense? Dworkin's answer is that the State should accept the moral rightness of treating all people as equal. This is the requirement of "integrate", that is, to apply the same principles to all the people, it is this form of governance that unites us as a community. A good example of this would be the principle of equality before the law. It is only when law embodies integrity that a foundation for a political community is built to serve all humanity.

Cotterrell argues that despite the fact that Dworkin does not make references to Pound, both have similar concerns regarding this issue. Both have attacked positivism, and in particular, Pound asserted that law should be understood in broader sense of perceptions that encompass rules, principles, conceptions and standards, techniques and ideals.[30]

Dworkin, on the other hand, mounted a sustained attack on positivism especially on Hart's theory of rules which state that law consists of primary and secondary rules and that judges use their discretion to legislate when the answer to a question is not found in rules. It means that one should conceive of law as the best of politics, which will fit into the legal materials.

To explain what is the best politics Dworkin invokes the value of fraternity according to which citizens share a sense of responsibility for what is done in their name. Community institutions are all trying to instil concern and respect towards all citizens on the basis of equality. It is this endeavour, which alone

turns community force into legitimate coercion, and is consequently named the 'law'. Dworkin has put it this way:

> "A community of principle ...can claim the authority of a genuine associate community and can therefore claim moral legitimacy - that is collective decisions are matters of obligation and not bare power in the name of fraternity."[31]

Dworkin gives a convincing example concerning the use of value integrity and whether we use the same name or not. For instance if a community is split over the issue of abortion; the pro-life group would be totally against it, while the pro-choice will obviously support abortion.

A referendum results may be, for instance, 50.5 per cent for abortion in some special circumstances and 49.5 per cent for abortion whenever the person chooses. Since the result is too close the legislature would enact a "checkerboard" statute. Under this statute women born in even-numbered years could get abortions while women born in odd-numbered years could not. But Dworkin argues that such a checkerboard statute is wrong even though it is recommended by some of the familiar political values, because it entails a more equal distribution of political power. On the other hand each vote on both sides could easily make a difference.

It seems, Dworkin says, that checkerboard statues are closer to the ideas of justice as well as fairness; but if this is the case then, why are checkerboard statutes wrong? The main reason, according to Dworkin, is the lack or absence of integrity. It is only the value of integrity that point to what is wrong with the checkerboard statutes.

Dworkin's theory focuses on the role of judges and adjudication. Judges, he believes, articulate the most

fundamental values of the community. But what about the majority of the citizens of an orderly society who do not have disputes or those who do, are not indisposed to adjudication?

However, most citizens are not concerned with adjudication; they seem to follow rules without question and fashion their lives accordingly. What can be seen from studying Austin and Hart's propositions is that Austin seemed to describe a "mature legal system", while Hart's theory only fits in a "modern legal system". Dworkin, on the other hand assumes that his theory (law as integrity) is applicable only to those ideal legal systems which pass some threshold of justice.

Unfortunately this theory cannot be applied to most of the legal systems in the world today. Simmonds criticizes Dworkin by saying that Dworkin's theory fails to address 'the mechanisms whereby the law may help to sustain the background of shared values upon which the laws own stability and determinacy may depend".[32]

It is Hart's rule of recognition (whose job it is to identify and validate all other rules of the legal system) that Simmonds has in mind while making this point. Dworkin has blatantly destroyed Hart's rule of recognition as discussed above, and he would, therefore, not agree with Simmonds one bit. Stanley Fish also criticizes Dworkin. While Dworkin iterates that interpretation must fit the (legal or literary) text, Fish argues that there is no such thing as a single text out there; instead, all meanings derive from the interpretative community.[33]

RIGHT ANSWERS

One of the ideas that are closely associated with Dworkin's work is that the process of adjudication inherent in the theory of "law as integrity" gives the 'right answer' to questions of law.

Dworkin maintains this throughout his book *'Law's Empire'*. In the preface he argues that in most hard cases there are right answers haunted by reason and imagination. He asserts that the 'no right answer' proposition claimed by positivists is deeply unpersuasive in morality as well as in law.[34]

Even in the very last chapter of the book he mentions, "I have not said that there is one right way, only different ways, to decide a hard case".[35] Thus, what Dworkin means by this is that most legal decisions do have a 'unique', if not a single, right answer.

Nevertheless, it may be difficult sometimes to demonstrate the 'right answer' in every situation. Many of Dworkin's critics presume that the right answer ought to be demonstrated in each and every single case. Dworkin, however, contends that the right answer may be easily derived in some situations, while in other cases it may not be the case, but this does not necessarily imply that there is no right answer in such cases. So it does not follow that if something cannot be demonstrated, it cannot be right.

According to Stephen Guest it is "insufficient" to claim that there cannot be a right answer merely because these answers cannot be proved or demonstrated. Dworkin's superhuman judge Hercules will accept the truth of the right thesis. His starting point will be at the community level; through its coercive statutes respecting the fundamental right of all citizens to equal status and respect. Judge Hercules will interpret legal material, as far as humanely possible, in such a way that they may be seen to yield general and concrete rights in a consistent and coherent fashion.

At the pre-interpretive stage he will have reached "law as integrity"; he may then proceed to the post-interpretive stage. However, a critic may ask; if the judge within the "law as

integrity" model is to use his political convictions to decide cases, and given that different judges will not necessarily have those same convictions, can they be expected to reach the same conclusion?

"For every route Hercules, (Dworkin's "ideal" judge endowed with "superhuman skill, learning, patience and acumen.)[36] took from the general conception to a particular verdict, another lawyer or judge who began in the same conception would find a different route and end in a different place...."[37] However, if "law as integrity" allows for disagreement on the law, can it provide a single right answer to a question of law?

But Dworkin does not seem to be addressing a method that would completely eliminate disagreement in law. Instead, writing about this problem he says, "the idea that there can be a "right" answer to a question about aesthetic or moral or social values strikes many people as even stranger than the presumption of a right answer to queries concerning the meanings of texts and practices".[38]

Dworkin, therefore, confesses that, "his abstract description of the most general aim of interpretation might well reinforce, for many readers, the sceptical thesis that it is a philosophical mistake to suppose that interpretations can be right or wrong, true or false".[39] Dworkin mentions that external scepticism seems to reject the view that there are right answers located in some transcendental reality.[40]

Turning back to Dworkin's "ideal" judge Hercules's method of adjudication, when a case comes before him, he must take into account both dimensions of "fit" and the moral "substantive" dimension. Being endowed with a superhuman wisdom, he may be able to declare the most justifiable outcome

of the case. He ought not to quickly jump to a conclusion in haste because this will be against the dimension of "fit". He might look at extinct statutes and case law as evidence of a conception of law under which people had rights although they were not perfect in the sense that the same rights were conferred on all citizens. If Hercules does this, he discovers the 'law' if he does not find integrity he will fail to discover it.

Thus Hercules is required by "law as integrity" to take into account the substantive dimension to find in law the right answer. In some cases this may be relatively easy because the constraint of fit will render prolonged investigation into the substantive dimension unnecessary. As Dworkin puts it, "we have been attending mainly to hard cases, when lawyers disagree whether some crucial proposition of law is true or false.

But questions of law are sometimes very easy for lawyers and even for laymen. It "goes without saying" that the speed limit in *Connecticut* is 55 miles an hour and that people in Britain have a legal duty to pay for food they order in a restaurant".[41] "Political morality must be understood in order to understand the substantive dimension of a case", argues Dworkin. Hercules must take into account all the components of political morality in order to find the right answer. These components are mainly; "justice", "fairness", and "procedural due process".

The integrity of a community's conception of fairness requires that the political principles necessary to justify the legislature's assumed authority be given full effect in deciding what a statute enacted by it means. Maintaining the integrity of a community's justice system demands that the moral principles necessary to justify the substance of its legislature's decisions be recognized in the rest of the law. Similarly, the integrity of its

conception of procedural due process demands that trial procedures which are perceived as striking the 'right' balance between accuracy and efficiency in enforcing some part of the law be recognized throughout a community; taking into account differences in the kind and degree of moral harm an inaccurate verdict imposes.

A common man may use "fair" and "just" as synonyms and interchangeably. According to Rawls the outcome of a case would be "fair" if it was arrived at by a process in which all those concerned had a proper say. Thus, for Rawls the two terms are synonymous and thus "Justice is fairness" in this context.[42] Meanwhile, in order to understand Dworkin's view of "fairness" in the context of Hercules's adjudication, it must be seen as synonymous with "supported by a majority opinion".

Dworkin's ideal judge Hercules must pay attention to the idea of "fit" regarding a statute as preferable to other inferences drawn from its legislative history. In the same way, Hercules ought to interpret the constitution in the context of contemporary views (idea of fit) rather than follow the initial intention of its drafters.[43]

Thus, Judge Hercules's job is to weigh up the three components of the substantive dimension, that is, "justice", "fairness" and "procedural due process", against one another in case they conflict and find the "lowest common denominator"; in Dworkin's terms: the optimal political solution that fits the legal material. Judge Hercules may disregard constitutional or statutory provisions in articulating his general scheme of finding the "right answer"[44] whilst labelling them as "embedded mistakes".[45]

Several of these claims seem to justify a commitment to consistency in principle valued for its own sake. As Dworkin

aptly puts it, "they suggest what I shall argue: that integrity rather than some superstition of elegance is the life of law, as we know it".[46]

Dworkin has given arguments for many liberal positions. For example, women have a right to choose abortion; every one has a right to moral independence in the context of pornography and sexual life styles. Dworkin brushes aside external scepticism since it contradicts his claim that answers yielded by integrity are "objectively" right answers to questions of law. It logically follows, argues Dworkin, that even if external scepticism is considered as a sound philosophical position, it is not a "threat to our case of law as integrity or to Hercules's methods of adjudication under it".[47]

What will happen, however, if the answers produced by "integrity" are not "objectively" right? In this case, how will they be considered right in another context? Dworkin notwithstanding considers such an answer to be right because "the judge as a participant in legal practice sees them as right".[48]

Dworkin's most recent work seems to treat the issue of "right answers" an irritating distraction that:

> We should now set aside, as a waste of important energy and recourse, grand debates about ... whether there are right or best or true or soundest answers or only useful or powerful or popular ones. We could then take up instead how the decisions that in any case will be made should be made and which of the answers that will in any case be thought right or best or true or soundest really are.[49]

According to Brian Bix, while the tone of this quotation is dismissive, it continues a theme that there are at least a few "best

answers" to complicated legal questions, even if for some reason one hesitates in calling them the "right" answers.[50]

At this juncture, one wonders, how Hercules would deal with precedents. Dworkin argues that he may overrule any established precedent in the case before him to arrive at a "right answer". In doing so, he ought to respectfully consider procedural due process, Justice and Fairness. But what about precedents that Hercules is not allowed, say by the constitution, to overrule? He may treat them unfairly as "embedded mistakes" and give them the narrowest possible construction. Moreover, earlier decisions which are neither overruled nor regarded as "embedded mistakes" ought to be seen as exerting a "gravitational force" on later decisions even when these later decisions lie outside their particular orbit.[51]

In cases where Hercules is confronted with a completely new question he must try to look into other branches of law to find the right answer. As Dworkin puts it,

> The law may not be a seamless web; but the plaintiff is entitled to ask Hercules to treat it as if it were. You will now see why I call our Judge Hercules. He must construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provision as well.[52]

Simmonds strongly disagrees with Dworkin on a couple of issues. For one, he completely refutes Dworkin's assertion that "law would founder if the various interpretive theories in play in courts and classrooms diverged too much in any one generation". Perhaps a shared sense of that danger provides yet another reason why they do not. Simmonds argues that, "Dworkin

simply ignores the fact that such a shared sense of collective danger would almost always compete with the individual advantages to be gained by offering innovative interpretations of the law".[53]

Moreover, according to Simmonds, Dworkin offers a theory of law that is compatible with "liberal pluralism." This requires people to be given clearly demarcated entitlements based on shared values. Simmonds asks that, "How a community can share rules and entitlements when it shares little else besides this?"[54] Dworkin has no apparent answer; however, if he would say that a liberal community can be held together by a liberal theory of justice, then Roberto Unger is right in stating that Dworkin's theory of liberal vision should not be calling for the closure of openness of his political society.[55]

Harris has summed up Dworkin's theory in the following words:

> The thrust of Dworkin's theory is that, whenever the materials can be read in different ways, judges should not simply give effect to their personal views. Instead they have a responsibility to apply their convictions about what the morality to which the community is committed should be understood to entail, so long as these convictions 'fit' the legal materials, they reveal what the law is. The process is "law-discovery", not legislation.[56]

Another criticism of Dworkin's work is that he perceives judges and legal theorists looking at the law through "rose-coloured glasses", making it "the best it can be", rather than describing the law "as it is". For Dworkin describing the law "as it is" necessarily involves an interpretative process, which in turn requires the best interpretation of past official actions. Law "as it

is" is only the collection of past official decisions by judges (that is, precedents) and legislators (whom Dworkin refers to as the "pre-interpretative data"). But the puzzle remains unsolved: "Can these individual decisions and actions offer an answer to a current legal question?"

End Notes

1. The founder of that school of thought was judge Oliver Windle Holmes (1841-1935) who used to say that, "the life of the law has not been logic, it has been experience" and "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law". See O. W. Holmes, The Path of the Law, in 10 *Harvard Law Review*, 1897, p. 173.
2. The critical legal studies movement or CLS sees the traditional forms of legal doctrinal analysis as profoundly flawed and mystificatory. They seem to suggest that the very structure of law has not been accurately defined by conventional jurisprudence. For details see R. M. Unger, *The Critical Legal Studies Movement*, Cambridge, Mass.: Harvard University Press, 1986.
3. See Ronald Dworkin, Taking Rights Seriously, Duckworth, 1977, Chap 2 & 3 (Hereinafter Dworkin, 1977). Chapter 2 of taking rights seriously was originally published in 1967 in the *University of Chicago Law Review.*
4. H.L.A Hart, *The Concept of Law*, Clarendon Press 1994, Chap. 05 (Hereinafter Hart, 1994).
5. 115 N.Y. 506, 22 N.E. 188 (1880).
6. Dworkin defines a principle as a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable but

because it is a requirement of justice or fairness or some other dimension of morality.

7. Dworkin, 1977 p. 24.
8. Ibid., p.26.
9. Dworkin, 1977, p. 41.
10. Hart, 1994, p. 259. For example see the opening sentence of chapter vii of *The Concept of Law*.
11. Hart, 1994, pp. 264-265.
12. Ibid., 260.
13. Ibid., 262.
14. See Hart, 1994, chap. 2, 3 & 4.
15. Dworkin, 1977, p. 42.
16. R. Dworkin, "Hard Cases", *Harvard Law Review*, 8 (1975) (hereinafter Dworkin, 1975). The same is reproduced in Dworkin's *Taking Rights Seriously*, 1977, ch. 4.
17. Hard cases are those where the statute does not cover the set of facts presented to the court, and the court has to resort to the general principles of the law. For a detailed discussion see Dworkin, 1975, p. 1057.
18. Ronald Dworkin, *Law's Empire*, 1986, first Indian reprint Universal Law Publishing Co. New Delhi 2002, p. 239. (Hereinafter Dworkin, 1986).
19. Stephen Guest, Ronald Dworkin, Edinburgh, 1992, p. 52. (Hereinafter Guest 1992).
20. See Richard A. Posner, *Law and Literature*, Harvard University Press, Cambridge, mass, 1988, pp, 209 – 268. (Hereinafter Posner 1988).
21. Stephen Guest notes that 'interpretive' is Dworkin's personal spelling and the usual spelling of the word is 'interpretative'. See S. F. D. Guest and others, *Jurisprudence and Legal Theory* (subject guide of the University of London external

programme), University of London Press, 2004, m. n. p. 175. (hereinafter Guest, 2004).

22. Dworkin, 1986, pp. 93-94.
23. Ibid., p. 94.
24. See N.E. Simmonds, "Why Conventionalism Does not Collapse into Pragmatism" (1990) *Cambridge Law Review,* p. 63.
25. Pragmatism is the determination of matter solely according to their practical consequences and bearing on human interest. This view is held by some within the school of American realism also called by Hart as rule sceptics.
26. Dworkin, 1986, pp.159-160.
27. Ibid.
28. Dworkin, 1986, p. 189.
29. See Dworkin, 1986, p.167.
30. See Roger Cotterrell, *The Politics of Jurisprudence*, Butterworths London and Edinburgh 1989, p.116. (Hereinafter Cotterrell 1989).
31. Dworkin, 1986, pp. 214-215.
32. N.E. Simmonds, Central Issues in Jurisprudence, 2nd ed. Thompson Sweet and Maxwell, 2002, pp. 217-218. (Hereinafter Simmonds, 2002).
33. Stanely Fish, Doing What Comes Naturally, 1989, p.14.
34. Dworkin, 1986, pp. VIII-IX.
35. Ibid., p. 412.
36. Dworkin, 1977, p. 105.
37. Dworkin, 1986, p. 412.
38. Dworkin, 1986, pp. 77-78.
39. Ibid., p. 78.
40. Ibid., p. 83.
41. Dworkin, 1986, p. 353-354.

42. See John Rawls, "Justice as Fairness", 54 *Journal of Philosophy* 653, 1957; in expanded form, 67 *Philosophical Review* 164, 1958. By "Justice as Fairness" Rawls means Justice as the result of agreement (a hypothetical negotiation) by persons under fair conditions.
43. Dworkin, 1986, pp. 363-65.
44. Dworkin, 1977, pp. 118-123.
45. Ibid.
46. Dworkin, 1986, pp. 166-167.
47. Dworkin, 1986, p. 266-267.
48. Ibid., p. 235.
49. Dworkin, "Pragmatism, Right Answers and True Banality" in Pragmatism in Law and Society, M. Brint and W. Weaver eds, Westview Press, Colo., 1991, p. 360.
50. Brian Bix, *Jurisprudence: Theory and Context*, 3rd ed., Thomson Sweet & Maxwell, 2003, p. 95.
51. Dworkin, 1977, p.111.
52. Dworkin, 1977, pp. 116-117.
53. Simmonds, 2002, p. 221.
54. Ibid., p. 218.
55. Roberto Unger, *What should Legal Analysis Become?* London, 1996, p. 114.
56. J. W. Harris, *Legal Philosophies*, 2nd ed., Butterworths London, 1997, pp. 209-210.