

Session 5 Dworkin, selections from *Law's Empire: Integrity and Adjudication*

A Test Case: *The McLoughlin Case*

- Under what circumstances, if any, is someone legally entitled to compensation for emotional injury?
 - Precedent considerations: judges had, in the past, awarded compensation for foreseeable emotional injuries, but a case where such injuries had been suffered not at the scene of the accident, but elsewhere and later, had not been tested.
 - Policy considerations: would recognizing a larger area of liability have undesirable consequences, like congestion in the courts, driving up the cost of liability insurance, and encouraging fraudulent claims?
 - Considerations of moral principle: does the moral principle justifying compensation for emotional damage suffered at the accident scene justify similar compensation for more removed cases of emotional damage or not?

Three views of law and adjudication:

(1) *Conventionalism* (e.g. Hart's legal positivism):

- Legal rights are fully determined by the letter of the laws that have the proper – that is, conventionally recognized – pedigree.
- The meaning of these laws is such that competent lawyers and judges will all agree on it.
- Judges bound by precedent, because the rule of law requires that the assignment of legal rights be consistent; the point of consistency is predictability.
- If the meaning of a law is in dispute (amongst competent lawyers and judges), then the law is not settled on that question.
- In such cases, and in cases not explicitly covered by existing law, the judge must reach *beyond the law* and decide cases on extra-legal grounds.
- In such cases, the judge is not enforcing *legal* rights, though she may (depending on the rule of recognition) be establishing *new* legal rights.
- Legal interpretation is *backward-looking* – purely a matter of reviewing past legislation and legal decisions.

(2) *Pragmatism* (e.g. Richard Posner; closely related to legal realism):

- Legal rights are simply rights that officers of the law (e.g. judges) *will* enforce.
- There is no requirement that the assignment of legal rights be consistent with past decisions. Judges should decide each case by considering which decision would be *best* in this case (usually, have the best consequences, or be best for the community as a whole, though this needn't be the case).
- Predictability is valuable (often in the interests of the community), and so judges often have reason to act *as if* bound by previous decisions. But this value can be outweighed in individual cases.

- Legal interpretation is *forward-looking* – a matter of deciding what will have the best outcome.

(3) *Law as Integrity* (Dworkin):

- False dichotomy between *finding* and *inventing* law.
- “[P]ropositions 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.” (p. 92)
- Judges should “identify rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness.” (p. 92)
- Legal decisions should be consistent with past decisions, but what counts as consistency is a matter of interpretation and may well be controversial.
- This doesn’t mean that there are no right answers!
- Judges who exercise their discretion (in the weak sense) in interpreting the law one way or another *are* enforcing *existing* legal rights – they are not reaching “beyond the law” to make their decisions.
- Two dimensions of legal interpretation:
 - *Fit*: how well does the rationale for the decision fit with past decisions/laws? How many of those past decisions must it classify as mistakes, or outliers, or accidents?
 - *Justification*: does the interpretation on which the decision is based show our legal practice in its best light? Does it interpret that practice in a way that is justifiable (on grounds of political morality)? Also: will the decision project to future possible cases with acceptable results?

The Chain-Novel Analogy:

A judge’s role in reaching legal decisions is not mechanically bound by the past (the way a translator may be bound when translating a text into a foreign language).

Nor is she free to ignore the past (like someone beginning a new novel of her own).

Rather she “must think of [her] decisions as part of a long story [she] must interpret and then continue according to [her] own judgment of how to make the developing story as good as it can be.” (p. 95)

Defending Law as Integrity

Dworkin thinks *jurisprudence* – the investigation into the nature of law – is *itself* an exercise of interpretation. To understand what *law is*, we have to look at our legal practices (esp. at the behavior of lawyers and judges) and try to interpret it in its best light – to find a theory of law that *fits* the data while making *sense* of it. He thinks the theory that legal reasoning is

itself an interpretive process offers a better interpretation of legal practice than conventionalism or pragmatism.

- *Conventionalism* suffers from poor *fit*: it can't explain why there seems to be *legal* disagreement about the resolution of hard cases, or why lawyers and judges wrestle so hard with how to interpret legal materials in such cases. They think of questions they acknowledge as controversial as nonetheless internal to law.
- *Conventionalism* also fares poorly along the *justification* dimension: it suggests that being so tightly bound by precedent is justified because of the value of predictability. But at least those conventionalists who think it's proper for judges to decide hard cases on moral grounds, by reaching beyond the law, will have to concede that on this model judicial rulings will often not be predictable (since hard cases are common).
- *Pragmatism* also suffers from poor *fit*: our practice of law seems to attach much more intrinsic significance to consistency than the pragmatist's model does.
- But *pragmatism* at least does fairly well when it comes to *justification*, since it says the right legal decision is simply the one that most justified (on moral grounds).
- *Law as Integrity*, Dworkin argues, does well on both dimensions. *Question*: how should the two dimensions be balanced?

Deciding the McLoughlin case...

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