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The Americanization of the Railroad: Railroad Power in Norther Securities, 1903, and McClure's Magazine, 1896-1901

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REVIEWS

DWORKIN TODAY

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Law's Empire, by Ronald Dworkin. Cambridge: Belknap Press of Harvard University Press, 1986. Pp. x + 413, \$20.00.

This excellent book would have been better titled *The Empire Strikes Back*. Admittedly, Professor Dworkin gives topographical and metes-and-bounds descriptions of the Empire. But these are subordinate to the Emperor's efforts to unhorse his enemies, by edict. (I mean no disrespect to the preeminent legal philosopher, English-speaking, of our time.) Jurisprudence, the capital of Law's Empire, the Jewel in the Crown, has been under unremitting academic attack for a decade. Law and Economics entered the field from the Right and Critical Legal Studies from the Left,¹ capturing Chicago and Harvard castles respectively (please turn your map upside down) — law schools where even the architecture announces an intention to repel invaders. In the middle and under the threat of being cut off from mainstream legal analysis, jurisprudence initially responded with tepid defenses of tradition and moderation. Having had the field too long to itself, jurisprudence had become rather loose in argument, stale, inward-looking, and lacking in the spit-and-polish of a concrete methodology. Professor Dworkin's muscular attempt to rally the jurisprudential troops, rag-tag groups marching to many different drummers, succeeds at the level of tactics. His strategy is perhaps open to question: he attempts to co-opt the insurgent barbarians by showing them how they are really "just like us." The outcome of his efforts may be licentiousness around campfires built in the Forum of the law. Lacking the hindsight and wit of Gibbon, I will de-

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1. See R. DWORIN, *LAW'S EMPIRE* 96 (1986) [hereinafter *EMPIRE*] (examining the "flesh and battledress" of jurisprudential theories); *id.* at 407 (quoted *infra* note 64); R. DWORIN, *A MATTER OF PRINCIPLE* 4 (1985) [hereinafter *PRINCIPLE*] (economics "has colonized a large part of American legal education and placed ambassadors in Britain and elsewhere."); Clark, *Philosophies at War in Law Schools*, *INSIGHT*, Sept. 29, 1986, at 52. ("New tribes are camped on the borders of the legal profession."); Reiding, *Civil War in the Ivy*, *A.B.A.J.*, Nov. 1, 1986, at 64.

part from my strained metaphor to describe and tentatively criticize² Dworkin's ideas as matters of strategy and tactics. I will draw upon Dworkin's *A Matter of Principle* (1985) and *Taking Rights Seriously* (1977) where they make the same points more clearly and/or in greater detail.

TACTICS

Dworkin is not one of those rare legal philosophers with a great deal of respect for philosophies other than their own. *Law's Empire* thus begins by showing jurisprudes why their more fissiparous beliefs are wrong and even heretical. Through sheer brilliance, this demonstration succeeds better than might be expected as a means to rally the troops. He lumps legal philosophies into two categories for purposes of brief criticisms. Legal positivism, legal realism, and natural law are termed "semantic" theories; conventionalism and pragmatism, along with the "integrity" Dworkin now espouses, become "interpretive" theories of law. This gross distinction is difficult to sustain because, among other things, interpretive legal analysis usually involves a great deal of semantic manipulation.³ Conventionalism inevitably shades over into legal positivism, pragmatism becomes legal realism in the 1920s and 1930s, and Dworkin's integrity theory frequently appears as a species of natural law, perhaps with a minimum content.⁴

2. It is said that if you shoot at the king you must kill him, but I have neither the desire nor the ability to do Professor Dworkin an injury. Improved legal analysis, rather than a gratified ego, should be the aim of all who care for the law, including those who would reject the Imperial dimensions Dworkin ascribes to it. Lacking a strong background in philosophy, I will nevertheless cite some sources that cast doubt on some of Dworkin's arguments. His arguments may be valid alternatives to those I cite; I cannot be certain. Although Ken Klein provided helpful comments on a draft of this Review, errors remain my responsibility.

3. Semantic theories of law are those grounded in the philosophers' insistence on following certain linguistic criteria (which are often hidden) for applying legal propositions. *EMPIRE*, *supra* note 1, at 31-32. But these criteria are frequently manipulated for political purposes when, for example, British judges interpret statutes. See *PRINCIPLE*, *supra* note 1, at 14, 30. This confirms the expectations of empiricists like Mill, who see analytical statements as based on the artful manipulation of language — a process which seems to account for some of the force in Dworkin's arguments. See SCHMITT, *Phenomenology*, 6 *ENCYCLOPEDIA OF PHILOSOPHY* 135, 136 (P. Edwards, ed. 1967).

4. Natural law criteria are not merely factual but moral, at least in part. *EMPIRE*, *supra* note 1, at 35. Through the kind of integrity Dworkin observes in legislating, judging, and much of our political practice, he aims at a morally coherent set of laws. *Id.* at 176, 243, 262-63; see *id.*, *passim*. This can be termed a "morality of aspiration" not always realized, the minimum content of an "internal morality of law." See L. FULLER, *THE MORALITY OF LAW* 184-86 (1969); *infra* text accompanying note 17. See also R. DIAS, *JURISPRUDENCE* 501-02 (5th ed., 1985). But it "is not a very important objection" to call integrity a version of natural law. *EMPIRE*, *supra* note 1, at 263.

Apart from integrity and perhaps conventionalism, the terms Dworkin uses to describe legal philosophies will be familiar to readers with an interest in jurisprudence. Under conventionalism, past decisions are sources of rights and responsibilities only to the extent that these can be made explicit by methods conventionally accepted by the entire legal profession. Where

Law-as-integrity derives from Dworkin's aesthetic perspective on the legal system, in what seems to be the first significant influence aesthetics exerts on modern legal philosophy. Many of us have been struck by the beauty, ugliness, or consummatory quality of a rule or chain of precedent, and Dworkin offers a means to formalize our impressions. Integrity is the "illuminating fit" between a rule and our legal and political practice.⁵ As in literary criticism, interpretations of law and the means of developing them may be controversial. Yet the critics are joined in a constructive pursuit of understanding. They impose "purpose on an object or practice . . . to make of it the best possible example of the form or genre to which it is taken to belong."⁶ Deconstructive critics of law or literature would disagree strongly, but Dworkin treats this as their problem rather than his.

Making an Elizabethan property case relevant to a current American dispute is akin to presenting a meaningful "Merchant of Venice" to a contemporary audience. The judge, an author as well as a critic and a student of contemporary culture, behaves like a writer adding a subsequent chapter to a chain novel written by several people. Interpretations of plot and character, etc., must be discarded by the writer where they fit poorly with the preexisting material; formal and structural considerations, and accidents of circumstance, will win out over fresh insight, realism, and beauty. Dworkin does well to perch his judge halfway between a total creative freedom and the mechanical textual constraint of, for example, a mere discovery of a previous author's intent. But Dworkin may not be justified in assuming that

no applicable convention exists, judges have discretion to fashion a new convention from extra-legal sources. *Id.* at 95, 117.

EMPIRE continues the argument against positivism that Dworkin began in *R. DWORKIN, TAKING RIGHTS SERIOUSLY* (1977). EMPIRE, *supra* note 1, at viii. *But see also infra* notes 44, 46-48 and accompanying text. For Dworkin's positivists, law consists of historical decisions by those in political power. This purely descriptive approach breaks down in "hard" cases because positivists are interested merely in "different" answers, rather than in the "right answers" Dworkin seeks. EMPIRE, *supra* note 1, at viii, 34; PRINCIPLE, *supra* note 1, at 147. Dworkin's treatment of jurisprudential theories is also discussed *infra* note 24 and accompanying text.

5. EMPIRE, *supra* note 1, at 411. Dworkin suggests at one point that integrity requires the best story to be told from the standpoint of political morality, rather than of aesthetics. *Id.* at 239. PRINCIPLE nevertheless demonstrates the debt Dworkin's integrity concept owes to aesthetics. PRINCIPLE, *supra* note 1, at 146-66, Chapter 6, entitled "How Law is Like Literature" contains "The Aesthetic Hypothesis." *Id.* at 149-54. This Hypothesis describes what critics disagree about: Which way of reading a text makes it the best work of art? Arguments here are to be evaluated in terms of their explanatory and critical power (rather than in terms of political morality). *Id.* at 149, 154.

6. EMPIRE, *supra* note 1, at 52. *See id.* at 16-17, 49-50, 248, 250. Legal theories are termed constructive interpretations which seek "equilibrium between legal practice . . . and the best justification of that practice." *Id.* at 90. The best statutory interpretation is that which creates the best "performance of the legislative function." *Id.* at 353. Dworkin's aesthetic purpose seems to be that of a "constructive metaphysics" giving us "the great visions of philosophy." But positivists would argue that there are no verification or confirmation procedures for testing his conclusions. *See V. ALDRICH, PHILOSOPHY OF ART* 90-91 (1963).

the material for a judicial chain novel resembles Charles Dickens' *A Christmas Carol*⁷ rather than, say, William Burroughs' disordered and disorienting *Naked Lunch*.⁸

There may be other weaknesses in Dworkin's approach, such as an arguably inappropriate "tone." Just as critics may ascribe more weighty socio-economic commentary to Raymond Chandler than this detective novelist can comfortably bear,⁹ so too may Dworkin's philosophical "high style" lend too much dignity to artifacts of a political rough-and-tumble. He may, in other words, wind up taking rights too seriously, out of a love of art for art's sake.¹⁰ Having made rights sacrosanct, Dworkin does not tell us how to compromise them sensibly when they inevitably come into conflict with each other.

Law may be less like a Dworkinian chain novel than a working within an artistic or craft tradition, especially under contemporary, looser notions of precedent and statutory interpretation. We often cannot say that the judge-as-artist has made his "canvas" the best it can be, either because the canvas starts out so blank that it can become literally anything, or because it has been painted over so frequently that any new rendering will seem a

7. EMPIRE, *supra* note 1, at 229, 231-34, 237; PRINCIPLE, *supra* note 1, at 149. See EMPIRE, *supra* note 1, at 56.

8. W. BURROUGHS, *NAKED LUNCH* (1959). LUNCH is a convenient example of disorienting material presented in a disordered but nevertheless effective way, under the "fold out, fold in" technique pioneered by Burroughs. Burger Court opinions in some areas of the law perhaps read like chain novels adopting Burroughs' technique. For Dworkin, skepticism predicts the result many see as flowing from these opinions: entropy leading to a legal chaos. This result can be avoided by applying energy, imagination, and foresight but these qualities were arguably in short supply on the Burger Court. EMPIRE, *supra* note 1, at 407.

9. *But see* PRINCIPLE, *supra* note 1, at 151.

10. Dworkin apparently seeks to perfect the formal beauty of his system, regardless of what society expects and of rival aesthetic theories. These would include realism, a related need to base one's system on empirical and experimental results, Marxism, and American naturalism—the continuity of art with the rest of life and culture. Dworkin does display a broad sense of social responsibility and some sensitivity to the symbolism of law, but his emphasis on a "phenomenology" of adjudication gives the impression of a legal system rather too independent of its creators and perceivers. Like art, law is expressive of human feelings. See BEARDSLEY, *History of Aesthetics*, 1 ENCYCLOPEDIA OF PHILOSOPHY 18, 30-33 (1967); HOSPER, *Problems of Aesthetics*, 1 ENCYCLOPEDIA OF PHILOSOPHY 35, 46-50 (1967); *infra* note 61 and accompanying text (Dworkin's assertion that law makes us what we are).

Real judges decide cases more instinctively than Dworkin's judge; his announced need to relate everything to a general theory would cause paralysis and clog dockets. This may be the objection of a "minor critic," as Dworkin argues, but I fear that Dworkin's judge occasionally has to re-invent the wheel in order to change a tire. See EMPIRE, *supra* note 1, at 264-65. Dworkin does admit that theories of art do not exist in isolation from philosophy, sociology, and cosmology, and that the best of criticism denies that literature has but one function. PRINCIPLE, *supra* note 1, at 151-52. As to whether these insights are fully carried over into his legal analyses, see *infra* note 39 and accompanying text and *infra* text following note 65.

whitewash or a vulgar pastiche.¹¹ The materials and media of law and art sometimes seem to have their own powers of expression, independent of their manipulators. In art, and in law if we are honest, many critics excessively praise the merely sensuous, or a mere breakout from tradition, or a subtle lampoon of that tradition.

These quibbles aside, Dworkin's law-as-integrity succeeds admirably as a pioneering aesthetics of law. Description, interpretation, and evaluation are blended together in "conversations" about art and law. Diverse legal elements are put in balance and skillfully added up to suggest an overall unity. Many of the seams where Dworkin has stitched this unity together remain clearly visible. Yet the reader also sees how that which is unique, in four representative works of the "hard" case genre, contributes to that which is universally significant in Anglo-American (only) law. Dworkin stresses that, like the aesthete, a judge faces the difficult struggle to attain detachment and disinterestedness. These attainments are not always displayed by Dworkin himself — personal preferences perhaps intrude in his analyses more often than is strictly necessary — but he at least does the reader the favor of making these preferences explicit.¹²

In good philosophical fashion, Dworkin's theory of integrity puts a premium on coherence for its own sake. His judge¹³ does not stop after discovering the applicable legal conventions or the rule that is best for our future on pragmatic grounds. Integrity forces a judge to go further and establish a broad consistency among contemporary principles, rather than among policies. Dworkin does not feel the need for consistency among principles over time, since he seeks to discover order in legal doctrine rather than in the forces creating it.¹⁴ Fair enough, but he should recognize and somehow ac-

11. See *EMPIRE*, *supra* note 1, at 111 and *infra* note 12. But see *infra* note 65.

12. See V. ALDRICH, *supra* note 6, at 4, 88; HOSPERS, *supra* note 10, at 36, 43. Dworkin notes that we "find it very difficult to achieve the distance from our own convictions necessary to examine these systematically as a whole. We can only inspect and reform our settled views the way sailors repair a boat at sea one plank at a time. . . ." *EMPIRE*, *supra* note 1, at 111. Also, "detail is more illuminating than range" in jurisprudence. *Id.* at 397. For an example of what is arguably the intrusion of personal preferences into Dworkin's analysis, see *EMPIRE*, at 297-98, 301-09, 403-04, 407-08 (equality of resources as a canon of justice).

13. Dworkin frequently calls his judge Hercules, and less frequently Hermes (the interpreter of statutes) or Siegfried (a judge in a disdained, Nazi-style legal system). See *id.* at 105, 239, 248, 313, 317, 354, 380, 394, 399, *passim*. Dworkin first introduced his readers to Hercules in *TAKING RIGHTS SERIOUSLY*, *supra* note 4, at 105-30. There, Hercules easily demonstrated his intellectual superiority over a dumb judge rather tastelessly named Herbert, presumably after H.L.A. Hart. See *id.* at 125-30. It is difficult to see why so Nietzschean a "superjudge" as Hercules is not beyond so mundane a matter as the law—beyond, indeed, good and evil. We can perhaps take comfort from the thought that Hercules is, after all, only Dworkin in disguise.

14. *EMPIRE*, *supra* note 1, at 167, 220-22, 226-27, 273. Historical consistency of legal principles is essential to, among other things, give fair warning of what the law requires in the

count for the fact that these historical forces operate as accidental, conceptual, and institutional constraints on achieving a doctrinal order. History may, in other words, create more anomalies than even Dworkin can sweep away.

He should also realize that many have trouble making the clearcut distinction between legal principles and policies that he first stressed in *Taking Rights Seriously*.¹⁶ In most legal theories, and certainly in legal practice, principles are not invariably more important than policies and an efficiency-enhancing consistency among policies. At least on occasion, courts use newly-discovered policies to override moral principles deeply embedded in the case law: environmental and child labor laws, for example, overrode established property rights and the related freedom to conduct your business as you see fit. Such policies may be less or more attractive than the rights they displace, but the political will to implement them cannot be negated simply by terming it unprincipled and incoherent.

For Dworkin, integrity does not enforce itself. Judgment is required over the "contested convictions" of justice, fairness, and procedural due process. These convictions must be melded into an overall opinion "sensitive to the great complexity of political virtues," popular convictions, and national traditions.¹⁶ Different judges will strike different balances of conviction and erect different thresholds beyond which personal preferences will not influence case outcomes. The functions of integrity are rather modest here: identifying the "branching points" of legal argument, the points at which judges' opinions will diverge; showing how to avoid "checkerboard" solutions that justify the part by endorsing principles which must be rejected to justify the rest; and forcing judges to face candidly their responsibility to make principled new law when the old law runs out.¹⁷ Integrity seems so loose a constraint at this level that it is hard to see how, as Dwor-

present — an important aspect of justice. *See id.* at 141, 248.

15. *See supra* note 4, at 22-28, 90-100. Policy questions are those where no principles or rights are involved, and court decisions are thus to be governed by the will of the people. EMPIRE, *supra* note 1, at 341. *See id.* at 339-40 (discussion of Endangered Species Act policies). Yet the Constitution as currently interpreted does not seem to recognize all of Dworkin's principles, and constitutional rights are narrower and otherwise differ from those Dworkin discusses. He argues that legislation invites the policy judgments that adjudication does not; preexisting rights and duties consistently constrain judges' policies, under the canons of integrity. *Id.* at 244, 410. Pragmatists, legal realists, economists, and the growing numbers of judges conscious of their policymaking function would dispute this statement. The relevant issues are not merely those raised by an "activist" judge substituting his judgment for the legislature's in matters of policy as well as principle. *But see id.* at 398.

16. EMPIRE, *supra* note 1, at 398. *See id.* at 410, 412; *infra* note 23 and accompanying text.

17. EMPIRE, *supra* note 1, at 132, 134, 184, 412. *See id.* at 248, 250, 255. Dworkin presumably knows that it will not always be politically feasible for courts to make new law, candidly or otherwise.

kin maintains, the application of integrity will consistently generate the "right" answer. Dworkin admits that the answer cannot be *proved* right to the satisfaction of all,¹⁸ but this leaves unanswered the question of how many people must be satisfied. The high level of consensus Dworkin seeks¹⁹ suggests that nearly everyone must be satisfied with the rightness of answers.

Law-as-integrity comes into its own in constitutional adjudication, the locus of many "hard" cases. The abstractions of Dworkin's integrity blend well with "notoriously abstract" constitutional provisions and the no less abstract convictions of the Framers. This blend accounts for case outcomes much better than do the "famously elusive" distinctions drawn in American constitutional theory, distinctions which are usefully reviewed by Dworkin.²⁰

The Constitution itself is found to contain some checkerboard solutions: slavery was a massive violation of principles used to justify other parts of the Constitution and, at the other end of the spectrum, tort laws are permitted to vary from state to state — a possible violation of Equal Protection. Integrity can nevertheless be used to generate interpretations that both match the Framers' state of mind and permit a principled community to change its constitutional purposes. Partly by inference, Dworkin shows how currently-popular theories of constitutional "original intent" are lacking in integrity, as that word is commonly used and as Dworkin uses it. He seems to fall only a bit short of a full theory of constitutional enforcement (remedies) that fits and justifies the power the Constitution gives courts.²¹ The vagueness of this power means that no theory of enforcement

18. *Id.* at ix. See *infra* notes 52-53 and accompanying text.

19. See *infra* notes 31-33, 52-56 and accompanying text.

20. EMPIRE, *supra* note 1, at 355, 357-59, 364-65. See generally *id.* at 355-99. See also *infra* note 65. There is no evidence of a constitutional meta-intent — that the Framers intended their attitudes to be decisive in the future — and no reason to forever adhere to the intent of so unrepresentative a group. EMPIRE, at 364. The "famously elusive" distinctions of constitutional theory surveyed include: conservative/liberal, interpretivist/noninterpretivist, and passivism/activism (a "virulent" legal pragmatism). *Id.* at 358-59, 368-73, 378. Integrity papers over these distinctions with the fine-grained, discriminating, case-by-case approach that gives place to many political judgments but tyranny to none. See *id.* at 378; *infra* note 21.

21. EMPIRE, *supra* note 1, at 184-86, 360, 364-65. See *id.* at 390-91. One facet of this theory is the treating of like cases alike while acting on a single, coherent set of principles, so as to promote the community's moral authority to a monopoly of coercion (legitimacy). See *id.* at 141, 188; *infra* note 55 and accompanying text. An example may illustrate a potential weakness in Dworkin's approach: his analysis of *Brown v. Board of Educ.*, 347 U.S. 486 (1954) in EMPIRE, at 362. For Dworkin, the dominant conviction of the Congress passing the Civil War Amendments was suitably abstract — the law should treat all citizens as equals — even if some Congressmen then thought that school segregation did not violate this principle. *Id.* A cynic (and not me, in any event) might argue for a different conviction: Congress wished to register in legal form the fact of who had won the Civil War. This "carpetbagger" sentiment would have to be phrased as an abstraction, so as to not antagonize unduly those who

can be placed beyond dispute.

Philosophy is a linguistic art, and Dworkin attempts an aesthetic use of this art form to describe what he sees as another art form: law. The danger is one of being too "arty," of allowing aesthetics to refer chiefly to itself rather than to the subject matter under investigation. In the visual arts, such self-reference can occur when values like color, line, shape, mass, and balance are the primary means for evaluating a work. Similarly, legal theory often refers chiefly to itself when law-as-integrity pursues the mediumistic values of justice, fairness, and procedural due process.²² Political philosophers and other non-lawyers do not ignore these values, of course, but those values play a much smaller role in everyday discourse and political practice than Dworkin's theory would have us believe. This is also true of legal consistency for its own sake, which is too Germanic a value to have much influence in a rather pragmatic nation seeking something that works, rather than philosophic salvation.

Dworkin is unclear as to how his integrity-based values link up: "integrity of process" (presumably including fairness as well as due process values) is said to provide a check on "substantive integrity," the primary goal

would find it inelegant or otherwise distasteful. If this were the dominant conviction, canons of integrity would prompt a judge to ask: Would school desegregation make the Civil War victory the best it can be? The answer might be desegregation for the South — to dismantle institutions and indirectly a culture perpetuating attitudes inconsistent with that victory — and, as has sometimes been argued, no desegregation in the North. If such a conclusion follows the rules of logic, it suggests that the wrong answer can flow from applications of integrity, particularly where the law attempts a checkerboard solution (the Civil War Amendments) to a checkerboard problem (slavery). Such situations are more common than Dworkin seems to assume.

22. See *id.* at 243, which states:

Law as integrity asks a judge to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these . . . so that each person's situation is fair and just according to the same standards. That style of adjudication respects the ambition . . . to be a community of principle.

See *also id.* at 166-67; HOSPERS, *supra* note 10, at 46.

Justice concerns the *right outcome* in distributions of resources and opportunities. Fairness amounts to the *right political structure*, where each person exerts more or less equal influence and a legislative supremacy protects the majority's right to make law. Procedural due process adds up to the *right procedures*, in an equitable enforcement process that (as law and economics creeps in) strikes a balance between accuracy and efficiency. Included are a strict view of precedent, deference to legislative history, and allowing local preferences to take priority wherever possible. EMPIRE, *supra* note 1, at 164, 166-67, 403-05, 411. An example of the mediumistic nature of due process is the extreme view that whatever happens under fair procedures is just. See *id.* at 177. This is something most citizens and politicians who are, e.g., watching "criminals" go free on procedural "technicalities" would never accept. Some legalistic minds find it quite plausible, however. Dworkin's value system can operate as he intends only if there is a consensus over the rightness of outcomes, structures, and procedures. This is a rather unlikely eventuality. See *infra* notes 51-54 and accompanying text.

called justice. Justice is defined as equality in the distribution of resources, so liberty is presumably relegated to the subordinate, constraining role described by "integrity of process." Perennial conflicts between liberty and equality cannot be dealt with evenhandedly and resolved to the satisfaction of conservatives when liberty is given a subordinate role; equality is more likely to win out over liberty under Dworkin's scheme, which runs counter to the usual outcome in the United States.²³

But there may be no way to resolve the liberty/equality dilemma to the satisfaction of all or even most, and Dworkin obviously cannot solve all of the problems of political and legal philosophy in any one book. *Law's Empire* should serve to increase the sense of harmony among jurists on many topics. Many of Dworkin's arguments are compelling, and they seemingly grant concessions to dissidents by incorporating more from the rival theories of conventionalism, natural law, and pragmatism than Dworkin lets on.²⁴ He also admits that the "off duty" philosopher will likely argue mat-

23. *EMPIRE*, *supra* note 1, at 403. See *id.* at 188, 310; *id.* at 222-23 ("most working political theories" recognize "individual rights as trumps over . . . policy" concerning the equalization of wealth); *id.* at 297-98 (rejecting libertarian or "natural" and welfare-maximizing definitions of property rights, in a preemptory fashion); *supra* note 22; *infra* notes 46, 59 and accompanying text.

Dworkin does admit that due process, fairness, and justice sometimes conflict with each other and with integrity, particularly when the majority's interests conflict with those of a minority. *EMPIRE*, at 178, 188, 218-19. See *id.* at 218 (products liability laws can violate integrity); *id.* at 341 (an example arising under the Endangered Species Act, where Dworkin arguably defines away the conflict between environmentalists and pro-growth advocates). Libertarians and egalitarians nevertheless share a sense of the rough boundaries of justice. *Id.* at 73, 75.

There is little discussion of the socially-significant conflict between liberty and equality in *EMPIRE*, perhaps to minimize the messy compromises necessary where conflicting rights are taken too seriously; the reader is left to infer that (liberty) rights *sometimes* stop redistribution (justice, defined as equality of resources). But the liberty/equality conflict is treated as a *political* problem in *PRINCIPLE*. Liberals value equality more, and conservatives value liberty. *PRINCIPLE*, *supra* note 1, at 189. The suggestion is that this conflict over cardinal principles must be resolved politically rather than by law-as-integrity, resolved in terms of how many legislators and judges each side can muster. Dworkin does say that justice requires "some" protection of the successful and "some" sovereignty over personal possessions, *id.* at 200, but how much? At times, Dworkin seems to argue that the Equal Protection clause can, and should more often be, a canon of redistribution, subject to the constraints of other rights. See *id.* at 310-11.

24. Much in the values Dworkin espouses can plausibly be termed "mediumistic" because they represent the conventional wisdom of Anglo-American lawyers that is based on training, convenience, satisfaction with tested results, etc. The very categories Dworkin uses blithely, because he cannot re-invent all of law in one book, are based on conventions about what, e.g., counts as a "tort." See S. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* 204-10 (1985); Alexander, *Conventionalism*, 2 *ENCYCLOPEDIA OF PHILOSOPHY* 216 (1967); *EMPIRE*, *supra* note 1, at 114-15, 251; *supra* notes 22-23 and accompanying text.

Compared to conventionalism, integrity may thus be a somewhat similar and a somewhat better account of our law. There will be disagreement about conventions, *EMPIRE*, at 122, and about values of integrity too. The absence of an important convention means the loss of a

ters differently.²⁵ This can be seen in his pragmatic, somewhat ethnocentric *New York Review of Books* discussion of recent legal events in Argentina.²⁶

connection between law and fair warning. *Id.* at 141-42. But such a connection is tenuous or even absent when a judge makes new law by applying canons of integrity. Wise adjudication always requires the "right" balance between predictability and flexibility, yet integrity is said to constrain judges more than does conventionalism or pragmatism. *Id.* at 147, 261. *But see id.* at 371; *supra* notes 22-23 and accompanying text; *infra* notes 52, 54-55 and accompanying text.

Something like Dworkin's principle of justice (equality of resources) can be made more specific, to decide cases, in an almost infinite number of ways. Those specifics which get accepted become conventions of a "selective subjectivism:" matters of legal technology, the range of viable political and personal preferences, accidents of circumstance, etc. *See* Alexander, *supra* note 22, at 217-19 (*quoting* A.S. Eddington at 217). The specifics become conventional symbols of justice: "A is a sign of B because human beings have made it so," not because there is a natural relationship in which, e.g., clouds are a sign of rain. HOSPERS, *supra* note 10, at 48.

See supra note 4 on the relationship between Dworkin's ideas and theories of natural law. In *EMPIRE*, Dworkin seems to conflate a dichotomy much beloved by positivists, between the law as it is and as it ought to be: If Hercules said plaintiff "has no legal right to win but has a moral right that he proposes to honor, he would be *misstating* his [integrity-informed] view of the matter." *EMPIRE*, *supra* note 1, at 262. The community would be outraged if Hercules chose other than the best, from the standpoint of political morality. *Id.* at 263. This suggests that all conflicts are to be resolved in favor of what law ought to be, a proposition favoring natural lawyers that positivists could not accept. Legal positivists *may* be declining in numbers, but positivism has received a powerful shot in the arm from economists pondering law. *See infra* notes 44-47 and accompanying text.

Like pragmatism, integrity is reluctant to accept or reject whole chunks of doctrine. Both theories seek to respond to social needs and to reflect a continuity between law and political culture. They both recognize a plurality of *a priori* principles and categories, pigeonholes where judges must often fit their decisions so as to conform to public opinion and to avoid uprooting large areas of the law. Pragmatic judges and their law-as-integrity brethren must sometimes choose between conflicting principles, where the scope of past decisions is unclear and controversial. Historical consistency is not valued for its own sake, and all judges must go on to win public support for good decisions. This gives a futuristic orientation to legal pragmatism and to law-as-integrity, a willingness to trade some predictability to gain the flexibility needed to attain reformist or Progressive goals. Both theories recognize the evolutionary character of interpretations of principles and categories, and the evolutionary legal system that results. *See* Beardsley, *supra* note 10, at 30-31; Thayer, *Pragmatism*, 6 *ENCYCLOPEDIA OF PHILOSOPHY* 430, 435 (1967) (discussing the ideas of C.I. Lewis); *EMPIRE*, at 95, 148-49, 153, 158-59, 163, 252.

Dworkin does admit that integrity represents a going beyond elements of conventionalism and pragmatism. *Id.* at 95-96. He may properly criticize an "activist" judge for pursuing a "virulent form of legal pragmatism. . . ." *Id.* at 378. But a judge pursuing integrity would also have to be fairly activist in order to reform the legal system to the point where it plausibly resembles the ideal Dworkin describes. There is even some of the instrumental, predictive quality in integrity that he associates with legal realism. *See id.* at 36. But Dworkin is not nearly so skeptical as the realists. *See infra* note 26 and accompanying text. This leads him to denigrate the Critical Legal Studies "School" (the successor to legal realism) while seeking to co-opt it. *See infra* notes 37-39 and accompanying text.

25. PRINCIPLE, *supra* note 1, at 173.

26. Dworkin, *Report from Hell*, *NEW YORK REVIEW OF BOOKS*, July 17, 1986, at 11.

It is clear, however, that there is little of the positivist or skeptic about Dworkin. This is bound to limit his appeal to those "barbarians" he courts as such: the skeptical advocates of Critical Legal Studies (conventionally termed Crits), and the positivist, often skeptical proponents of an economic approach to law.

STRATEGY

For jurists, economists and Crits are barbarians because they do not automatically adopt the Empire's methods and culture. These rebels skeptically question the reliability of jurisprudential truths, with no fear of putting their, or law's, salvation at risk. This is fatal to a comprehensive system like Dworkin's; as in theology or the sociology of a consensus, the rest of a harmonious system must be accepted on faith while each of its elements is "proved" correct, one at a time. With bellicose language and rather overdrawn analyses, economists like Richard Posner and Crits like Duncan Kennedy try to provoke legal philosophers into abandoning their citadel and starting afresh from different first principles. Debates grow inefficient, generating more heat than light, when the jurists reply in kind. Dworkin puts it politely: "Incredibly, our jurisprudence has no plausible theory of theoretical disagreement in law," of how disagreement is possible

Although an Argentinean commission report finds "ultimate brutality and absolute caprice" by the previous military regime, *id.* at 12, Dworkin approves a pragmatic rather than a principled solution: "Argentina needed to bury its past as well as condemn it, and many citizens felt that years of trials would undermine the fresh sense of community . . . which would be unwise in a nation where military coups have become almost a ritual." *Id.* at 14. This makes sense because there are degrees of guilt in crimes against humanity, because the Argentinean polity and economy are fragile, and because it is "desperately important" to Latin America that the Alfonsín Government succeed. *Id.* at 15-16.

Argentina "is one of the few governments in the region firmly committed to constitutional democracy in our own sense, one of the few we can respect unreservedly." *Id.* at 16. Fine, but do we "respect" Argentina by bending our own principles, especially when some Argentineans, objecting to too few and modest punishments imposed too slowly, seem to echo our principles? Dworkin may believe that this is the best we can expect from a country which is "not like us." LAW'S EMPIRE, after all, defends "an interpretation of our own political culture, not an abstract and timeless political morality. . . ." EMPIRE, *supra* note 1, at 216; see *infra* note 58 and accompanying text.

Dworkin discusses one "principle" which seeks to circumvent Nuremberg-style problems: government can be held accountable under law, without *ex post facto* changes in Argentina's criminal law or procedure. Thus, the defense of superior orders remains available to lower-ranking soldiers in some circumstances, and military courts can, if they choose, oust the jurisdiction of civilian courts over military personnel. *Report from Hell*, at 14, 16. But Dworkin ignores an evolving but fairly definite *international* law of human rights, which is *not ex post facto* the events in Argentina and which could be applied by its civilian courts. The events Dworkin describes could indeed be regarded as a missed opportunity to take a step on the long road to an *international* community of principle, the kind of community Dworkin seeks for Britain and the United States. See *infra* notes 31-35 and accompanying text.

and what it is about.²⁷ The “theory” Dworkin proceeds to create is certainly as “plausible” as a theory about theory can be, but he begs the question of whether this meta-theory should come from a “jurisprudence” rejected by a significant and apparently growing number of the debaters. At stake is nothing less than: whose Empire is it anyway, and who then are the barbarians?

Dworkin’s treatment of skepticism offers too few incentives for the skeptics to join in his enterprise. He does admit that Anglo-American lawyers are skeptical about the possibility of right answers. But some other theorists would add their skepticism about the relevance of some or many of the questions in legal philosophy, questions like those Dworkin says judges and legislators should and actually do ask. The right answer can be located, economists like Posner would argue, but not through the medium of jurisprudence. Attacking an “internal” (to jurisprudence) skepticism with vigor, Dworkin seems to underestimate the extent to which jurisprudential values (e.g., justice, fairness, and due process) and/or principles conflict. He asserts that a “schizophrenia” of unstructured and disconnected doctrines — the entropy leading to legal chaos stressed by some advocates of Critical Legal Studies (Crits) and by some legal realists before them — will never prevail.²⁸ We may wish to believe, and thus be comforted, but we would do well to demand the rigorous proof of this matter that Dworkin has not yet supplied. Past and present experience offers little hope for judicial decisions of so consistent an excellence that pockets of legal incoherence will not be left to grow like cancers in our body politic.

The Crits’ aesthetic principles, if they can be called that, have works of art created out of communitarian visions (perhaps a mural spontaneously drawn on a ghetto building), created by an indeterminate process (a more randomized Jackson Pollock), or created by the fiat of a particular critical community (presumably the Crits’ deconstructionists as well as, e.g., the American Bar Association’s conventionalists). Rights then become either less than they seem to Dworkin, or more. For example, some rights may

27. EMPIRE, at 6, 11. The theory of disagreement concerns what is the best that law can be. See *id.* at 160. Economists might accept this, while Crits might see a need to account for how bad law is and can be. For some Crits, this is a precondition to making law better — a proposition Dworkin rejects. See *infra* notes 31-33 and accompanying text.

28. EMPIRE, *supra* note 1, at 407; PRINCIPLE, *supra* note 1, at 3, 175. See Popkin, *Skepticism*, 7 ENCYCLOPEDIA OF PHILOSOPHY 449, 457 (1967); *id.* at 458 (most thinkers today are covertly skeptical “about the possibility of attaining knowledge concerning reality”); EMPIRE, at 83, 153, 271-72; *supra* note 13. Dworkin makes some telling points, however. Skeptics who nevertheless believe slavery to be wrong are just playing a game which they assume can be distinguished from the real world; the supposed absence of an “objectivity” makes no difference to the result they would reach, based on their belief. On one account, skepticism is self-defeating because the skeptic must adopt a moral point of view to criticize morality. PRINCIPLE, *supra* note 1, at 173-75. See *id.* at 174.

gain importance because they illustrate the workings of altruism or of the economic substructure.²⁹ The Crits' aesthetic principles differ from Dworkin's chiefly in that they disparage his mediumistic values, as self-imposed limitations drummed into students at art and law schools. Dworkin seeks to co-opt some Crits by finding them committed to law-as-integrity, and he makes strategic concessions to all Crits. He claims to share with the Crits the desire to demystify law, perhaps helping to create a new legal mystique in the process. He values Crit demonstrations of the need consciously to maintain a legal coherence, and agrees with their stress on political convictions, ideology, and power as determinants of legal outcomes.³⁰

The most significant, though far from total, concession *Law's Empire* makes to the Crits is Dworkin's new concept of the "community of principle." To fulfill the promise of law-as-integrity, everyone in this community, not just judges and legislators, must regularly reflect on the consequences of their commitments to principle. Crits are presumably pleased when Dworkin traces his notion of community back to the French Revolution concept of fraternity, but he does not go on to demonstrate fully how something like Rousseau's "general will" emerges from the collectivity. Community membership is seen by Dworkin to "attract" obligations, just like family, scholarly, and neighborly relations do. An active commitment to an equal concern for all people supposedly breeds, even while people remain divided in interest and over attitudes toward political morality and wisdom.³¹ With a certain amount of sleight-of-hand from Dworkin, egalitarianism becomes somewhat more consistent with the individualistic rights through which a self-interest is asserted.³²

Dworkin's seems the kind of organic community reflected in glorifications of the *Volk* by some nineteenth (and, alas, twentieth) century Germans, and reflected by those Crits apparently bemused by the commune movement of the late '60s and early '70s. They all see the community as a happy family, where occasional quarrels among rough equals do not weaken the bonds of communal authenticity. Assuming that an unrealistically high

29. See Beardsley, *supra* note 10, at 32; Clark, *supra* note 1, at 52, 54; EMPIRE, *supra* note 1, at 272-73, 408. But see also PRINCIPLE, *supra* note 1, at 150.

30. EMPIRE, *supra* note 1, at 272-75, 408. See *id.* at 275.

31. *Id.* at 1, 96-97, 188, 196, 198-200, 411, 413. Dworkin distinguishes three types of community. The community of *circumstance* is based on accidents of history and geography; agreements are kept only so long as they are mutually advantageous. In the *rulebook* community, rules generate obligations on the basis of negotiated compromises rather than a commitment to principle. The community of *principle* takes a more generous and comprehensive view of shared understandings; outcomes may be unjust but at least checkerboard solutions and unprincipled compromises are condemned. *Id.* at 209-14. See *infra* note 45 and accompanying text.

32. See EMPIRE, *supra* note 1, at 299-300, 408 (arguably a less elegant theory of justice than Rawls').

degree of consensus will emerge, they all see that the community can be a single moral agent acting out a single, coherent set of principles. This feat is accomplished through a personification of the community which, in Dworkin's hands, takes a form few Critics could accept: an analogy to the corporation-as-a-person. For Dworkin, corporate and community responsibilities are akin to a sense of personal responsibility, and the responsibilities are felt to be binding even by those who are not at fault or even in control.³³ Recent books by Bellah and Walzer³⁴ demonstrate how difficult it would be to achieve a community of principle. Ours is not a society simple enough to be joined by the single bond of principle, with a potent recent history to unite us and few conflicting commitments to divide us. We are indoctrinated with individuality to the point where it is hard to find even the language to express a commitment to community. "Lifestyle enclaves" serve as seductive substitutes for community and forestall its formation. The alienation and anomie some sociologists observe in some of us make it unlikely that community moral guidance will have the effects Dworkin desires.

Having recognized a "personification mistake" by economists,³⁵ Dworkin should be more sensitive to the risks of making a similar mistake. Like Rousseau, he sometimes seems to confuse the community with the state. Roscoe Pound, some Critics, and some economists effectively demonstrate that the community and the state can have very different and conflicting interests. The only response Dworkin makes is that community integrity serves as an (apparently rather weak) "constraint" on actions by what can

33. See *id.* at 166-70. For example, we apply facsimiles of personal responsibility to a corporation in a products liability case, because no single employee has full control over manufacture. *Id.* at 170 (a process by which individual responsibility is often circumvented, however). Likewise, "white Americans who inherited nothing from slaveholders feel an indeterminate responsibility to blacks who never wore chains." *Id.* at 172 (a statement which seemingly cannot be true of all "white Americans"). This is the political integrity of the community personified, since it otherwise seems incompatible with principles of not blaming those who were not unjustly enriched or who had no control over the perpetrators. *Id.* One problem with analogizing the community of principle and the concept of the corporation is that this concept is often little more than a legal fiction; it is invoked so that our legal system can somehow deal with a collectivity and still retain an intense individualism inconsistent with the sense of community Dworkin pursues. The personification of the corporation occasionally enables and perhaps encourages a collectivity to act in the unprincipled fashion Dworkin presumably deplores: e.g., pursuing profit maximization or managerial welfare, to the exclusion of other values.

Dworkin and some Critics arguably underestimate the difficulties in building a sense of community, just as some economists and political scientists exaggerate the difficulties under theories of an interest group pluralism. See *infra* notes 45, 48-49 and accompanying text. How, for example, can the many, cross-cutting sub-communities, which James Madison described in *Federalist* No. 51 as controlling the "vice of faction," be brought together?

34. See R. BELLAH, *HABITS OF THE HEART* 7-8, 19, 333, 335, *passim* (1985); M. WALZER, *EXODUS AND REVOLUTION* (1985); Abrahms, *Kitsch and Community*, 84 *MICH. L. REV.* 941 (1986).

35. PRINCIPLE, *supra* note 1, at 240, 249.

be a strong and determined state. Dworkin's community *may* be conscious of its identity, but it is difficult to see how it, as opposed to the state, can be held responsible for acts and omissions — including failures to constrain the state.³⁶

Dworkin does not go the whole communitarian hog with the Crits for whom, apparently, "the only good is the communal good" and law must be purified of the "individual rights that corrupt the community's sense. . . ." ³⁷ He finds in Crit analysis a defective account of liberalism — hardly a surprise since few Crits claim to be liberals. Dworkin flatly opposes the Crit conclusions that legal culture is incoherent and that it can be grasped only through what he calls "the infertile metric of contradiction."³⁸ This remark can perhaps be allowed to pass with the observation that analysts have as much trouble applying the Hegelian dialectic on alien American soil as Dworkin would have in criticizing their results. Criticizing the Crits, Dworkin has not, as Holmes recommends, entered into their theory with a hypothetical sympathy. Dworkin would then have to show that Crit demonstrations of law at its worst are of no value, that the avenues to significant legal change are in fact open, and that Crit mystifications and political goals are necessarily worse than the old ones. Absent such proofs, Crits can thumb their noses and plausibly argue that Dworkin's analyses and values are not necessarily the best account to be given of an authentic existence under law.³⁹ His theory may reflect, rather, the unattractive subconscious desires and improper bases for action that some Crits enumerate, the systematic errors fostered by a political and economic system benefiting from the errors.

Dworkin takes "THE ECONOMIC INTERPRETATION" of law⁴⁰

36. See Danto, *Persons*, 6 ENCYCLOPEDIA OF PHILOSOPHY 110, 111 (1967) (citing Kant); EMPIRE, *supra* note 1, at 166, 190, 401; *id.* at 188 (discussed *infra* note 55). For Dworkin, government is "the community personified," EMPIRE at 296: i.e., the rather confusing and manipulable personification of a personification. Government thus has the duty, the pervasive public responsibility, to take the interests of all within the territory equally into account. *Id.* But see *infra* note 45, and accompanying text (the contrary view, from law and economics).

37. EMPIRE, *supra* note 1, at 408.

38. *Id.* at 272, 275. See *id.* at 274: Crits claim that constitutional and main doctrinal lines can only be justified as liberal views of personality and community. Perhaps, but Crit theories are much less individualistic than those incorporated by Dworkin.

39. See Beardsley, *supra* note 10, at 33. But see also PRINCIPLE, *supra* note 1, at 172.

40. EMPIRE, *supra* note 1, at 276. Dworkin cannot purport to encompass all of law and economics within a discussion of the law of accidents, but he does give a useful discussion of the Coase Theorem and complexities arising under it. See *id.* at 276-85. For Dworkin, economics "argues that common law judges, at least, have on the whole decided hard cases to maximize social wealth, and that they ought to decide such cases in that way." PRINCIPLE, *supra* note 1, at 237. Their argument turns on an easily misunderstood wealth maximization, which cannot be equated with Pareto efficiency and which equates value with the willingness and

more seriously than he does Critical Legal Studies. He enters into economic theory more fully and grants it more concessions. The economist, co-opted as “[a]nother philosopher of our law,” sees law as “*more* thoroughly utilitarian . . . *more* consistently and accurately devoted to maximizing the *uncritical* satisfaction of people’s overall preferences.”⁴¹ Dworkin’s argument seems one of: I am a utilitarian too, but not by as much as the economist. This admission must hurt, since Dworkin’s aesthetics of integrity are designed to counteract crass theories like neoclassical economics, where the only concern is with the utility of an art-object — its financial value and its instrumental role in maximizing the wealth of society. Nevertheless, *Law’s Empire* argues that, like the Crits, economists respect and use integrity while constructing chain novels of epic dimensions.⁴² This may be so or it may reflect a co-opting of rebels against Law’s Empire. Crits and economists seem to be using very different texts — perhaps Jack London’s and Horatio Alger’s or Theodore Dreiser’s respectively — under the influence of critics so very different in approach that there is no joining of issues, either between themselves or with Dworkin.

Dworkin makes many concessions to economists,⁴³ the crucial one be-

ability to pay. *Id.*

41. EMPIRE, *supra* note 1, at 408 (emphasis supplied). At one level, Dworkin says little more than that law and economics, as he defines it, does not necessarily amount to a philosophical utilitarianism, as he defines it. Many economists would agree or dismiss the matter as irrelevant. But Dworkin makes some telling points which suggest that it is still fair to term law and economics a utilitarianism in another guise. E.g., sadistic racial bigots might be so numerous that torturing a black person would increase overall happiness. *Id.* at 290-91. This is the kind of issue, like slavery, sex discrimination, etc., with which law and economics has trouble coping. See *id.* at 294: Personal autonomy would collapse if a market-simulating duty exists. This duty never sleeps, and I could perform only those activities for which I would and could outbid others. *Id.*

42. *Id.* at 408-09. See HOSPERS, *supra* note 10, at 36.

43. E.g., integrity promotes efficiency. When people accept governance by standards as well as rules, the standards can be expanded or contracted to deal efficiently with new circumstances, and to allow people to experiment to reach the best result. EMPIRE, *supra* note 1, at 144, 188. The explicit goals of integrity — justice, fairness, and due process — are at one juncture stated to be in addition to creating wealth. *Id.* at 243. But this leaves open the question of how courts are to balance wealth against the explicit goals more fully elaborated by Dworkin. Due process is defined as a judicial balance struck between accuracy and efficiency. *Id.* at 166-67. Others might define efficiency as a watering down of due process protections. The connection between law and fair warning is maintained, not necessarily because surprise is unfair but because it is inefficient — it imposes unnecessary risks. *Id.* at 141-42. We take relative costs into account when making moral decisions about, for example, whether or not to run sparking locomotives through dry grain fields. *Id.* at 302-03. If compromise is impossible, “we must act as if the concrete rights we cannot both exercise had not yet been distributed between us, and we must distribute these ourselves as best we can. . . .” *Id.* at 303. This is exactly what many economists would advocate, but on the basis of a willingness and ability to pay for rights rather than Dworkin’s standard: “in the way equality of resources commends.” *Id.* See also *id.* at 253 (limited concessions to economics in drawing the distinction between nuisance and negligence); *id.* at 302 (quoted *infra* text accompanying note 45); PRINCIPLE,

ing his admission against interest that economics passes integrity's threshold test of a good "fit" between theoretical principles and actual outcomes. He goes on to argue that economics does not justify the legal process as well as integrity does, but many economists would, as positivists, dispute the relevance of such a justification. For them, there is simply no need to plug Dworkin's moral duty into economics: advancing the good of the community by avoiding injury to others or compensating them when injury occurs.⁴⁴ A self-interested rationality, operating through markets, serves as an adequate constraint on behavior for many economists, and their principles of efficiency and wealth maximization create a consistency of result which Dworkin cannot hope to match. His explicit pursuit of justice, fairness, and due process is thus both unnecessary and inefficient.

Many economists' notions of community are as skeptical as their marketplace notions are naive. To generalize, their community is one of negotiated compromises among antagonistic interests. Bargains are kept only as long as the benefits of doing so exceed the costs. Values and rights are relative and subjective because they are allocated in a "porkbarrel" fashion within a community which is no greater than the sum of its interest-group parts. This is the antithesis of Dworkin's community of principle, and he argues forcefully against the economists' community but is unable to damage it much. Most accounts of legislative and judicial processes show that little effort is consistently made to put everyone in the fair and just position Dworkin espouses. Economists can plausibly argue that, contra Dworkin, it is all but impossible for legislators to act for the good of the entire community and on the basis of a scheme of political morality. Judges often implement the interest—group bargains we call legislation, rather than the values Dworkin associates with the integrity of a community of principle.⁴⁵

We can expect many economists to object strongly to Dworkin's notion that equality should prevail in the distribution of resources. Anticipating their criticism, Dworkin rejects the rival wealth-maximizing distribution of resources he attributes to economists because it forces private choice to compete with public responsibility. Positivist economists would presumably respond that a public responsibility is identical to a private choice, con-

supra note 1, at 194 (discussed *infra* note 46).

44. EMPIRE, *supra* note 1, at 284-86.

45. See Landes and Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. AND ECON. 875 (1975); Niskanen, *Bureaucrats and Politicians*, 18 J.L. AND ECON. 617 (1975); Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. AND ECON. 211 (1976); PRINCIPLE, *supra* note 1, at 249 (economists' personification of the community silly and malign); *supra* note 31. But see also EMPIRE, *supra* note 1, at 209-10, 243-44, 344. If the theory of interest—group pluralism is plausible — and it has certainly convinced many American political scientists as well as economists — Dworkin cannot maintain that, for example, certain kinds of legislative history are especially good evidence of "public opinion." But see *id.* at 42.

strained by market forces, and no competition arises between the two. But Dworkin is right to insist on some demarcation of private and public spheres, if for no other reason than this offers another way of considering the liberty/equality dilemma.⁴⁶

He asks: Why is the wealthier society "better," when wealth is but one component of a social value that includes happiness, utility, and fairness in distribution?⁴⁷ But if wealth doesn't matter much, why do so many pursue

46. *Id.* at 297-98; *supra* note 23 and accompanying text. An egalitarian distribution requires that the costs of satisfying one's preferences be as close as possible to the costs of satisfying another's. This is a market-like efficiency solution. PRINCIPLE, *supra* note 1, at 194. Many economists would disagree, reasoning that the "free" market, rather than one constrained by Dworkin's principle, determines efficient solutions. An equality in the cost of, e.g., preference-satisfying opera and rock concert tickets will occur only by accident. Dworkin argues that the "market produces both the required and the forbidden equalities," *id.* at 196, a normative judgment most positivist economists could not accept. Dworkin acknowledges this by noting that the market represents equality of opportunity for conservatives, an equality which will be denied if an equality of result is sought. *Id.* at 201. Many economists would also reject as contrary to wealth maximization the special allowances Dworkin makes in his distributive scheme for an inequality of talents, for the effects of an ancestor's skill or luck in generating wealth, and for the needs of the handicapped. *Id.* at 195.

Dworkin would require people to treat others as equals, not when *using* what the system assigns them but when deciding *what* the system assigns them. The latter issue raises the question of what the system should be taken to be, and thus calls for a public responsibility. EMPIRE, *supra* note 1, at 302. This is impossibly altruistic for many positivist economists, for whom self-interested behavior in markets best determines assignments (distributions). See *infra* notes 50-51 and accompanying text. They might also deny the relevance of Dworkin's distinction: the value and even the nature of resources can only be determined by using them, by thus establishing their opportunity costs. Such economists would not adopt Dworkin's equality in the distribution of resources because it would not maximize social wealth.

It is also possible that applications of Dworkin's principles to generate an equality of resources will result in empty or minimal rights. After each individual receives her justly-earned share, there may be too little left over for redistribution — a potential problem for Rawls' theory of justice as well. Dworkin would use rights to trump wealth maximization so as to, for example, secure the independence of each against the others' prejudices and dislikes. If these are allowed to influence market transactions, the results become less sensitive to the "true cost" of choices: my child's life depends on a noisy ambulance that others, annoyed by the noise, will pay more than all I have to eliminate. EMPIRE, at 307. See PRINCIPLE, *supra* note 1, at 253 (discussed *infra* note 49). (This example assumes that the costs of annoyance would not be voluntarily absorbed by the sufferers, out of an altruistic regard for those in peril.)

Economists might disagree with Dworkin's conclusion, finding the noisy ambulance to be wealth maximizing: the benefits of the child's life, *plus* the benefits of avoiding accidents between the ambulance and other motorists (their insurance companies would "bribe" the ambulance or the legislature to require use of the siren), outweigh the costs of annoyance. Further, having abandoned marketplace measurements of cost, Dworkin would find it difficult to demonstrate what the "true cost" is. In any event, individuals often vote for ambulances in a legislative "market" because the costs of noisy ambulances are outweighed by the benefits of their use, even after the benefits are discounted in each individual's mind by the probability of having to use the ambulance and being unable to then bribe his way into it.

47. EMPIRE, *supra* note 1, at 288; PRINCIPLE, *supra* note 1, at 240. See *id.* at 242, 245-

it so avidly, regardless of happiness, fairness, and a low probability of success? Perhaps Americans (at least) are pursuing a culturally-induced goal which serves to deny the possibility of a community of principle, a wealth goal of which economics theory is an effect as well as a cause. Once again, many economists would deny the relevance of Dworkin's normative judgments about better and worse societies, and see them as attempts to return economics to the inferior (unscientific) status of a moral philosophy. It is not the positivist economists' responsibility to inculcate virtue. Despite his desire to make war against positivism, Dworkin fails to account for the virulence of an economics positivism.

He nevertheless makes some arguments which tell against the economists' expansionist legal enterprise. An analysis which assumes the adequacy of the scheme already in place is "a grotesquely circular and feeble weapon" for pursuing the public interest.⁴⁶ Dworkin seems to recognize that if we do not believe in the existence of something called the public interest, we may never look for it and attempt to express it; finding the economists' interest—group pluralism plausible, we may come to accept their theory as the only possible means of governance and thereby prove economists correct by default. Intuitively at least, government must be something more than the alternative supplier of household inputs that some economists make it out to be.

If a democratic society entails a democratic economy, Dworkin attempts to describe what such an economy would look like under his canons of justice and fairness. The line must obviously be drawn somewhere, between an aggressive enforcement of rights and an amoral wealth maximization that would ignore or relegate rights to the status of interest—group preferences. Dworkin probably goes too far in treating rights as trump cards against marketplace results, but some economists go much too far in having the market inevitably trump and even define rights. A mid-point, an appropriately "mixed" economy, must be found between an economist's privatizing of all life and Dworkin's turning of life's responsibilities into something rather more public (in a community of principle) than many

46. Integrity prefers a consistency of principle over a consistency of policy. *See supra* note 15. Economists might find this notion strange and even incomprehensible. Dworkin considers the economists' favorite policy in the area of torts — choose the principle for accident compensation that minimizes community accident costs — and concludes that it is "far from obvious" that economists are stating any principle of justice here. *Id.* at 242; *see also id.* at 282. Any principle could apparently override this mere policy.

48. *Id.* at 310. *See id.* at 323, 328-29. Dworkin argues that positivism cannot cope with "hard" cases, PRINCIPLE, *supra* note 1, at 147, but many economists would disagree concerning an economics positivism. It seems that economic analysis gives rise to "hard" cases that are different from Dworkin's, situations where it is unclear which is the efficient or wealth maximizing result.

Americans would tolerate.⁴⁹

Having held out against the economists with some success, Dworkin nearly gives the game away by noting that choices among legal rules will be directed "to market simulation in most ordinary cases" where rights compete.⁵⁰ This leaves the door open for efficiency and wealth maximization (principles of "market simulation") to serve as tie-breakers in the situations — which are much more common than Dworkin recognizes or admits — where rights, principles and/or values conflict. The door remaining open, certain economists will rush in headlong. They can, like Dworkin, assert a consensus without proving its existence. Their consensus (over the pursuit of wealth and efficiency) is corroborated fairly convincingly by a public abhorrence of policies perceived as welfare programs and of a broadly-defined waste in government. Economists can argue that such a consensus will prevail unless and until Dworkin or others demonstrate a consensus to do something different.⁵¹ Like those of the Crits, many economists' arguments serve to increase substantially Dworkin's burden of proof: showing the actual or potential existence of a community of principle committed to the values of integrity.

THE TACTICS OF STRATEGY

Many would want their legal system to display integrity. We would agree with some or many of the meta-virtues Dworkin describes, yet dispute the results in concrete cases about abortion, school prayer, and even the parol evidence rule. A consensus over principles, which Dworkin states but does not prove, combined with a dissensus over results, which he admits, would achieve little more than to shift the topics for discursive disagreement.⁵² If a reader, a Crit or an economist for example, leaves the "argu-

49. See PRINCIPLE, *supra* note 1, at 196-97, 252. Dworkin does, however, ignore the possibility that different types of rights would be appropriate for different facets of a democracy's economic system: for marketplace decisions, a Keynesian economic stabilization (under, e.g., the Full Employment Act of 1946), or an industrial policy or selective centralized planning. He offers an example challenging to economics: if A is B's slave, A cannot afford to buy this right from B. A might borrow the money, but this would presumably lead to an equally distasteful life as "the slave of the First National Bank (of Chicago, of course)." *Id.* at 253-54. If A were not B's slave, B would not be able to buy this right from A. *Id.* at 253. This and other analyses lead Dworkin to the plausible conclusion that, in economics, "we cannot specify an initial assignment of rights unless we answer questions that cannot be answered unless an initial assignment of rights is specified." *Id.* at 253.

50. EMPIRE, *supra* note 1, at 302.

51. See Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 MINN. L. REV. 1015 (1978); Posner, *Some Uses and Misuses of Economics in Law*, 46 U. CHI. L. REV. 281 (1979). See also *supra* note 23 and accompanying text.

52. See EMPIRE, at 73, 75, 164-68, 178-79; *supra* notes 16-18, 23 and accompanying text. Not very long ago, liberalism was a consensus political theory in Britain and America, at least among political philosophers. There was consensus over improving the chances of each to

ment early, at some crucial abstract stage, then I [Dworkin] have largely failed for him. If he leaves it late, in some manner of relative detail, then I have largely succeeded. I have failed entirely, however, if he never leaves my argument at all."⁵³ This is fine stuff, a charming liberal disarming his critics. His tactic is to hypothesize critics and then describe them as more or less important. These critics can come to resemble straw men, especially when the reader thinks of more and better criticisms than Dworkin invents. It is not that he is being unfair; his approach merely reflects the difficulty of anticipating criticisms based in other systems when you are deep within your own.⁵⁴

Dworkin pursues consensus so avidly and attacks skepticism so strenuously because he feels the need to legitimate his vision of the legal system. Like others who worry over retaining the power of unelected judges in a democratic society, Dworkin tries to augment the authority of contentious decisions and, ultimately, of all principled exercises of state coercion. His argument is that those who take the benefits of political organization — improvements in their welfare, judged in some politically-neutral way — must take the burdens as well.⁵⁵ Some economists and Critics would deny the

live the life he/she thought best, and over decreasing the inequality of resources available for this purpose. But some now think this too generous and expensive a precept, while others find it too divisive and mean-spirited. PRINCIPLE, *supra* note 1, at 4.

53. EMPIRE, *supra* note 1, at 413.

54. *see id.* at 36-37, 263-64; *See also id.* at 263, quoted *supra* note 4; *id.* at 264-65, quoted *supra* note 10. For example, having in effect invented integrity a hundred pages earlier, Dworkin finds that: "No aspect of law as integrity has been so misunderstood as its refusal to accept the popular view that there are no uniquely-right answers in hard cases at law." *Id.* at 266.

Dworkin does usefully pursue the liberal technique of accounting for his convictions in good faith, standing ready to abandon them when better ones come along. PRINCIPLE, *supra* note 1, at 172. Yet, in his crusade against skepticism, there is a great deal of flexibility within his elaborately-defined and -analyzed system, but very little flexibility with regard to considerations outside its ambit.

55. *See* EMPIRE, *supra* note 1, at 37, 117, 153, 159, 188, 190-91, 195; PRINCIPLE, *supra* note 1, at 199. Despite its being a unitary concept *de jure*, sovereignty comes in many shapes and shades *de facto*. Dworkin ignores this, despite his sensitivity to "political practices" at other junctures. He simply asserts: There must be a consensus that legal institutions form a system. EMPIRE, at 91. Here, Dworkin may well be arguing against Critics and economists, whose powerful ideological claims dispute the legitimacy of current political attempts to define concepts such as justice and fairness. They would thus oppose his central argument here: integrity creates a special form of community, promoting its moral authority to a monopoly of coercion by protecting against partiality, deceit, and other forms of corruption. *Id.* at 188. *But see supra* note 36 and accompanying text; Greve, Book Review, 85 THE PUB. INTEREST, 131 (Fall 1986) which states:

[In EMPIRE], Dworkin goes on at length about the parallels between literary and judicial interpretation, but it never occurs to him that coercion and authority might make a crucial difference.

. . . Dworkin's failure to come to grips with authority explains why he does not realize that "law as integrity" is altogether incompatible with "true community." Hercu-

possibility of a neutral political evaluation, but Dworkin's formulation could prove a salutary lesson for the many people who do cost-benefit calculations about particular court decisions and governmental programs. The problem is that people may not trouble to evaluate the system as a whole, or they may, in an unprincipled fashion, accept the benefits and reject the burdens by, for example, "evading" or "avoiding" taxes. Even worse for Dworkin, some people basically accept the system while working so hard against parts of it — Vietnam, abortion, etc. — in so principled a fashion as to delegitimize the process as a whole.

Clearly, then, *Law's Empire* must make the legal system add up so well and function so tightly that people cannot accept the bits they like and reject the rest. But as noted earlier,⁵⁶ Dworkin's justice, fairness, and due process values do not add up particularly well. The "fit" of these components of integrity is apparently to be improved under the most abstract, fundamental, and uncontroversial part of law. This is the concept "that force not be used or withheld, no matter how useful that would be to ends in view . . . except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified."⁵⁷ In the end, Dworkin makes little use of this assertion. It merits further elaboration in relation to the values of integrity.⁵⁸

Dworkin prefers, rather, to spend the last few pages of *Law's Empire* describing "law beyond law," how "law works itself pure" through applications of integrity. A "pure" integrity abstracts what *it* requires from the constraints of fairness and due process; justice then becomes "what the community personified, abstracting from institutional responsibilities,"

lean decisions [see *supra* note 13], imposed by brute judicial force, tend to do very little in the way of promoting a fraternal atmosphere.

[In the liberal tradition, officials are constrained by "highly formal" rules.] When rules are replaced with a muddle of [Dworkin's] "values," official coercion is more readily exercised. Law becomes unpredictable. . . .

56. See *supra* notes 16-18, 22-23 and accompanying text.

57. EMPIRE, at 93. See *id.* at 93-96. This concept is to be distinguished from the conceptions of law that refine it: conventionalism, pragmatism, and integrity. *Id.* at 94. "Concept" is one of the oldest terms in philosophy, remaining useful because of its ambiguity. Heath, *Concept*, 2 ENCYCLOPEDIA OF PHILOSOPHY 177 (1967). A passkey through labyrinths of theory, a "concept" is essentially a dummy expression or a variable assigned meaning by, and only ascertainable through, a theory. *Id.* at 177-78. This seems a fair comment on Dworkin's usage.

58. See EMPIRE, *supra* note 1, at 216: "I am defending an interpretation of our own political culture, not an abstract and timeless political morality." But this is exactly what the "concept" sounds like. Dworkin is unwilling or unable to make much use of it while analyzing "wicked" or "defective" legal systems. See *id.* at 107-08; *supra* note 26. The "concept" is useful precisely because it exists at so abstract a level, above competing explanations of the relation between law and community opinion. EMPIRE, at 97. But see *infra* note 68 and accompanying text.

ought to achieve.⁵⁹ With respect, this is the *deus ex machina* that makes everything come out right in a theory of pure law, much as the *Grundnorm* squares everything in Hans Kelsen's pure theory of law.⁶⁰ Argument at so abstract and utopian a level has its advantages in terms of defining away disputes. But paralyzing disagreements will reappear at the most inconvenient time: just when concrete "hard" cases are being decided, the time when Dworkin claims to be the most helpful. *Law's Empire* thus ends on a mystical note, the same way it begins: "law makes us what we are," the "liegemen to its methods and ideals. . . ."⁶¹ Why don't we make law what it is, as many of Dworkin's other arguments suggest, unless he feels the need for an Imperial law which will turn barbarians into "liegemen"?

There are at least three fundamental and contradictory visions of what the Empire should be. Each responds to the continuing decline of belief in traditional authority, black letter law, and an arid doctrinalism. Each thus seeks a more compelling theory and, except for Dworkin's, more effective policy arguments. Economists see

an individualism which represents a world consisting of independent and self-sufficient persons, confidently drawing up and robustly pursuing their own life plans. . . . The [Crits'] . . . vision flows from a collectivism that views the world as made up of interdependent and cooperating persons. Recognizing the vulnerability of individuals, it encourages greater solidarity and al-

59. *EMPIRE*, *supra* note 1, at 400, 405-07. See *id.* at 400-07; *supra* note 23 and accompanying text.

60. See H. KELSEN, *THE PURE THEORY OF LAW* (1967). Perhaps the best formulation is Kelsen, *Professor Stone and the Pure Theory of Law*, 17 *STAN. L. REV.* 1130, 1139-42 (1965).

Dworkin's process of law working itself pure sounds rather dialectical and Hegelian: "The Absolute Idea is pure thought thinking about pure thought." B. RUSSELL, *Philosophy and Politics*, *UNPOPULAR ESSAYS* 11, 20 (1976) (paraphrasing Hegel). But see also *EMPIRE*, *supra* note 1, at 400; *id.* at 400-01 ("Law as integrity . . . is the idea of law worked pure," subject to the institutional constraints on judges). At this, their highest level of meta-theory, Dworkin's arguments may be too rarified and Germanic to appeal to many American lawyers. Judges could presumably manipulate semantics, symbols, ideologies, and even institutions to escape the strictures of law working itself pure — which is not a very satisfactory aesthetic principle of law either. A work of art is said to be "pure" if it does not combine several arts or media, it excludes content (it is non-representational), and it is not muddled or mixed with nonaesthetic modes: historical reporting, propaganda, or straightforward moralizing. V. Aldrich, *supra* note 6, at 101. It is difficult to imagine so austere and pristine a legal theory, even from Dworkin.

61. *EMPIRE*, *supra* note 1, at vii. Our "most structured and revealing social institution," law commands even "when the lawbooks are silent or unclear or ambiguous. . . ." *Id.* at vii, 11. The Supreme Court is "the most dramatic witness for judicial power. . . ." *Id.* at 2. Law may even be fundamentally flawed, but "it is not a grotesque joke. . . ." *Id.* at 44. Although some Crits would disagree, these statements are perhaps the central message of *LAW'S EMPIRE*: the Imperial dimensions of law in what nevertheless remains a democratic society.

truism. . . . Each vision represents only a partial and incomplete depiction of social life and its possibilities. . . .⁶²

These visions leave a great deal of room for a third, more complete vision from Dworkin.

Economics or critical theory is not a license to run roughshod over the Constitution and precedent. Doctrine obviously does not capture all of the reality in law,⁶³ but there are *some* objective *legal* values in it worth saving. The question is whether Dworkin has identified them correctly and plotted a safe and democratic course between anarchism and authoritarianism. His flexible dogmatics, to be used to implement a moderate preference for equality, are calculated to appeal to those of us who disdain the extremist politics implied by the other visions. Moderate liberals and those moderate conservatives who are appalled by some economists' conclusions may join with Dworkin in his fight to reinstate the power of jurisprudence. But Critics and economists are too smart to fight the battle on Dworkin's chosen ground: "abstract political morality."⁶⁴ This ground would give too great an advantage to the philosopher-king. If this sounds an unfair characterization of Dworkin, consider the striking similarities between the import of Dworkin's arguments and some of those in Plato's *Republic*.⁶⁵ Much in Dwor-

62. Hutchinson, *Of Kings and Dirty Rascals: The Struggle for Democracy*, 1985 QUEEN'S L.J. 273, 282, as quoted in EMPIRE, *supra* note 1, at 442, n.20 (discussing social visions concerning accident compensation law). Hutchinson goes on to say that, "[w]hichever principle [anyone] opts for is simply his preference," *id.* — a laissez faire argument that arguably favors the economists and that may deny the possibility of a workable legal system. Dworkin calls these visions "Law's Dreams," EMPIRE, at 407-10.

63. Clark, *supra* note 1, at 53-54; Reidinger, *supra* note 1, at 65.

64. EMPIRE, *supra* note 1, at 408. *See id.* at 407: "The courts are the capitals of law's empire and judges are its princes, but not its seers and prophets. It falls to philosophers . . . to work out law's ambitions for itself, the purer form of law within and beyond the law we have."

65. Consider, for example, Plato, *THE REPUBLIC* 209-10 (F. Cornford trans. 1945) (Bk. VI., 500-01) (source suggested by Ken Klein, *supra* note 2):

[H]ow will this artist set to work?

He will take society and human character as his canvas, and begin by scraping it clean. That is no easy matter; but, as you know, unlike other reformers, he will not consent to take in hand either an individual or a state or to draft laws, until he is given a clean surface to work on or has cleansed it himself.

. . . .
Next, he will sketch in the outline of the constitution. Then, as the work goes on, he will frequently refer to his model, the ideals of justice, goodness, temperance, and the rest, and compare with them the copy of those qualities which he is trying to create in human society. Combining the various elements of social life as a painter mixes his colours, he will reproduce the complexion of true humanity, guided by that divine pattern whose likeness Homer saw in the men he called godlike. He will rub out and paint in again this or that feature, until he has produced, so far as may be, a type of human character that heaven can approve.

. . . .
Are we now making any impression on those assailants who . . . would fall upon us

kin's philosophy seems to have many of the Platonic strengths and weaknesses, most notably the difficulty of imposing so much philosophizing upon an unreflective democratic society.

Resistance by economists and Critics is no mere guerilla tactic; the redistribution of power that has already occurred in academe forces Dworkin to fight on their chosen battlefields at least some of the time. This is not a bad thing, except when battles merely replicate for law the academic wars of "disciplines" that were frozen into "departments" when we took our model of the university from nineteenth century Germany. In the mainstream of the liberalism that so influenced Britain and America, parts of philosophy, history, economics, political science, and law were all facets of a unified "political economy." Adam Smith, Bentham, Mill, and many others derived their broad theories of justice from this political economy. An updating and a reintegration of its insights is both necessary and an appropriate burden to place on those who claim the title "liberal" by way of succession: Dworkin, many economists, and, if Dworkin is correct, some Critics. No

so furiously when we spoke in praise of the philosopher and proposed to give him control of the state? Will they be calmer now that we have told them we mean an artist who will use his skill in this way to design a constitution?

Despite statements like the one in *EMPIRE*, *supra* note 1, at 111 (quoted *supra* note 12), I would argue that this extract from Plato fairly indicates the enormity of the task Dworkin has undertaken.

Similarities between Dworkin's aesthetics and that in *THE REPUBLIC* are further illustrated by this extract from Book V. (*THE REPUBLIC*, at 177-78; Bk. V., 472-73):

[W]hen we set out to discover the essential nature of justice and injustice and what a perfectly just and a perfectly unjust man would be like, supposing them to exist, our purpose was to use them as ideal patterns: we were to observe the degree of happiness or unhappiness that each exhibited, and to draw the necessary inference that our own destiny would be like that of the one we most resembled. We did not set out to show that these ideals could in fact exist.

Then suppose a painter had drawn an ideally beautiful figure complete to the last touch, would you think any the worse of him, if he could not show that a person as beautiful as that could exist?

No, I should not.

Well, we have been constructing in discourse the pattern of an ideal state. Is our theory any the worse, if we cannot prove it possible that a state so organized should be actually founded?

That, then, is the truth of the matter. But if, for your satisfaction, I am to do my best to show under what conditions our ideal would have the best chance of being realized, I must ask you once more to admit that the same principle applies here. Can theory ever be fully realized in practice? Is it not in the nature of things that action should come less close to truth than thought?

This extract in my view nicely characterizes Dworkin's idealistic, utopian (community of principle) approach, with all the strengths and weaknesses of such an approach done well. When "someone has a belief or conviction it makes sense to ask for its pedigree," *EMPIRE*, *supra* note 1, at 426 n.27, yet Dworkin describes little of his pedigree. For example, there is no index entry for Plato.

sub-specialization in law can dominate, except on the merits of arguments intelligible to the educated non-specialist.

The history of Progressivism and legal realism suggests that economists and Critics will eventually be incorporated into the Establishment (represented here by Dworkin), as effective judges and law school deans who have to defend decisions in ways acceptable to a broader audience.⁶⁶ How, then, will the articles of incorporation read? Key phrases will certainly be drawn from Dworkin's draft, but we will be better off if the incorporation occurs later rather than sooner. There is value in maintaining skepticisms external to jurisprudence, rather than co-opted by it. The gadfly role of Critics and economists forces jurists to look to their laurels, rather than quibble over their beloved finer points. Deep reflection may create constructive alternatives and sweep out an accumulation of attenuated subtleties, the better results that a jurisprudence not under attack could arguably never attain.

For example, the gadflies can demonstrate that Dworkin has not answered three central questions as well as he might have hoped. What is the content of individual rationality (and, for the Critics, irrationality), and what are its implications for a group rationality? What, if anything, holds a community together, other than self-interest and brute force? What, if anything, justifies interferences in the distribution of wealth, in a democracy? Economics and much of Critical Legal Studies being strongly anti-statist, it is not enough for Dworkin to assert that the state, perhaps confused by him with the community, will promote a principled, consensus justice somehow. It is not enough for him to disdain history and policies, simply because they are thought inferior to principles.⁶⁷

Finally, it is not enough for the three different visions to tell us what we should want (elitism), in a utopia where none of us live:⁶⁸ perfect markets and fatally-flawed governments, a near-perfect altruism, or a community of principle. These utopian visions must inevitably be watered down and compromised later in order to get adopted and otherwise to yield concrete results. A healthy dose of pragmatism should arguably be introduced earlier, especially as this attitude is so deeply ingrained in twentieth century America. In sum, my "interpretive" reading of *Law's Empire* is that it is very, very good but not the very best it could and must be.

66. See Reidinger, *supra* note 1, at 68 (quoting a Crit, Robert Gordon): Critical Legal Studies, "it seems to me, is a descendant of the critical trend in [legal] realism, and the Chicago School [of law and economics] has inherited the constructive aspect. They share a sense that the institutions that were supposed to rescue us haven't worked out too well."

67. See *supra* note 14-17, 33-36 and accompanying text.

68. *But see* EMPIRE, at 409-10.

THE AMERICANIZATION OF THE RAILROAD: RAILROAD POWER IN NORTHERN SECURITIES, 1903, AND McCLURE'S MAGAZINE, 1896-1901

SUSAN HOERCHNER*

The railroad of the nineteenth century transformed American life. Not only did it connect distant buyers and sellers, displace the stagecoach for passenger use, and concentrate great wealth and power, but also it gripped the imagination of the populace. During the opening years of the twentieth century, two very different but widely influential institutions examined the impact of the American railroad. From 1896 to 1901 McCLURE'S MAGAZINE, a high-quality, ten-cent, monthly magazine of general circulation, published more than twenty short stories about the railroad, and in 1903 the United States Supreme Court decided *Northern Securities Co. v. United States*,¹ a landmark antitrust case in which the majority and minority opinions reflected in reverse proportion the McCLURE'S writers' attitudes towards the onrush of railroad power.

Northern Securities Co. v. United States was one of the early battlegrounds on which the provisions of the Sherman Act of 1890² were argued and defined. The Northern Securities Company was organized in 1901 under the laws of New Jersey as a combination in order to acquire a controlling interest in two competing railroads, the Great Northern Railway Company and the Northern Pacific Railway Company, in exchange for its own stock. In *Northern Securities* the Supreme Court affirmed the decision of the trial court that the Northern Securities Company acted in restraint of trade, and thus, in violation of the Sherman Antitrust Act. The Supreme Court also affirmed the circuit court's injunction prohibiting the company from acquiring further stock in, or exercising any control over, the two railway companies.³ In a five to four decision, Harlan wrote the majority opinion; Holmes wrote the major dissent.

Although *Northern Securities* was a landmark case in the formation of

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1. 193 U.S. 197 (1903).
2. 15 U.S.C. §§ 1-7 (1953).
3. 193 U.S. 197.

antitrust law, it was also a significant crystallization of the Supreme Court's response to the railroad as an economic institution. In *Northern Securities* the Supreme Court not only broke up a holding company; the majority of the Court made a stand in the name of the public welfare against the economic power of the American railroad.

Even before *Northern Securities* was argued, MCCLURE'S MAGAZINE had printed over twenty railroad stories between 1886 and 1901. Before and after this period the magazine published no such stories. MCCLURE'S writers had considered, solved, and dropped the problem of the railroad just before *Northern Securities* reached the Supreme Court. By the time of *Northern Securities*, MCCLURE'S readers had moved on to romantic tales of ships at sea and upper-class courtships.

Obviously, the Supreme Court and the writers of popular fiction viewed the railroad from radically different perspectives. The crucial difference between the Court and the authors published in MCCLURE'S MAGAZINE is, of course, power; the Supreme Court can order changes in personal and corporate behavior while the MCCLURE'S writers could only observe and comment upon the effects of behavior. This difference in power may in part account for the alacrity with which MCCLURE'S writers accepted, assimilated, and Americanized, the railroad. Having no power to change the economic system and the technology that generated the railroad, the fiction writers could at best make the railroad their own by decking it in American values of democracy, individualism, and family. The *Northern Securities* majority, however, had the power to destroy the railroad trust and effectively strip one facet of railroad power.

Popular writing, such as MCCLURE'S stories, is valuable not only because it comments upon contemporary social institutions, but because it reflects and influences social values and attitudes. More than serious literature, popular writing must be acceptable to the mass audience. Whereas the serious literary artist presumably relies for artistic insight on a critical distance from the subject matter, the popular writer may be closely attuned to the values of the mass audience. Insofar as the writer is so attuned, his work may influence and modify, if only incrementally, those values. Consequently, MCCLURE'S MAGAZINE, as a high-quality mass magazine, provided an excellent index of popular attitudes towards the railroad during the period when *Northern Securities* was making its way to the Supreme Court.

MCCLURE'S MAGAZINE, founded in 1893, featured articles and fiction on a literary level comparable to those of established quality magazines. In 1895 MCCLURE'S developed a ten-cent monthly format, relying on advertising for its revenue. The advent of the ten-cent monthlies created a vast new

audience for the general magazine.⁴ Though many monthlies existed around the turn of the century, no general magazines of comparable popularity and quality exist today. The monthly magazines were characterized by "copious and well-printed illustration, liveliness and freshness in presentation of non-fiction articles, variety in subject matter, a serious treatment of contemporary problems, a keen interest in new inventions and progress in general, and attention to major world events."⁵

MCCLURE'S readers shared with the justices of the Supreme Court a basic concern with the social and political events of their time. Yet, sharing those interests, the MCCLURE'S writers and the justices nevertheless polarized in their response to railroad power. Fiction in MCCLURE'S MAGAZINE assimilated the railroad into the American value system, usually in substantial agreement with the ideas presented in the *Northern Securities* dissent, while the Harlan majority still fought the railroad's power as a deadly threat to society. However, like the Court, popular fiction writers disagreed among themselves about the effect of the railroad upon these values. Some of the MCCLURE'S writers corresponded to the fears and pessimism that Harlan voiced in the *Northern Securities* majority, but the more popular opinion of the writers aligned with the Court's dissent. Thus, only a minority of the MCCLURE'S stories reflected the same sentiments as the Harlan majority.

PESSIMISM: THE MCCLURE'S MINORITY

The stories *The Farmer's Railroad*⁶ *The Locomotive That Lost Herself*,⁷ *Engineer Connor's Son*⁸ and *Progress*⁹ reflected the minority opinion among the MCCLURE'S writers. These stories voiced a poignant and pessimistic view of the railroad's impact upon economic and social life.

In *The Farmer's Railroad*, Daniel Minds, who had been an evangelist before the "power" left him, develops a scheme for a cooperatively-owned railroad to be known as the Farmer's Railroad. His campaign for the railroad takes on heroic proportions, as he walks 400 miles to visit the railroad owner, the man known as the Great Mogul, but his project comes to nought. Minds returns briefly to evangelism, and by the end of the story is dying in a mental institution. Minds represents the good, communitarian values in the story and demonstrates some understanding of anti-competitive behavior as he begins his campaign for the Farmer's Railroad. He is

4. F. MOTT, A HISTORY OF AMERICAN MAGAZINES 1885-1905, 8 (1956).

5. *Id.* at 6.

6. Tracy, *The Farmer's Railroad*, 13 MCCLURE'S MAGAZINE 35 (1899).

7. Warman, *The Locomotive That Lost Herself*, 7 MCCLURE'S MAGAZINE 89 (1896).

8. Dromgoole, *Engineer Connor's Son*, 8 MCCLURE'S MAGAZINE 355 (1897).

9. Elliott, *Progress*, 9 MCCLURE'S MAGAZINE 40 (1899-1900).

diametrically contrasted with the Great Mogul in terms which Harlan would have found appropriate. The Great Mogul had started out as a day laborer and risen slowly until his genius manifested itself. Within a short time, his trains reached the Pacific Ocean. But in contrast to the oligarchic myth that only the cream rises to the top of society, the Great Mogul rose, like curds in sour milk, through the development of socially destructive characteristics: “[H]e was the Boss, Master. His employees were peons, slaves. Scarcely anyone paid as poor wages as the Great Mogul. . . .”¹⁰ Through the Great Mogul, the author acknowledges upward social mobility but attempts to refute the view that only the best rise socially by showing in Minds the purest and most selfless sinking into social oblivion and death.

Minds’ mindlessness at the end of *The Farmer’s Railroad* is paralleled in two other pessimistic stories, Cy Warman’s *The Locomotive That Lost Herself*, and Will Allen Dromgoole’s *Engineer Connor’s Son*. *The Locomotive That Lost Herself* tells the tale of the Danish engineer Oscar Hansen, whose obsession with the engine he designed leads him into a mystical union with the engine and lures him to his death. On the train’s trial run, Hansen overcomes efforts to restrain him, bounds to the engine, and puts it into motion. On the wild ride which ensues, the engine crashes leaving Hansen unconscious. He awakes an amnesiac and goes West to begin a new life as a cook in a railside restaurant. In the meantime engine number 13 establishes its reputation as a wastrel and a jinx. The trainmen say of engine 13, “She was a hoo-doo.”¹¹ In the climax of the story, the “crazy Dane” hears the sound of old number 13 as it passes his restaurant, and he manages to climb aboard unobserved. The train speeds into an unexpected washout, and cars and caboose pile into the water. Number 13, the engineer, and Hansen are never found.

The two stages of Hansen’s mindlessness provide a dramatic warning to McCLURE’S readers of the railroad’s threat. Hansen’s early obsession with the engine sucks the life out of him, leaving him a walking ghost. He does nothing with his life but serve the engine. Like Minds in *The Farmer’s Railroad*, Hansen becomes a monomaniac; the engine seems to demand this singleness of purpose. The story is really not so much about how an engine lost herself as about how Hansen lost his selfhood. The story not so subtly warns its readers that obsession with unchecked railroad power could cause them to lose their humanity, their selves, their souls.

In *Engineer Connor’s Son*, the warning is less dramatic but equally clear. In this sentimental story the railroad first plunges young Jack Connor, into a premature manhood then deprives him of his sanity and signals his death. His golden curls suggest the youthful innocence which his fa-

10. Tracy, *supra* note 6, at 39.

11. Warman, *supra* note 7, at 94.

ther's death in a train wreck shears from him. The railroad deprives him of his childhood, normal adulthood, and finally, life itself. As an engineer's son he "just naturally takes to the engine,"¹² and the railroad is the sole focus of his interest. In his naive, golden-haired way, he too is a monomaniac. The story warns not only that obsession with railroad power could result in real damage to the family, but in loss of humanity itself.

The McCLURE'S minority writers seem to address a larger question than individual monomania; they seem to picture in the life of the individual characters their fear about the effect of unchecked railroad power upon society as a whole. Similarly, *Progress*, another of the pessimistic stories, deals with the railroad's destruction of traditional values in a small southern town. The communitarian values are associated with Sam Long, the proprietor of the town's general store, and those people who preceded the coming of the railroad. The negative values are associated with the economy which the railroad both spawns and symbolizes.

The railroad in *Progress*, like the railroad in *The Farmer's Railroad*, obliterates the positive social values, including the values which McCLURE'S held most sacred. The railroad abrogates the Golden Rule, and when protagonist Sam Long, who refers to himself as a Christian, finally raises his prices in an effort to keep himself economically afloat, his customers take the train and their business to the next town. The fact that his mother, a vestige of the older, pre-railroad generation, saves the family through pioneer resourcefulness, adds the pessimistic conclusion that neither the transitional nor the new generation can fully deal with the railroad's disruption of society. To survive, the Long family must go backward, rather than forward, in time to habits acquired before the coming of the railroad.

A work of more modest scope, *The Passing of McIvor*,¹³ sketches the colorful character of a railroad engineer while it makes explicit the potential for lawlessness which the Harlan majority feared in the railroad. McIvor is a Southerner who had fought in the Civil War, and this fact contributes to the rebellious aura of one who does not hesitate to act outside of legal bounds. Although McIvor is in no way an official representative of the railroad in his exercises of vigilante justice, his behavior exhibits exactly that kind of extra-judicial and anti-social power which the Harlan majority saw in the railroad. If McIvor could act so successfully outside the law, how much more so a corporate combination?

The Farmer's Railroad, *The Locomotive That Lost Herself*, *Engineer O'Connor's Son*, *Progress*, and *McIvor* portray the railroad's power as wholly negative in effect. Under the sway of the railroad, individual enter-

12. Dromgoole, *supra* note 8, at 356.

13. Warman, *The Passing of McIvor*, 11 McCLURE'S MAGAZINE 484 (1898).

prise becomes futile, general social and economic welfare declines, and pro-social values become economically dysfunctional. These attitudes the writers share with Harlan and the *Northern Securities* majority.

THE *NORTHERN SECURITIES* MAJORITY

The bedrock value of the general welfare underlies Harlan's opinion. In the majority opinion he depicts society as at best cohesive and centripetal, rejecting the view that society consists of atomized individuals loosely held together by minimal laws. Consequently, Harlan values socially cohesive forces and fears those forces which cause social disintegration. In *Northern Securities* he identifies the centrifugal forces, the concatenations of power most threatening to the general welfare, as private money, the individual state, the corporation, and most ominously, the amorphous "combination." He perceives the role of the federal government in general, and Congress in particular, as protecting the general welfare against those scattering forces which the Great Mogul so vividly incarnated for McCLURE's readers. One method by which Congress should effectuate this protection, according to Harlan, is by fostering competition. In this majority view competition plays less the role of guarantor of consumer welfare than of guardian of the economic equilibrium which private money and/or the combination threaten to unbalance. For the Harlan majority, centrifugal threats are profound; throughout the opinion Harlan envisions the "public at the mercy of the holding corporation,"¹⁴ and the "Government and its laws -- prostrated at the feet of local authority."¹⁵ It is just this kind of abjectness, the majority implies, that the power of the railroad could impose upon the public and its governmental organs.

Harlan's values of the public welfare and national unity become apparent early in the opinion. While still accepting the value of individual liberty, he emphasizes a unitary concept of society in asserting that the United States are "a single nation," that in commerce we are one and the same people,¹⁶ and that the Constitution provides the Government of all; its powers are delegated by all, it represents all, and acts for all.¹⁷ Harlan, of course, emphasizes the value of social unity more explicitly than did those McCLURE's writers who shared his views. Yet behind the concept of a cooperative railroad and the sense of loss of community in a small Southern town, we sense a similar concern for social cohesion.

Arrayed against this centripetal force, Harlan finds variously private persons, the state, the corporation, and, most ominously, the combination.

14. 193 U.S. at 325.

15. *Id.* at 333 (citing *Cohens v. Virginia*, 6 Wheat 264, 414 (1821)).

16. *Id.* at 336 (citing *Cohens v. Virginia*, 6 Wheat 264, 413 (1821)).

17. *Id.* (citing *McCulloch v. Maryland*, 4 Wheat 316, 405 (1819)).

In admitting one of the dissent's major points, Harlan acknowledges that *Northern Securities* may have been formed to benefit those who created it, yet he subordinates the interests of these individuals to the public welfare: "But the interests of private persons and corporations cannot be made paramount to the interests of the general public."¹⁸

Harlan also takes great care to reassert the supremacy of the Constitution, particularly the Commerce Clause, over state power when he rejects the notion that Congress must stay its hands and allow corporations to combine just because they are state-chartered; such a proposition "means nothing less than that Congress, in regulating interstate commerce, must act in subordination to the will of the States when exerting their power to create corporations. No such view can be entertained even for a moment."¹⁹ Harlan more strongly states: "Every corporation created by a State is necessarily subject to the supreme law of the land."²⁰

Throughout his efforts to defend the general welfare from these centrifugal forces, Harlan manifests his concern that the corporation, a single, private, artificial individual, could concentrate enough power to be able to rend the social fabric. Harlan asserts that the government "does contend that no state corporation can stand in the way of the way of the national will, legally expressed."²¹ He speculates that Congress, in enacting the Sherman Act, had envisioned the possibility that a "few powerful corporations or combinations" could gain control of an entire area of trade to the detriment of the general welfare.²²

But Harlan finds centrifugal power in its most destructive guise in the hydra-headed "combination." The evil which invokes the commerce power of the United States in *Northern Securities* is the spectre of these "large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting *as one body*."²³ In this phrasing he reveals again the source of the threat—a power that could rival that of the federal government, but which is, without the protection of the Commerce Clause, subject to no national control. Harlan maintains that federal law must tether this maverick power. As Harlan identifies the issue: "The affirmation of the judgment below will only mean that no combination, however powerful, is stronger than the law. . . ."²⁴

18. *Id.* at 352.

19. *Id.* at 345.

20. *Id.* at 346.

21. *Id.* at 335.

22. *Id.* at 339.

23. *Id.* at 338 (original emphasis).

24. *Id.* at 346.

Combination is "an offense"²⁵ against which Congress and the states need to protect the public because the combination represses individual enterprise and inhibits the "natural law of competition."²⁶ Although Harlan does not explicitly expound the virtues of individual enterprise and competition, it is implicit in his opinion that they allow for a dynamic economic equilibrium which could not be undermined by a power rivaling that of the national government. At bottom it was this centrifugal power which the Harlan majority saw in the railroad holding company.

The McCLURE's minority similarly portrayed the corporation and combination, and even the single, powerful individual, as a threat to positive social values. The Great Mogul was bleeding the farmers who depended on his railroad in *The Farmer's Railroad*, and there was no effective way of countering his power with or without government aid. In *Progress* the railroad disrupted traditional social relations and uprooted families from the land, and only a retreat into the past offered a momentary stay against impending chaos. When at the end of *Progress* Lawyer Hicks suggests that the new generation may be able to deal with progress, Harlan would have sympathized with Sam Long's reply: "Maybe . . . maybe, God help us!"²⁷ The significant difference between Harlan and the McCLURE's minority, however, is that Minds goes insane, Jack and Hansen die, and Long resigns himself, but Harlan refuses to let the railroad combination transcend the public welfare and the law of the land.

ASSIMILATION: THE McCLURE'S MAJORITY

While the McCLURE's minority and the Harlan majority found only great social evil in railroad power, the McCLURE's majority embraced and endorsed the railroad after only the slightest hesitation. The vast majority of the stories explicitly cloak the railroad in American values of democracy, individualism, and the nuclear family, as though urging that railroad power was here to stay and the best attitude towards it was simply to make it our own. The McCLURE's majority Americanized the railroad.

Democracy and individualism are the major themes appearing in the stories of the McCLURE's majority. Men in these stories rise socially by exercising the virtues of courage and responsibility. The most desirable working class position is, of course, that of engineer, but a few characters rise into the managerial class while maintaining the human touch of their working class background. None of the characters of this majority opinion exhibit the ominous characteristics of the Great Mogul. In their hands power is umbilically united with compassion and fairness.

25. *Id.* at 340.

26. *Id.* at 341.

27. Elliott, *supra* note 9, at 47.

*A Couple O'Captains*²⁸ is a plotless story which details the ensuing careers of two cavalry buddies thrown upon the job market at the end of the Indian wars. Gene is from a wealthy family, Tom is not. When Tom takes a job as brakeman on the Burlington railroad the two part company, for Gene, in accordance with his upper class background, is preparing to study law. In accidental meetings throughout their careers, Tom's quick rise in the railroad is contrasted with Gene's less exciting career as a poet and a partner in a law firm. The railroad enables a man of intrinsic virtue to rise quickly to its highest position without losing the common touch which won the hearts of his subordinates.

Bucks,²⁹ one of Frank H. Spearman's imaginative and colorful railroad adventures, paints a more energetic picture of a man who retains the love and respect of his men as he rises to the railroad's managerial class. Bucks rose to his lofty position after saving a freight train which was on a runaway path to collision with a passenger train. After the ordeal was over Bucks fainted upon learning that his aged mother was a passenger on the threatened train. This incident demonstrates the qualities which the McCLURE's majority saw as precipitating a rise to power in the railroad—physical courage, moral courage, and tender sentiment.

Cy, in *Two Waifs of the Road*,³⁰ experiences some setbacks on his rise to the position of General Manager, but his progress varies directly with the rise and fall of his social and moral qualities. The story makes clear the majority position that the railroad as an institution enables men to rise in its ranks in direct proportion to their pro-social qualities and behavior. Cy literally has to clean up his act to gain success, and, when he does toe the line of status quo values, his reward is prompt and full.

Three other stories by Frank H. Spearman,³¹ narrate adventures in which a boy or young man earns the right to have his own railroad engine. He always earns this right through acts of personal heroism. The stories, even in their surface optimism, evince an underlying fear of the railroad's power. In several of the stories the hero gets his start in life by stopping a runaway train; a good man controls runaway power—here the physical train—saves lives and money, and receives as a reward a brilliant career. The McCLURE's majority thus rejects the court's majority view that men

28. Warman, *A Couple O'Captains*, 11 McCLURE'S MAGAZINE 551 (1898).

29. Spearman, *Bucks: A Story From The Train Dispatcher's Office*, 14 McCLURE'S MAGAZINE 147 (1899-1900).

30. Hill, *Two Waifs of the Road*, 13 McCLURE'S MAGAZINE 17 (1899).

31. Spearman, *The Million Dollar Freight Train: The Story of a Young Engineer on His First Run*, 14 McCLURE'S MAGAZINE 380 (1899-1900); Spearman, *How McGrath Got an Engine: The Wiper's Flying Trip on Extra No. 240*, 15 McCLURE'S MAGAZINE 443 (1900-1901); Spearman, *The Run of the Yellow Mail: How Jimmie the Wind Got His Name*, 17 McCLURE'S MAGAZINE 93 (1902-1903).

like the Great Mogul seize the railroad's power and ride it to lawless heights.

The conflict between the majority and minority views becomes explicit in a morally complex Spearman tale published at the end of the period, *The Old Guard: Dave Hawk, Conductor: Looter and Hero*.³² In this story, one of the railroad's own employees admits that the railroad had been founded on illegitimate power. But as he explains, times had changed, and the new dispensation demanded honesty of both management and men. The idea that underlies this story is that the railroad must earn its loyalty through fair dealing, just as the men must earn their positions. As the final story of the period, *The Old Guard* effectively assimilates the power of the railroad into the values of honesty and democracy and cuts the railroad down to the size of the fair and honest man.

The strength and establishment of the nuclear family provide the other major value through which the majority assimilates the railroad into status quo values. On the surface these stories are mere romances or adventurous tales, but beneath the surface lies the majority's denial that the railroad has disrupted American life. In *The Night Run of the Overland: A Story of Domestic Life Among the Railroad People*,³³ the railroad promotes the healing of a family fight with the train the vehicle of reconciliation. Three other romantic tales depend upon the railroad to unite hero and heroine in marriage. In *A Midsummer Night's Trip: A Railroad Story*³⁴ an engineer and fireman rescue a Mexican girl from pursuing wolves, the fireman falls in love with the girl, and after overcoming numerous obstacles including the fireman's racism, marries her. The narrator of *A Peg-legged Romance: A Railroad Story*³⁵ brings together a freight engineer and the beautiful and dutiful belle of the town by slightly exaggerating the extent of the injuries the engineer sustains in a minor railroad accident. Marie was bent on marrying a "hero," and through the medium of the railroad and the narrator's imagination, Miles becomes a hero worthy of her hand. *Jim Wainwright's Kid: A Railroad Story*³⁶ unites two lovers in a more complex manner with the railroad as the catalyst for the love relationship, providing the occasion for the lovers' meeting, the distraction in the face of grief, and the means of heroic self-sacrifice.

32. Spearman, *The Old Guard: Dave Hawk, Conductor: Looter and Hero*, 17 McCLURE'S MAGAZINE 450 (1901).

33. Peake, *The Night Run of the Overland: A Story of Domestic Life Among the Railroad People*, 15 McCLURE'S MAGAZINE 143 (1900).

34. Hill, *A Midsummer Night's Trip: A Railroad Story*, 11 McCLURE'S MAGAZINE 365 (1898).

35. Hill, *A Peg-legged Romance: A Railroad Story*, 11 McCLURE'S MAGAZINE 469 (1898).

36. Hill, *Jim Wainwright's Kid: A Railroad Story*, 11 McCLURE'S MAGAZINE 529 (1898).

In diametric contrast to the Harlan majority's fear that the railroad's power will destroy the public welfare is a strong line of majority stories in which the railroad enables the individual to sacrifice his life for the public good. In *Little Hallelujah's Convert*³⁷ death assumes quasi-religious proportions, and the railroad becomes the vehicle of the protagonist's salvation. The individual, rather than attacking the public welfare in the mode of the Great Mogul, voluntarily undertakes a Christ-like sacrifice. *Little Hallelujah's Convert*, in uniting the railroad with the culture's sacred values, implicitly reassures those who would fear the railroad's centripetal and selfish power.

*Shockley: How He Helped the Russian Switchman to Celebrate Christmas*³⁸ tells of one person's ultimate sacrifice for another. Less overtly than *Little Hallelujah's Convert*, *Shockley* infuses the hero's death with religious significance. Shockley rescues a Russian immigrant from inhuman baiting and then, one Christmas Eve, while repairing a railroad track, Shockley dies to save the switchman's life. This story shows the McCLURE's minority that the railroad would now immolate itself if necessary to save the life of the least of its workers.

These stories of self-sacrifice effectively answer both the McCLURE's minority and the Harlan majority who fear the railroad's ungoverned and anti-social power. Although the characters who die for others are not, even in literature, equivalent to the railroad as an economic institution, they are closely associated with the railroad and at times symbolic of the railroad. These stories provide the strongest, albeit implicit, argument that the railroad had abandoned its predatory ways and had now dedicated itself to serving the public at whatever cost to itself.

THE HOLMES DISSENT

The *Northern Securities* minority would substantially agree with the McCLURE's majority. Reasoning from the basis of individual value, and reducing the corporation or combination to a single person, the minority scoffs at the Harlan majority's fear of centrifugal force. The dissent finds no necessary value in the competition with which the majority optimistically maintained a balance of economic power.

The Holmes dissent implicitly considers the individual's freedom to act the central value from which to analyze the function of the railroad. At the beginning of his dissent, Holmes reduces the issues of *Northern Securities* to the determination of individual rights: "[W]e must read the words before

37. Kerr, *Little Hallelujah's Convert*, 16 McCLURE'S MAGAZINE 87 (1901).

38. Spearman, *Shockley: How He Helped the Russian Switchman to Celebrate Christmas*, 16 McCLURE'S MAGAZINE 174 (1901).

us as if the question were whether two small exporting grocers should go to jail.”³⁹ By the end of the dissent, he considers the combination in terms of individuals: “Unless I am entirely wrong in my understanding of what a ‘combination in restraint of trade’ means, then the same monopoly may be attempted and effected by an individual. . . .”⁴⁰ These attitudes correspond closely to the McCLURE’s majority’s emphasis on democracy and individual opportunity. Like the Holmes dissent, the McCLURE’s majority limits its concern to the trials and triumphs of individuals. On the contrary, the McCLURE’s minority and the majority justices examine the effect of the railroad on broader social developments and social groups.

Holmes values the freedom of the individual to act without harm to society. Holmes expresses no fear of centrifugal force; rather, he seems to value a society of energetic and somewhat centrifugal individuals who would provide the dynamic equilibrium that protects against excessive centralized control. In an extraordinary passage, Holmes implicitly defends the man of great power by attempting to reduce the government’s argument to an absurdity: “The personal ascendancy of one man may be such that it would give to his advice the effect of a command, if he owned but a single share in each road. The tendency of his presence in the stockholders’ meetings might be certain to prevent competition, and thus his advice, if not his mere existence, becomes a crime.”⁴¹ In this passage, while glorying in a vision of unbridled personal power, Holmes does not even consider the potential misuse of this power in the hands of a personage such as the Great Mogul, and in this attitude he resembles the McCLURE’s majority whose powerful individuals retain their humility and the love of their subordinates.

For Holmes, competition is not the central value that it is for Harlan. From a literalist, textual standpoint Holmes denies that the Sherman Act has anything to do with maintaining competition and rejects competition as a goal.⁴² But he makes clear the fact that he does not construe the Act as opting for the “universal disintegration of society into single men, each at war with all the rest. . . .”⁴³ Underlying his individualistic view is an unexplained mechanism which sustains social harmony, probably the centrifugal forces of individuals pursuing their own interests and, thus, balancing each other. Yet, in contrast to both the classic liberal view and that of Harlan, this mechanism does not depend on competition. The McCLURE’s majority, again in substantial agreement with Holmes, never portrays competition among the workers.

39. 193 U.S. at 402 (Holmes, J., dissenting).

40. *Id.* at 409.

41. *Id.* at 403.

42. *Id.* at 410.

43. *Id.* at 407.

The Holmes minority and the McCLURE's majority thus agree that the railroad is as integral an American institution as the corner grocery store. In rejecting the fears expressed by the Harlan majority and the McCLURE's minority, they assimilate the railroad harmoniously into a society which provides economic opportunity and freedom for its most hard-working and virtuous citizens.

CONCLUSION

The McCLURE's writers in this brief flurry of fictional concern with the railroad wrestled with many of the same conflicts with which the *Northern Securities* Court struggled. They dealt primarily with the relationship between the individual and the power of the railroad. But on this issue, popular fiction accepted and assimilated the American institution earlier than the Supreme Court.

The difference in the power of a Supreme Court justice and a writer of popular fiction accounts for the polar opposition between the ideas of the Supreme Court and those in the McCLURE's stores. The majority of the Court saw the disturbing possibilities in the railroad's concentration of wealth, as did the McCLURE's minority. But the justices could face these potentialities with the power to avert them, at least in part, without the resignation that the McCLURE's minority manifested. The majority of the McCLURE's writers, however, rejected this despair. Having no power to make an effective change in economic organization, they had to deny the destructive power of the railroad. Their optimism may be interpreted as their best response to a dimly-sensed political impotence.

The choices available to the Supreme Court included the power in effect to dissolve the holding company, while the options of the McCLURE's writers involved casting their characters in social relationships. The McCLURE's characters who felt the negative influence of railroad power could do nothing to combat it, but they could develop friendships and loyalties which ameliorated the impact of the institution. They experience the railroad in terms of colorful characters, profound friendships, and even romantic love, rather than as individuals facing the railroad's monolithic power. This emphasis on personal relationships is derived, of course, from the nature of fiction. Yet it draws at least as much from the sense that, given individual powerlessness to defeat the railroad, here was one domain where the individual could transcend the limits to which the railroad bound him in his role as worker, consumer, and family member. The McCLURE's majority, in the end, had only an essential humanity to assert against onrushing railroad power. The Harlan majority had the power, at least in one economic arena, to bring it to a halt.

