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Post-Modern Jurisprudence - Finally (Maybe)

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Abstract

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KEYWORDS: philosopher, reflection, empire

POST-MODERN JURISPRUDENCE—Finally (MAYBE)

Law's Empire. By Ronald Dworkin.* Cambridge, Mass.: Harvard University Press, 1986. pp. xiii, 470. \$20.00

Reviewed by Fred L. Rush, Jr.**

D'ALEMBERT: *Still, in the morning I find the greater probability on my right, and in the afternoon I find it on my left.*

DIDEROT: *You really mean that you are dogmatically pro in the morning and dogmatically con in the afternoon.*

D'ALEMBERT: *And in the evening, when I recall how rapidly my judgments were made and unmade, I disbelieve both my morning's opinion and the one I had in the afternoon.*

—Diderot, *D'Alembert's Dream*

A new book from Ronald Dworkin is more than a publication by an eminent legal philosopher; it is a signal for jurisprudential reflection, reassessment and wood-shedding. *Law's Empire* is a book which marks a turning point in Dworkin's thought and, consequently, recasts the dialogue of modern analytical jurisprudence. In it, Dworkin reformulates jurisprudential questions in explicitly post-modern terms — utilizing, in the main, theories of literary criticism. To be sure, other commentators have pointed out similarities between literature and law, and the profitability of applying criterial theories to legal decisionmaking,¹ but

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This Review is dedicated to Professor Martin Feinrider, who died in June, 1986. He was a fine teacher, a challenging scholar, and a good friend.

1. See, e.g., West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985). For an interesting, if not totally convincing, application of legal schema to deconstruction metaphysics, see G. ROSE, *DIALECTIC OF NIHILISM: POST-STRUCTURALISM AND LAW* (1984).

none possess the stature and influence of Dworkin. Thus, in a sense, this union between critical theory² and legal philosophy is legitimized as a proper topic of jurisprudence by Dworkin's treatment. But the value of this book far exceeds this tacit imprimatur, for *Law's Empire* offers a rich account of the implications of post-modern critical theory for the philosophy of law.

This Review treats two seminal aspects of the book. Part I discusses the *historical* importance of the work — in short, that it brings jurisprudence in line with the advances of philosophy in general since the later Wittgenstein and the “Ox-bridge” ordinary language philosophers. Part II focuses on the *theoretical* aims of the book, scrutinizing Dworkin's uses (or misuses) of critical theory.³

I.

Anglo-American jurisprudence has long been concerned with either embracing or repudiating one of two visions of law — the utilitarian/positivist or the rights theory/deontologist. In this respect, at least, the philosophy of law has languished behind advances in other areas of philosophy by almost a half-century. Today the old arguments run on, not because they are the enduring questions of law, but because current perspectives on the jurisprudential enterprise remain steeped in turn-of-the-century philosophical method.

Much of the focus of contemporary analytical jurisprudence has been shaped by early to middle twentieth century linguistic philosophy. H.L.A. Hart's reformulation of Austin's positivism is deeply indebted to the Vienna Circle of logical positivists⁴ (including Wittgenstein of

2. This review refers to literary theory in general as “critical theory.” This is not meant to suggest any relationship between a legal use of literary criticism and the critical legal studies movement, although CLS adherents might claim such a connection. See Note, *Expanding the Legal Vocabulary: The Challenge Posed by the Deconstruction and Defense of Law*, 95 YALE L.J. 969 (1986) (discussing connections between Habermas and CLS).

3. There are, of course, other aspects of *Law's Empire* which will go unmentioned in this review. I have singled out Dworkin's use of post-modern literary theory because of its historical importance.

4. See R. VON MISES, *POSITIVISM* 329-42 (Dover ed. 1968)(1st ed. 1951); see also A. SCHAFF, *LANGUAGE AND COGNITION* 37-47 (1973). Logical positivism (or logical atomism) also had a profound effect on the legal theories of Hans Kelsen. See, e.g., H. KELSEN, *PURE THEORY OF LAW* (1934); H. KELSEN, *GENERAL THEORY OF LAW AND STATE* (1946). For an excellent historical account of the inner workings of the Vienna Circle, see G. VON WRIGHT, *THE VIENNA CIRCLE* (1970).

the *Tractatus*) and, to some degree, the post-positivist writings of J.L. Austin⁵ and the Oxford ethicists.⁶ Reactions to Hart have been equally dependent on this mode of discourse which stresses the situationality of language.⁷ Notable exceptions to this trend are legal realists, legal economists and critical legal studies advocates.

Law and economics, in both its Chicago and Yale manifestations,⁸ can be seen as a close variant of legal positivism. As a historically descriptive venture, explaining the way judges have (unbeknownst to themselves) furthered efficiency⁹ through judicial decision, law and economics is decidedly positivistic. It assumes determinacy of meaning, fixed by quantifiable criteria. As a normative enterprise, weak or strong

5. See, e.g., J.L. AUSTIN, *SENSE AND SENSIBILIA* (1962); Austin, *A Plea for Excuses*, in *PHILOSOPHICAL PAPERS* 175 (J.O. Urmson & G.J. Warnock eds. 1961). Most of Austin's work was collected posthumously, which accounts for why the dates of his materials are out of step with the mainstream of ordinary language philosophy. In point of fact, Austin and Hart frequently taught joint seminars in legal philosophy at Oxford in the late 1940s to '50s.

6. This term refers to the gaggle of academic philosophers collected at Oxford and Cambridge who endlessly wrote and rewrote critiques on the first generation of British ordinary language philosophers. Along with Austin, see *supra* note 5 and accompanying text, the most influential of the ordinary language school were G.E. Moore, Gilbert Ryle, John Wisdom and A.J. Ayer. See, e.g., G.E. MOORE, *PRINCIPIA ETHICA* (1903); G. RYLE, *THE CONCEPT OF MIND* (1949); Wisdom, *Metaphysics and Verification*, 47 *MIND* 452 (1938); A.J. AYER, *LANGUAGE, TRUTH AND LOGIC* (2d ed. 1946). Professor John Searle of the University of California, Berkeley, is the sole original adherent to the ordinary language approach currently applying these principles. See Searle, *Meaning and Speech Acts*, 71 *PHIL. REV.* 423 (1962). For an adequate overview of twentieth century British philosophy, see C. CATON, *PHILOSOPHY AND ORDINARY LANGUAGE* (1963).

7. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 6-17 (1961).

8. Law and economics is an attempt to describe or prescribe legal outcomes by reference to principles of wealth maximization or efficiency. Much of the early scholarship in this field can be attributed to Coase's provocative little piece, *The Problem of Social Cost*, 3 *J. LAW & ECON.* 1 (1960). The Chicago School of law and economics is characterized by a steadfast adherence to wealth maximization as the sole aim of a justly ordered society. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 2-8 (2d ed. 1977). The Yale School, on the other hand, does not insist that efficiency (even in its strong non-pareto sense) is the sole aim of a moral state. There are extra-economic norms which temper efficiency concerns. See, e.g., B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 43-45 (1980) (Ackerman's two principles of neutrality).

Dworkin, among others, has forcefully criticized even the "weak" law and economics of Ackerman/Calabresi as unable to meld ideas of normative value into a predominantly economical view of the State. See R. DWORKIN, *A MATTER OF PRINCIPLE* 242-59 (1985).

9. See R. POSNER, *THE ECONOMICS OF JUSTICE* 48-87 *passim* (1981).

legal economics is open to many of the telling criticisms offered against positivism — as Dworkin elsewhere has pointed out.¹⁰

American legal realism, at least in its more strenuous forms, advocated indeterminacy of legal norms and principles. The “hard case” is “solved” not with reference to principle¹¹ or rules.¹² Rather, the judge exhibits a set of preferences concerning the outcome of the case and acts upon them. Thus, judicial decisionmaking, and the legal enterprise taken as a whole, is freed from pretensions of rule-following and is seen as it truly is — indeterminate. This approach, which had its genesis in Pound’s sociological jurisprudence¹³ and which was crystalized (insofar as that is possible) by Jerome Frank and Karl Llewellyn,¹⁴ has had its day and no longer remains a significant force in jurisprudential thought due to severe problems accompanying the indeterminacy thesis. However, one aspect of legal realism has proven central to modern legal philosophy — that is, realism’s skeptical demand to critically dismantle legal shibboleths.

This critical demand of Realism seems to have found a new home. Although it is difficult to group its proponents into a unified theoretical community,¹⁵ a growing number of commentators embrace a brand of proto-realism termed Critical Legal Studies. Although at least one noted historian of the realists disavows significant contact between that school and its progeny,¹⁶ Critical Legal Studies does, at the very least, co-opt Realism’s programme of demystification.¹⁷ It hardly needs to be

10. See R. DWORKIN, *supra* note 8, at 252-59.

11. Cf. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 71-80 (1977).

12. Cf. H.L.A. HART, *supra* note 7, at 77-96 (secondary as distinguished from primary rules).

13. See generally R. POUND, *INTRODUCTION TO THE PHILOSOPHY OF LAW* (1930).

14. See K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1948); J. FRANK, *COURTS ON TRIAL* (Atheneum ed. 1961); see also O.W. HOLMES, *THE COMMON LAW* 5 (M. Howe ed. 1963) (the law “at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient.”)

15. See B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 43 & n.13 (1983) (criticizing Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685 (1976)).

16. Twining, *Talk About Realism*, 60 *N.Y.U. L. REV.* 324, 338 n.21, 356 n.87 (1985); but cf. Presser, *Some Realism About Orphism, or the Critical Legal Studies Movement and the New Great Chain of Being: An Academic’s Guide to the Current State of American Law*, 79 *Nw. U.L. REV.* 869 (1986).

17. See Abel, *Torts*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 185, 194-96 (D. Kairys ed. 1982). This insistence on removing the blinders of bourgeois

mentioned that advocates of the Ungero-Marxist¹⁸ approach stress the debilitating role of individual property and personal rights as prime obfuscations to demystified law. Major objections to this programme are rejections of certain marxian assumptions¹⁹ and the old criticisms leveled at realism.²⁰ Several scholars have disdainfully suspended judgment on critical legal studies until its supporters offer a coherent picture of their otherwise disparate positions.²¹

Of course, straight-line natural law theory²² does not depend on turn-of-the-century linguistic philosophy. Instead, it refurbishes Aquinian notions of "true law." Dworkin's taste for Rawls prefigures Kantian leanings, but these are not indicative of his stance on *analytic* problems of case decision. Dworkin's Rawlsian ties²³ only inform his

traditionalism is classically marxist. See K. MARX & F. ENGELS, *THE COMMUNIST MANIFESTO* 80-95 (F. Randall trans. 1964); 1 K. MARX, *CAPITAL* 252-86 (S. Moore & E. Aveling trans.) (F. Engels ed. 1887, repr. 1954); K. MARX, *GRUNDRISSE: FOUNDATIONS OF THE CRITIQUE OF POLITICAL ECONOMY* 151-59 (M. Nicolaus trans. 1973); see also F. ENGELS, *LUDWIG FEUERBACH AND THE OUTCOME OF CLASSICAL GERMAN PHILOSOPHY* 54-55 (C.P. Dutt trans. 1941); G. LUKACS, *HISTORY AND CLASS CONSCIOUSNESS* 46-81 (R. Livingstone trans. 1971); L. STEVENSON, *SEVEN THEORIES OF HUMAN NATURE* 55-56 (1974) (discussing Marx's indebtedness to Hegel and the theory of alienation from labor).

18. The phrase is Ackerman's. B. ACKERMAN, *supra* note 15, at 44 n.15.

19. For example, the Marxist theory of revolutionary motivation. See L. DUPRE, *MARX'S SOCIAL CRITIQUE OF CULTURE* 65-66 (1983). If, as Marx posits, the impetus for revolutionary action is the material mechanism of capital economy, there is nothing to prevent individual free-riders. Of course, *individuals* must revolt — the idea of group revolt is meaningless without the motivation to revolt on the part of the group's constituents. Thus, it seems to many critics that Marx must allow for some motivating factor outside materialism, such as liberal indignity. To say the least, the importation of liberalism into marxist theory is, in many ways, anathemata to that theory.

Some critical legal studies advocates have recognized these difficulties in a doctrinaire marxist stance and propound ways to unite socialist legal theory with a theory of rights (normally considered by Marxists a liberal ideal, since it presupposes the existence of individualized notions of property). See, e.g., Chase, *The Left on Rights: An Introduction*, 62 *TEX. L. REV.* 1541 (1984).

20. See *supra* notes 13-14 and accompanying text.

21. E.g., B. ACKERMAN, *supra* note 15, at 44 & n.15, 102-03.

22. For modern proponents, see generally P. DEVLIN, *ENFORCEMENT OF MORALS* (1965); L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1959); J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980). Many documents evincing international law of human rights contain natural law elements. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. Doc. A/810, at 71 (1948)(preamble).

23. Dworkin's indebtedness to Rawls is well-documented and especially present when addressing problems of distributive justice. An entire chapter of *Taking Rights*

view of the substance of correct decision-making principles, not whether there are principles in the first place. Although Dworkin would rail against any *complete* theoretical separation between law and justice, it is clear that he relies on different philosophical traditions when discussing "analytical" as opposed to "political" issues of law and justice.

Dworkin moves main-line jurisprudential debate beyond the tired positivist/naturalist debate by invoking structuralist and deconstructionist notions of literary (and social) interpretation. Early twentieth century Anglo-American philosophy evolved from a strictly positivist enterprise into a post-positivist programme of formal (i.e., meta-logical) linguistic analysis. Continental philosophy has contemporaneously tracked a different course. Although the German logician Gottlob Frege was decidedly instrumental in positivist thought and Wittgenstein was never what could correctly be termed an "Anglican" philosopher,²⁴ turn-of-the-century European thought was dominated by the phenomenologists Husserl and Heidegger and, to a more fashionable degree, by those who traded on phenomenological technique for Nietzschean/Kierkegaardian purposes — the Existentialists, most notably Sartre and, to a lesser degree, Merleau-Ponty.²⁵ The weird chemistry

Seriously involves criticism and defense of Rawls' argument of original position. R. DWORKIN, *supra* note 11, at 150-83 (1977); see also J. RAWLS, A THEORY OF JUSTICE 17-22, 60-65 (1972) (setting forth, in general terms, the original position argument for the two principles of justice in Rawls' system). The Rawlsian social contract argument is appealing to Dworkin on many levels. First, the argument from original position supports Dworkin's notion of egalitarianism as a technique of equilibrium — shared moral premises not the product of inferential or deductive logic. See R. DWORKIN, *supra* note 11, at 159-68. Second, the idea of a social contract implicitly recognizes a right of veto exercisable by anyone not willing to be bound by its terms. *Id.* at 173-74, 176. Finally, Dworkin finds Rawls' *reductio* of justice as fairness a sufficient theoretical basis for a politic of "deep rights." *Id.* at 182.

Of course, Rawls' theory has received a less deferential, yet still congenial, treatment at the hands of Robert Nozick. Nozick points out, correctly I think, that a hypothetical contract cannot insure real rights by historical principle. See R. NOZICK, ANARCHY, STATE, AND UTOPIA 200-204 (1974).

24. Of course, the author of the *Tractatus Logico-Philosophicus* was firmly a logical positivist in the Frege tradition. But even during the post-*Investigations* period, Wittgenstein maintained a guarded respect for the work of Heidegger. See Wittgenstein, *Zu Heidegger*, in LUDWIG WITTGENSTEIN UND DER WEINER KREIS: GESPRÄCHE, AUFGEZEICHNET VON FRIEDRICH WAISMANN (B.F. McGinnis 1967) (stating that he understands what Heidegger means by *Dasein* ("being there") and *Frucht* ("dread"); see also R. GIER, WITTGENSTEIN AND PHENOMENOLOGY (1981).

25. The course of pre-structuralist European philosophy was, and still is, to a

1986]

Book Review

277

between the positivist and hermeneutical regimes begat structuralism — much in the same way that Hume prompted Kant.

Post-modern²⁶ philosophy begins with structuralism.²⁷ As is often

great extent dominated by the school of phenomenology. Phenomenology, as a methodological system, was first developed by Edmund Husserl. Husserl was so committed to a “science” of philosophical investigation (much in the Hegelian sense of “science”) that his writings never explored the hermeneutical edge of phenomenology. His method was to explicate the method. See, e.g., E. HUSSERL, *IDEAS* 171-328 *passim* (W.R.B. Gibson trans. 1972). It was left to Husserl’s most brilliant pupil, Martin Heidegger, to engage the new method in “substantive” philosophical argument.

Heidegger, enamored of pre-Socratic questions of Being, turned phenomenology to the task of constructing a modern metaphysics of ontology. Drawn to Husserl’s method as a means to resuscitate philosophy (and, in particular, metaphysics) from a period of skepticism led by Nietzsche and Kierkegaard, Heidegger put ontology in a preeminent position for philosophical inquiry. See M. HEIDEGGER, *INTRODUCTION TO METAPHYSICS* 14-16 (R. Manheim trans. 1961) (questions of Being are the first questions of philosophy); see also Q. LAUER, *PHENOMENOLOGY: ITS GENESIS AND PROSPECT* 169-73 (1958); J.N. MOHANTY, *PHENOMENOLOGIE AND ONTOLOGY* 92-107 (1970).

Regardless of Heidegger’s efforts to redefine metaphysics as a science of Being, elements of the terse Nietzschean/Kierkegaardian response to German Idealism (as found in Hegel’s system) remained. Initially a student under Heidegger, Jean-Paul Sartre produced a more fashionable rendering of Heideggerian ontology with ethical (or non-ethical) overtones. This became popularized as existentialism. Other proponents of phenomenology such as Merleau-Ponty took a more directly Husserlian approach, eschewing a phenomenological explication of ethics and later, as did Sartre, adopting neo-Marxist views to supplement the phenomenological endeavor. J. BANNAN, *THE PHILOSOPHY OF MERLEAU-PONTY* 193-228 (1967).

With the incursion of marxism into phenomenological dialogue and the rediscovered interest of phenomenology with language rather than Being, Continental philosophy began the development towards structuralism. See H. GADAMER, *ESSAYS IN PHILOSOPHICAL HERMENEUTICS* 173-74 (1985). Of course, this also lead to a partial reconciliation between Nietzsche and Hegel in the works of Habermas, Gadamer, and Derrida.

26. “Post-Modernism” is difficult to define. Perhaps the best way to attempt to describe the term is to get clear on its antecedent — “Modernism.” Modernism can be understood both as an historical period and a description of a style of thought. In its temporal dimension, Modernism (or the Modern era) spans c. 1890-1945. It is characterized by an explosion of experimental technique pursuant to the credo “make it new.” E. POUND, *ABC OF READING* 19 (New Directions ed. 1960). In literature, this is exemplified in the experimentation by Joyce, Faulkner, Proust, and Woolf with mirroring inner impressions or subjective time-consciousness with stylistic invention. In a different vein, both Eliot’s *The Waste Land* and Joyce’s *Finnegan’s Wake* utilize allusions and interior mythologies to give expansive significance to what would normally be considered everyday occurrences. In music, Stravinsky (*Le Sacre du Printemps*) and Prokofiev (*Lieutenant Kijie Suite*) incorporated dissonance into mainstream thematic composition. See A. HODEIR, *SINCE DEBUSSY: A VIEW OF CONTEMPORARY MUSIC* 24-

the case, the most difficult aspect of assessing a school of thought is determining whether there is indeed a "school of thought." This is very much the case with structuralism. There are unifying elements in the work of de Saussure, Levi-Strauss, Chomsky and Piaget, yet their theories of what constitutes "structure" are in many ways, divergent.²⁸ Further, writers like Barthes and Foucault straddle structuralism and deconstruction²⁹ — which is, as we shall see, both the progeny and

30, 216-18 (1961). Schoenberg developed the twelve-tone system of composition. More adventuresome composers, such as Webern, Berg, Satie, Cage, and Stockhausen, developed atonal systems and industrial or environmental musics — *musique concrète*. See D. MITCHELL, *THE LANGUAGE OF MODERN MUSIC* 123-58 (1963). The Cubism of Picasso, Braque, Leger and Matisse led to the non-representational painting and sculpture of Miro, Pollock, Kline and Brancusi. See I. W. HAFTMANN, *PAINTING IN THE TWENTIETH CENTURY* 95-125 (R. Manheim trans. 1965). In philosophy, and other "social sciences," the Modern period saw a move from idealism towards positivism and the scientific method of logic. Psychoanalysis broke away from more philosophical explanations of human motivation and philosophy proper predominantly concerned itself with questions of language, ontology, and ethics.

Post-Modernism incorporates the historicity of Modernism and seeks to reestablish a historical continuum incorporating itself. Hence, Structuralism incorporated Wittgensteinian ideas on language with a return to Kantian Idealism. Music reached back to tonality, utilizing rhythmic innovations pioneered in the Modern period. See, e.g., P. GLASS, *Einstein at the Beach* (CBS Masterworks 1982). Performance artists such as Laurie Anderson have created a decidedly Post-Modernist voice through the use of multi-media. In literature, Post-Modernism has returned to relatively unadventurous prose technique; but this style belies inventive subjects for the writer — sometimes bordering on the fantastic or the surrealistic. See, e.g., G. GRASS, *THE TIN DRUM* (R. Manheim trans. 1961); G. GARCIA-MARQUEZ, *ONE HUNDRED YEARS OF SOLITUDE* (G. Rabassa trans. 1970); I. CALVINO, *T ZERO* (W. Weaver trans. 1969); T. PYNCHON, *GRAVITY'S RAINBOW* (1973), D. BARTHELME, *SADNESS* (1970); A. RICE, *INTERVIEW WITH THE VAMPIRE* (1976). In the graphic arts, Post-Modernism recalls representationalism, but with startling results. See, e.g., W. DeKooning, "Two Women in the Country" (1954); Balthus, "The Golden Days" (1944-46); P. Klee, "Child Consecrated in Suffering" (1935). At least one commentator has likened Post-Modernism to a return to Romanticism. See, e.g., J. BARZUN, *CLASSIC, ROMANTIC AND MODERN* 140-54 (Anchor ed. 1961).

27. This is certainly an arguable point, but not one made without authority. See E. CASSIRER, *ESSAY ON MAN: AN INTRODUCTION TO A PHILOSOPHY OF HUMAN CULTURE* 391-99 (1944); R. BARTHES, *Myth Today*, in *MYTHOLOGIES* 109, 111-13 (A. Lavers trans. 1972).

28. See DeGeorge & DeGeorge, *Introduction* in *THE STRUCTURALISTS: FROM MARX TO LEVI-STRAUSS* xi-xii (R. DeGeorge & F. DeGeorge eds. 1972) [hereinafter cited as *THE STRUCTURALISTS*]; T. TODOROV, *THEORIES OF THE SYMBOL* 223-26 (C. Porter trans. 1982).

29. Foucault presents the clearest case of wavering between approaches. *Com-*

1986]

Book Review

279

nemesis of mainstay structuralist thought. Structuralism as a programme is perhaps best described as "Kantianism without the transcendental subject."³⁰ Although structuralism has had an almost universal impact on contemporary thought, for present purposes it is only necessary to grasp structuralism as a doctrine which has greatly influenced literary theory. If one were to single out a central tenet of structuralist literary theory, it would be the integrity of the text. That is, for the structuralist, the relationship of the reader to the text is determinate.³¹ This position assumes two things. First, that the reader and the text are distinguishable. Second, that if they are distinguishable, then they are separate. It is only if there is a reader/text dichotomy that there can be any meaningful notion of supremacy of one over the other.

Early structuralist literary theory insisted on the integrity of the text because it was thought that any theory grounded, even in part, on the reader's reactions to the text was doomed to fail for relativism.³² Imagine Molly Bloom's soliloquy in Joyce's *Ulysses* or the climactic death scene in Kafka's *The Trial* with the concomitant variety of readers' responses, and one can easily see the initial appeal of the textual

pare M. FOUCAULT, LANGUAGE, COUNTER-MEMORY, PRACTICE 87-109 (D. Bouchart & S. Simon trans. & eds. 1977) (discussion of the concept of reverie in Flaubert's novels and the prose poem *The Temptation of St. Anthony*) with M. FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 104-131 (A. Sheridan trans. 1979) (deconstructionist analysis of the internalization of corporal and capital punishment in European penology).

Barthes is equally at home in either school. On the one hand, Barthes was, at least in the early stages of his thought, committed to the structuralist position of viewing spoken language as primordial to language-as-system:

A language does not exist properly except in 'the speaking mass;' one cannot handle speech except by drawing on the language. But conversely, a language is possible only starting from speech; historically, speech phenomena always precede language phenomena (it is speech which makes language evolve), and genetically, a language is constituted in the individual through his learning from the environmental speech.

R. BARTHES, ELEMENTS OF SEMIOLOGY 16 (A. Lavers & C. Smith trans. 1967). Yet, in his "autobiography," Barthes takes a uniquely deconstructionist view of *difference* in text and language. R. BARTHES, ROLAND BARTHES BY ROLAND BARTHES 165-66 (R. Howard trans. 1977); cf. J. DERRIDA, SPEECH AND PHENOMENA 18 (D. Allison trans. 1973) (Derrida's treatment of Husserl's idea of a "sign").

30. C. NORRIS, DECONSTRUCTION: THEORY AND PRACTICE 3 (1982) (quoting an aphorism attributed to Paul Ricoeur).

31. See Jakobson, *Linguistics and Poetics*, in THE STRUCTURALISTS, *supra* note 28, at 85; R. BARTHES, WRITING DEGREE ZERO (A. Lavers & C. Smith trans. 1967).

32. See W. BEARDSLEY, *The Affective Fallacy*, in THE VERBAL ICON 21 (1954).

school. This form of criticism, based on fixed notions of text, engendered what is now known as the New Criticism.³³ The epitome of the text/structuralist approach can be seen in the Jakobson/Levi-Strauss analysis of Baudelaire's "Les Chats."³⁴

This mode of textual analysis quickly gained formulaic "stature" and one can easily find a structuralist critique of almost any "significant" literary text.³⁵ However, concurrent with the apex of structuralist critique was a severe reaction against many of the presuppositions underlying the programme. Collectively, this reaction has become known as deconstructionism, its most powerful proponent being Jacques Derrida.³⁶ Yet deconstructionism is much more than a reaction to structuralism — at least insofar as literary theory is concerned. While, in its initial stages, deconstruction was primarily concerned with questioning hypotheses of structure, it has grown into a full-blown literary theory which urges a synthetic approach to problems of reader versus text.

33. See, e.g., N. FRYE, ANATOMY OF CRITICISM (1957); A. TATE, LITERATURE AS KNOWLEDGE (1941); R.P. BLACKMUR, FORM AND VALUE IN MODERN POETRY (1957).

34. Jakobson & Levi-Strauss, "Les Chats" de Charles Baudelaire, 2 L'HOMME 5 (1962), reprinted in THE STRUCTURALISTS, *supra* note 28, at 124.

35. See C. NORRIS, *supra* note 30, at 7-8.

36. Derrida's thought is very difficult to pin down in any systematic fashion. Much like Wittgenstein, he writes epigrammatically and many of his extended meditations are *just that* — long, seamless internal dialogues. See J. DERRIDA, DISSEMINATION (B. Johnson trans. 1981); J. DERRIDA, MARGINS OF PHILOSOPHY (Harvard ed. 1983); J. DERRIDA, OF GRAMMATOLOGY (G.T. Spivak trans. 1977). One of Derrida's central works is yet to be translated, J. DERRIDA, GLAS (1974).

If one would attempt to isolate central tenets of Derrida's philosophy, two propositions (positions?) present themselves. First, Derrida is expressly concerned with laying bare (deconstructing) certain presuppositions assumed by the structuralists, *viz.* the distinction between speech (*parole*) and language system as object (*langue*). See J. DERRIDA, DISSEMINATION, *supra*, at 181-285 *passim* (discussion of Mallarme's diacritics). Derrida's method to this end is decidedly sceptical, but not in a Humean sense. See C. NORRIS, THE DECONSTRUCTIVE TURN: ESSAYS IN THE RHETORIC OF PHILOSOPHY 34-35 (1983). Rather, Derrida takes erudite polemical stances much in the manner of Nietzsche. In fact, Nietzsche's *Genealogy of Morals* provides an excellent introduction into Derridean metaphysics. Derrida himself is an expositor of Nietzsche. See J. DERRIDA, SPURS: NIETZSCHE'S STYLES (B. Harlow trans. 1979).

The second major thrust of Derridean deconstruction is to lift barriers between philosophy and other modes of writing such as fiction. Ostensibly, this is the primary theme of *Margins of Philosophy*. Derrida's reformulation of metaphysics has been well received in the United States. For an excellent account of Derrida's influence on American philosophy and literary theory, see Godzich, *The Domestication of Derrida*, in THE YALE CRITICS: DECONSTRUCTION IN AMERICA 20 (J. Arac, W. Godzich & W. Martin eds. 1983).

The first step in this new theory is to deny that there is a meaningful distinction between text and reader which enables the theorist to set one against the other. Thus the reader is not the meaning, nor is the text. Rather, there exists a symbiosis of text and reader which makes critical judgments possible.³⁷ Deconstructionists still speak in terms of text, author and audience — but these terms take on a fresh meaning.³⁸ These factions no longer compete for critical prominence — they coexist in an interpretive community.

This challenge to the integrity of the text was spearheaded by analyzing the temporal, rather than the spatial, dimensions of the reading experience.³⁹ But a return to the early view of subjective reader experience entailed a relativity of meaning which rendered critical commentary pointless. Therefore, a unity of text and reader is posited — meaning becomes an “event rather than an entity.”⁴⁰ Some critics, however, continued to give the reader primacy in the new joint relationship. This was plainly wrong. Such an approach relied on reader/structuralist ideas which created the opposite of the result intended — a new formalism based on the reader instead of on the text.

This dilemma influenced the move among literary critics to speak in terms of “interpretive communities.” Thus, as Stanley Fish has noted, “the act of recognizing literature is not constrained by something in the text, nor does it issue from an independent and arbitrary will; rather, it proceeds from a collective decision as to what will count as literature”⁴¹ The stability of interpretive norms is a result of community unity — and the unity, at least *some kind* of community unity, is *a priori*. Interpretive disagreements can exist because of community stabilities. Thus, advocating a particular interpretation is not discovering *the* meaning, but rather showing the audience a new way to mean. Given that there is no absolutely correct reading of a slice of text, formulation and reformulation of interpretive strategies takes on a true dialectical character. The “rightness” of an interpretation is a matter of better convention — nothing more and nothing less.

Well, one might ask, what does this tangled web of post-modern literary theory do for analytical jurisprudence? Without venturing into

37. See S. FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* 3 (1980).

38. *Id.* at 10-11.

39. *Id.* at 2.

40. *Id.* at 3.

41. *Id.* at 11.

the subject matter of Part II of this Review, one central problem of legal philosophy springs to mind as being aided by critical principles — namely, how does a judge go about deciding hard cases⁴² with reference to precedent or a statutory reading? Parallels with problems involved in literary interpretation immediately become apparent. Take, for example, the two main views on determining what a statute means (or, at least, the two views rightly or wrongly attributed to judges): interpretivism and non-interpretivism. Interpretivism holds that judges should read a statute (or a constitution) as the legislators who drafted it intended it to be read, regardless of change in societal (community) mores. Putting aside, for the moment, nagging questions about whether the particular legislators had a singular intent, a group intent, any intent about their intent, or an opinion about whether their intent should matter to judges,⁴³ this constructivist view of non-interpretation is seen, by parallel with literary theory, to be tacitly *non-interpretive*. The opposing school of statute reading, non-interpretivism, insists that framers' intent is not dispositive of the meaning of the statutory language at hand. Legislation should be read as a political enterprise, subject to judicial change. There are, of course, many scholars who advocate methods of reading between these two poles.^{43a}

Reliance on case law precedent invariably involves interpretation as well. The principle of *stare decisis* entirely begs the question of what a particular case or even a line of cases means. Here the appeal to the authors' intent is usually less strenuous, but it is, nevertheless, present. A recent line of cases in the area of federal jurisdiction may be illustrative.

In 1961, the Supreme Court decided the landmark case of *Monroe v. Pape*,⁴⁴ which held that state *judicial* remedies need not be exhausted in order to bring a claim under 42 U.S.C. section 1983 in federal court. Two years later, the Court wrote *McNeese v. Board of Edu-*

42. I use the term "hard case" as per Dworkin. See R. DWORKIN, *supra* note 11, at 81-130 *passim* (1977).

43. See R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 71-85 (1975); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).

43a. See J.H. ELY, *DEMOCRACY AND DISTRUST* 1-9 (1980) (explaining that interpretivism cuts across conservative and moderate political positions); see also Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1071 (1981) (role of consent through history supplements framers' intent theories).

44. 365 U.S. 167 (1961).

tion,⁴⁵ which appeared to hold that it was unnecessary for a section 1983 plaintiff to exhaust state *administrative* remedies before proceeding in federal court. Several circuit courts disagreed with this reading of *McNeese*.⁴⁶ Nevertheless, in dicta in several cases subsequent to *McNeese*, the Supreme Court relied on that case for the flat statement that exhaustion was not mandatory.⁴⁷ Finally, the Court recognized the need to settle the question and *Patsy v. Board of Regents*⁴⁸ did so — holding that there is no requirement of exhaustion of state administrative remedies prior to a federal 1983 suit.

The *Monroe-Patsy* line of cases demonstrates the labyrinth of interpretation that courts are faced with in construing precedent. Even the Supreme Court was treating what, in the final analysis, was dicta in *Monroe* as precedent. If this were not the case, the decision in *Patsy* must be seen as superfluous. Rather than stark appeals to original intent⁴⁹ or protection of non-majoritarian virtues,⁵⁰ the turn to a post-modern jurisprudence resembling current trends in literary theory affords the legal theorist the conceptual ammunition to confront primordial questions of judicial decisionmaking — the coherent explanation of the legal principles presupposing the “grand theories” of constitutional adjudication currently fashionable.⁵¹

45. 373 U.S. 668 (1963).

46. The lower courts read *McNeese* as only addressing the question of adequacy of the particular state administrative procedures. Thus, where those procedures were found to conform with constitutional notions of due process (fair opportunity to be heard), courts upheld an exhaustion requirement. See, e.g., *Eisen v. Eastman*, 421 F.2d 560, 567-69 (2d Cir. 1969); see also C.A. WRIGHT, *THE LAW OF FEDERAL COURTS* § 49, at 294 (4th ed. 1983); Note, *Exhaustion of State Administrative Remedies in Section 1983 Cases*, 41 U. CHI. L. REV. 537 (1974).

47. *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974); *Wilwording v. Swenson*, 404 U.S. 249 (1971); *Damico v. California*, 389 U.S. 416 (1967).

48. 457 U.S. 496 (1982).

49. See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY* (1978). A more tempered and insightful approach along the same lines can be found in A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970).

50. See, e.g., J.H. ELY, *supra* note 43a.; J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982); L. TRIBE, *CONSTITUTIONAL CHOICES* 121-37, 238-45 (1985); L. LUSKY, *BY WHAT RIGHT?* (1975). This is not to suggest that the “grand theories” are ill-founded or useless — they do not, however, provide the analytical building-blocks necessary to the interpretation of a *particular text*.

51. See *supra* notes 49-50 and accompanying text.

II.

There is certainly much more to *Law's Empire*⁵² than the literary interpretation/legal interpretation analogy, but I choose to solely address this section of the book because I find it the most engaging part of the work, as well as the most divergent from Dworkin's earlier thought.

I begin by mentioning that the sections of *Law's Empire* which treat the literary/legal interpretation analogy are, in large part, rehashes of a lively debate between Dworkin and Professor Fish initiated four years ago in a symposium on law as literature in the *Texas Law Review*.⁵³ Fish offers several telling criticisms of Dworkin's adaptation of literary theory to law. I shall set these out and hope to expand upon them.

Dworkin begins his discussion of legal interpretation by contrasting it with "semantic" theories of law.⁵⁴ By "semantic theories" Dworkin means ordinary language notions of what can qualify as "law" — in other words, legal positivism. This position troubles Dworkin on two counts — one philosophical, the other political. First, positivism, in its insistence on qualifying and disqualifying things as "law" or "non-law," is philosophically chauvinistic. Second, positivism can lead to a very conservative theory of interpretation (or, non-interpretation — although, as we have seen, this is a misnomer). Equally problematic for Dworkin is legal realism. He views this super-relativistic theory of legal inventionism as a judicial free-for-all — decisionmaking without the guidance of principle. Legal Realism also produces a form of interpretation unsavory to Dworkin's tastes — total reliance on the reader and hence ultimate indeterminacy.⁵⁵ Therefore, Dworkin must arrive at a theory of how to read cases and statutes which falls between these two extremes. Whether he has done so in a coherent fashion is the question which occupies the remainder of this Review.

Dworkin first sets out what he considers to be the necessities underlying any interpretive schema. There are two prerequisites: (1) the object of the interpretation — the entity to be interpreted — must be seen by those in the interpretive community as having intrinsic value, that is, to be worthy of interpretation; (2) the object must be suscepti-

52. References to *Law's Empire* are given by page number only.

53. *Symposium — Law and Literature*, 60 *TEX. L. REV.* 373 (1982).

54. Pp. 31-44.

55. Dworkin, *Law as Interpretation*, 60 *TEX. L. REV.* 527, 528-29 (1982).

ble to interpretation.⁵⁶ Next, Dworkin distinguishes creative interpretation from scientific and conversational interpretation, and associates legal interpretation with the former.⁵⁷ The major distinguishing point here is that both legal and creative interpretation treat objects of interpretation which are created by "people as an entity distinct from them, rather than what people say, as in conversational interpretation, or events not created by people, as in scientific interpretation."⁵⁸ One can certainly quarrel with the neatness of these distinctions, but for the purposes of this Review I will grant the point. As creative interpretation, law is concerned predominantly with purposes and not with causes (as would undoubtedly be the case in scientific interpretation). Thus, Dworkin has provided the groundwork for positing interpretive communities. He then turns to the central question of interpretation — how is it possible to evaluate rival interpretations as right or wrong?

In developing his answer to this query, Dworkin first attempts to demonstrate the appropriate relationship between interpretation and author's intention. First, it is necessary to clarify what Dworkin means by "intention." He is very careful to disavow any psychological qualification on intent. Rather, intent is an attitude presupposed by the critical enterprise.⁵⁹ In a strict sense, the author's intention is always part and parcel of the baggage of interpretation since an author creates a work *to be interpreted*. This is not to say, however, that every author contemplates a particular interpretation. Nevertheless, a writer must separate herself from the text to the extent that she recognizes the historicity of its interpretation — *i.e.*, that it is amenable to the interpretive process, whatever its end result may turn out to be.⁶⁰ This does not

56. P. 47.

57. Pp. 50-51.

58. P. 50.

59. Pp. 55-56.

60. Pp. 59-60; *see also* Dworkin, *supra* note 55, at 539-40. Perhaps some authors have made conscious attempts to foreclose particular interpretations of their works prior to literary criticism. This is one way to explain Eliot's footnotes to *The Waste Land*. *See, e.g.*, Eliot, "The Waste Land," *Preface to Footnotes* (1922) (explaining the author's indebtedness to Frazier's *The Golden Bough* and Weston's *From Ritual to Romance*). There is good authority, however, that Eliot viewed the now infamous notes as superfluous. *See* L. SIMPSON, *THREE ON THE TOWER: THE LIVES AND WORKS OF EZRA POUND, T.S. ELIOT AND WILLIAM CARLOS WILLIAMS* 149 (1975). The director Sergei Eisenstein has been remarkably forward about suggesting how to interpret the "Odessa Steps" sequence of *The Battleship Potemkin*. *See* S. EISENSTEIN, *FILM FORM: ESSAYS IN FILM THEORY* 162-65 (J. Leyda ed. & trans. 1949).

The more interesting question is whether, assuming an author wants to stake claim

necessarily commit one to a *theory* of critical interpretation *qua* author's intent, however. Indeed, the farthest that Dworkin will go on this account is to admit that there is inherent in the interpretive enterprise an "intentional air."⁶¹

It is clear that Dworkin's main purpose in analyzing the author's intention theory of literary criticism is to undermine strict constructionism in legal decisionmaking. Even though he will accord a modicum of deference to conservative renderings of *canonical* legal texts (e.g., the Constitution),^{61a} the "framers" intent theory of constitutional construction is still suspect. Dworkin begins this criticism of positivistic judicial decisionmaking by demonstrating fallacies inherent in creative interpretation which is author intent centered.

Dworkin demonstrates that determining an author's intention invariably proves problematic. To bring the point home, he cites Stanley Cavell's now famous example of an intention not realized yet brought to the attention of the author.⁶² Cavell would have us imagine a conversation with Fellini where the director is informed that the female lead in *La Strada* is really an allusion to the Philomel legend.⁶³ What happens if this "interpretation" is recognized — legitimized — by Fellini saying "come to think of it, that *is* what the character means?"⁶⁴ This example certainly blurs the line between author's intent and interpretation. Dworkin recognizes this aspect of Cavell's imaginary conversation; however, he does not go far enough and admit that the example brings into question the very propriety of separating text from reader — author from interpretation. I will return to this oversight on Dworkin's part later.

If Dworkin renounces the author's intent theory of interpretation,

to interpretive ground, this foreclosure can ever be successful. Congress has gotten into the habit of publishing official legislative histories to important enactments in just such an attempt. These official legislative histories can present an artificially homogenous portrait of Congressional intent underlying legislation. Many times they do no justice to the fact that most legislation is forged on the anvil of dissent.

61. P. 59.

61a. Cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

62. Pp. 56.

63. See S. CAVELL, *MUST WE MEAN WHAT WE SAY?* ch. 8 (1969).

64. An unimaginary example presents itself readily. Thomas Mann, when informed of the poet Howard Nemerov's reading of *The Magic Mountain* as a Grail epic, stated that his characterization of Hans Castorp was unconsciously one of Perceval. T. MANN, *Author's Postscript*, in *THE MAGIC MOUNTAIN* 717, 725-26 (H.T. Lowe-Porter trans. 1969).

what does he propose in its place? At this juncture in his analysis, Dworkin coins a rather opaque phrase which he maintains is determinative of the problem. An interpretation attempts to make the text the "best it can be."⁶⁵ Most of the problems with Dworkin's idea of interpretation are attributable to conceptions underlying this phrase. If Dworkin rejects the author's intent theory and if there can be real disagreement about whether interpretation *A* is better than interpretation *B* of a text, then he must rescue his pluralistic/democratic theory of interpretation from the grips of legal realism. For, without a substitute for author's intent as the immovable signpost for what readings count as "right" and "wrong," anything — literally *anything* — goes.

Dworkin terms the "anything goes" account of legal interpretation "external skepticism."⁶⁶ This is contrasted with internal skepticism, which is intra-community disagreement over plausible and implausible interpretations. Dworkin's answer to this dilemma of potential indeterminacy is the Achilles heel of his interpretive theory, for he seeks refuge in the very author's intent theory he initially turns aside. In short, Dworkin must attempt to side-step the time-honored naturalistic fallacy — attributing truth values to normative positions. Dworkin's conundrum is amply illustrated in his account of how judges read precedent.

Dworkin likens a judge's role as interpreter of precedent to that of a chain novelist.⁶⁷ If, for instance, there are ten authors writing a particular novel in serial fashion (*i.e.*, they do not consult with each other concerning treatment of their respective chapters), Dworkin argues that the position of each successive author is progressively distanced from a "text" so that intent becomes an attenuated issue — if it is an issue at all.⁶⁸ Through the writing of these chapters — or cases, if you

65. P. 77.

66. Pp. 78-85.

67. There have been very few of these efforts — none of them worth reading. Dworkin points to the soft-core porn *Naked Came the Stranger* (written serially by a number of *New York Post* journalists, ostensibly as a hoax to demonstrate that anything can get published) as an example of this technique. However, the slight characterizations authored in that book do not suit his purposes so well, and he urges us to imagine that Dickens' *A Christmas Carol* was chain written. See pp. 232-37. Apparently, Dworkin uses this story as exemplar because the character of Scrooge undergoes a metamorphosis — a narrative result which would constrain a later serial writer. Perhaps a more elegant example of the same would be to imagine a *Bildungsroman* such as Mann's *Buddenbrooks* or Musil's *Young Torless* so written.

68. Pp. 228-38; see also Dworkin, *supra* note 55, at 541-42; accord S. SONTAG,

like — the respective authors increasingly become constrained by the history of the other authors' prior work. That is, author *five* is constrained to some extent by what authors *one* through *four* have written. Thus, for example, if the narrative has stipulated in clear terms that the hero of the book is *x*, then the next author must either be limited by *x* or rewrite prior text. So it is with judges, Dworkin argues. Each is an author in a chain, constrained by what has gone before. Dworkin terms this communal constraining force in law "legal history."

It is crucial to realize what is going on here. Judges are not only writing their own cases, they are also interpreting legal history *and*, as they write, they are *authoring interpretations*. Therefore, the idea of author's intent as a guide-post for determining whether an interpretation is right or wrong is denuded as chimera — there is no brute fact, only interpretation.

This is the logical payoff of Dworkin's theory of judicial decision-making, but it is an end that Dworkin himself cannot accept. Stanley Fish has poked holes in prior versions of Dworkin's theory, holes which bear recounting and analysis. Fish contends, and I think rightly, that Dworkin starts out on the right track but cannot accept the consequences of his theory — or at least the consequences as he sees them. Thus, he retreats to an author's intent theory and accomplishes nothing. According to Fish, Dworkin can give no account about what it would be for a particular judge to be wrong in a particular interpretation of prior case law under the chain novel analogy.⁶⁹ In order to erect standards by which right can be separated from wrong, Dworkin must distinguish between the position of the first author in the chain and that of the later, more remote authors. This distinction is essentially one of the original or primordial intent. Thus, although Dworkin does not place the first author's writing/interpretation of the work in an absolute posture, he does accord it primacy — a first among equals as a historically constraining factor. The first author has greater freedom than the others to adhere to or depart from narrative. This seemingly small step is fatal to Dworkin's position. It inadvertantly posits text as brute fact and commits Dworkin unwillingly to a strict constructionist reading of law.

The concept of constraining legal history does not help Dworkin either. As was the case with the text of the first author, Dworkin in-

Against Interpretation, in A SUSAN SONTAG READER 96, 100 (E. Hardwick ed. 1983).

69. Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551, 554-56 (1982).

vests legal history with the status of brute fact. But this cannot be. If every chain author is interpreting and not freely intending a text, how can legal history be anything but the result of interpretation? If it is an interpretive resultant, then it is not brute fact and will not serve as a barometer for distinguishing correct from incorrect interpretations. This is the dilemma; Dworkin must embrace either legal realism and its indeterminance or positivism and its determinancy. Otherwise he, like Odysseus, would be cast against the rocks.

Dworkin has offered an answer to Fish's objections,⁷⁰ but I remain unconvinced. The attempted rebuttal of Fish involves a distinction Dworkin makes between *explaining* and *changing* law. An interpretation which changes law cannot be legitimate, whereas one that merely explains law can. But this begs the question. The very measuring-stick for distinguishing change from explanation must be some notion of a fixed text.⁷¹ This later position, which appears in *Law's Empire*, indicates that Dworkin, for the time being, has thrown his interpretive hat to the edge of the positivist ring.

It is interesting to conjecture just how far this confusion over the base structure of interpretation undermines the later, more explicitly jurisprudential, sections of *Law's Empire*. My inclination is that it severely affects the later portions of the book. However, I say this with a caveat. I do not think that Dworkin's position is beyond restructuring and I think that with some reshaping the later parts of *Law's Empire* are indeed more forceful than they would have seemed initially — even to one who accepted Dworkin's interpretive theory.

The red herring in Dworkin's search for a pluralistic theory of interpretation which provides the basis for a liberal view of judicial decisionmaking is that determinancy, and hence correctness and incorrectness, of interpretation must be predicated on truth values. It is here that deconstructivist theory aids the theoretician. Rather than relying on "right" and "wrong" as determinative of the value of different interpretations, the judge could feel a constraining interpretive force in "persuasive" and "unpersuasive" as criteria for earmarking which interpretations to accept and which to reject. This position is consonant with the idea that one cannot shed the interpretive robe and separate text from reader, yet it does not commit one to either a positivist or a

70. See Dworkin, *My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk About Objectivity Anymore*, in *THE POLITICS OF INTERPRETATION* 287 (W. Mitchell ed. 1983).

71. See Fish, *Wrong Again*, 62 *TEX. L. REV.* 299, 300-01 (1984); see also p. 238.

realist position. True, it does not allow a judge to compartmentalize "correct" and "incorrect" interpretations, but who said that a judge's job was easy? Moreover, such a view does little to change the role that principle, as opposed to rules and policy, play in Dworkin's earlier jurisprudence.

Most book reviews end with a recommendation about whether to read the book or not. Everyone who is even the slightest bit interested in how judges do or should decide cases should peruse this latest offering by Dworkin. It is ingeniously crafted, cogently argued, tersely written and extremely interesting. What is more surprising is that it is remarkably accessible to the non-lawyer. The most important aspect of the book, however, is that it sets the stage for further meditations throughout the legal and philosophical communities on the theme of judicial decisionmaking. Further, it brings discussions of this topic into a decidedly updated forum. Perhaps jurisprudence has finally caught step with the rest of critical inquiry — post-modern jurisprudence, maybe.