A COUP D'ÉTAT IN LAW'S EMPIRE: DWORIKIN'S HERCULES MEETS ATLAS

ABSTRACT. In Law's Empire, Ronald Dworkin advances two incompatible versions of law as integrity. On the strong thesis, political integrity understood as coherence in fundamental moral principles constitutes an overriding constraint on justice, fairness and due process. On the weak thesis, political integrity, while a value, is not to be privileged over justice, fairness, and due process, but to be weighed along with them. I argue that the weak thesis is superior on both of Dworkin's criteria: fit and justifiability. However, the weak thesis must be amended to allow for coherence in policies as well as in principles: the social consequences of legal decisions must be taken into account.

Hercules, the mythical reigning jurisprude in Ronald Dworkin's Law's Empire, presides over what appears to be a foreign land. One usually thinks of the Anglo-American legal system as an organ of justice. But in Dworkin's judicial fiefdom, the ideal judge Hercules decides not according to what would be most just, but rather what makes the law and the legal system "the best it can be". On Dworkin's conception of the law as integrity, judges are obligated to decide cases in a way which makes the law coherent in principle, even though this may mean that at times justice must bow to integrity.

I would like to explore how it is that integrity is able to trump justice. Rather than contesting Dworkin's interpretation on the grounds that it sometimes allows integrity to override justice, I argue that Dworkin's version of law as integrity is unacceptable because its requirement that the law be made coherent in principle forces judges to always side with integrity over justice whenever there is a conflict.

1 I would like to thank Kenneth Kipnis for his helpful comments on earlier drafts.
2 Law's Empire (Cambridge: Harvard University Press, 1986). All parenthetical numbers are page references to Law's Empire, hereafter LE.
Though Dworkin attempts to distance himself from this strong thesis, he is committed to it by virtue of his support for egalitarian communities of principle\(^3\) which unconditionally reject so-called checkerboard laws\(^4\) on the grounds that such laws represent a compromise of our fundamental moral principles and thus do not make the law coherent in principle. Ironically, this strong version of law as integrity fails both of Dworkin's own tests, fit and justifiability.

In place of the strong version, I offer a competing view, one that is pragmatic in character, though not the simple, forward-looking utilitarian pragmatism that Dworkin uses as a foil for his own theory of integrity. My ideal judge, whom I shall call Atlas, also tries to provide the interpretation which will make the law the best it can be. Like Hercules, he too will require a proper relation between justice, fairness, and due process.\(^5\)

But unlike Hercules, Atlas will not require that this relation be subject to the overriding constraint of "coherence in principle" where this troublesome phrase is understood as either coherence for its own sake or coherence in principles — that is, that judicial decisions be made on the basis of principles and not policies. Rather, for Atlas the best answer will be the one that achieves integrity as a balance between justice, fairness, due process, and political integrity, where political integrity reflects the need for coherence in policies as well as in principles.\(^6\)

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\(^3\) See *LE*, pp. 211--15, and below pp. 11--13.

\(^4\) See *LE*, pp. 178--84; pp. 214--18; 435, n. 6 and below pp. 9--10, 20--21.

\(^5\) Dworkin, in keeping with his much maligned claim that there is a single right answer to legal questions, calls for "the right relation" (263). In *LE*, however, Dworkin concedes that there is no available objective or conclusive test of correctness for a judge's decision. As Max Weaver has remarked, since a decision cannot be shown to be the right answer, the right answer thesis seems unnecessary and pointless (review of *Law's Empire*, *Journal of Law and Society* 14 (1987): 268). I agree that, at least in regard to the adequacy of law as integrity as an interpretation of the law, not much hinges on there being a single right answer as opposed to fallibly better ones and so will not add to this already tired debate.

\(^6\) Coherent policies reflect due consideration of the social consequences of judicial decisions.