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"PROTESTANT" INTERPRETATION AND SOCIAL PRACTICES

> ...learned disputants... take the field,
> Sure not to conquer, and sure not to yield,
> Both sides deceiv'd if rightly understood,
> Pelting each other for the public good.
> William Cowper, "Charity"

> Though the word (*logos*) is common, the many live as if each had a private understanding (*phronēsin*)
> Heraclitus (Diels-Kranz, fragment 2)

The impressive theoretical structure of *Law's Empire*[1] is organized around three major claims. The first concerns the aim and method of general jurisprudence: it is the claim that law (or, rather, the concept of law) is an interpretive concept. Thus, to explicate the concept of law is to give an interpretation of the practice of law at a very general level (LE vii).

The second claim concerns the nature of law itself. According to Dworkin, the best general interpretation of the practice of law as we know it treats legal practice itself as an interpretive practice and treats legal reasoning, at every level, as an exercise in constructive interpretation. From this Dworkin draws the corollary that the activities of judges, lawyers, and lay participants, on the one hand, and legal theorists and philosophers on the other, are essentially of the same nature.[2] Philosophical interpretations of the practice as a whole are,

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[1] Ronald Dworkin, *Law's Empire* (hereafter LE) (Cambridge, Mass.: Harvard University Press, 1986).

[2] "Lawyers are always philosophers, because jurisprudence is part of any lawyer's account of what the law is..." (LE 380).

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on his view, continuous with, indeed necessarily presupposed by, the more concrete interpretations offered by lay and official practitioners. To participate in legal practice is inter alia to engage in legal philosophy (LE 90, 226–27, MP 166).

The third major claim concerns the shape of the argument Dworkin offers for this account of the nature of law. He argues (1) that his theory fits legal practice as we know it at least as well as (or better than) other viable general interpretations, and (2) that it commands our allegiance because it portrays the law as serving a fundamental political ideal to which we are properly committed, namely, integrity. According to this ideal, judges (and, by extension, others who engage in legal argument) must, so far as possible, regard the existing legal practice as expressing or issuing from a coherent conception of justice and fairness, and so are charged to uncover this conception and to make decisions in specific cases on the basis of it. In Dworkin's general interpretive scheme, this political ideal of adjudicative integrity yields a thesis about the nature of law. (Hence, he calls his theory "law as integrity".) On this thesis, propositions of law are true if they figure in or follow from principles that provide the best constructive interpretation of the community's legal practice, and the law consists in the set of all such true propositions of law (LE vii, 225).

Dworkin's philosophical account of law, then, is built on two fundamental notions: interpretation and integrity. Much of *Law's Empire* is devoted to developing and defending his theory of interpretation and his account of integrity. The core jurisprudential doctrine of *Law's Empire* is familiar from Dworkin's earlier work,[3] but his grounding of it in these notions of interpretation and integrity represents a significant deepening of its foundations, and the theory is, in many respects, richer and more powerful for it. But it also exposes certain weaknesses of the theory which may have been less obvious before.

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[3] See *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978); *A Matter of Principle* (hereafter MP) (Cambridge, Mass.: Harvard University Press, 1985).

In this essay I will focus largely on Dworkin's general theory of interpretation. Integrity, Dworkin argues, calls a community to principled interpretation of its legal practice. This yields a conception of law as "a forum of principle",[4] defined and governed by a pervasive interpretive, reflective attitude, which makes not only judges and lawyers but also each citizen "responsible for imagining what his society's public commitments to principle are, and what these commitments require in new circumstances". This "protestant attitude", according to Dworkin, is essential to a people "united in community but divided in project, interest, and conviction" (LE 413).

I find this conception of law very attractive.[5] It treats law inter alia as providing a focus and a language for political debate about matters of serious common concern. However, Dworkin's "protestantism" goes deeper, infecting the general theory of interpretation on which his conception of law rests. It is this deeper "protestantism" that I will challenge. I will argue that it distorts practical understanding, discourse, and debate within social practices generally, and within legal practice in particular.

I. DWORKIN'S THEORY OF INTERPRETATION

A. *Observers, Participants, and Interpretation*

Law is a social practice of a certain sort, and interpretation of and within legal practice, in Dworkin's view, is a special case of interpretation of social practices in general. Thus, legal argument and

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[4] "We have an institution that calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become questions of justice" (MP 71).

[5] See my *Bentham and the Common Law Tradition* (hereafter BCLT) (Oxford: Clarendon Press, 1986), pp. 459–64. However, I am not convinced that argument in this "forum" must be restricted to matters of "principle" (i.e., matters of individual rights). I will not discuss this issue here.

deliberation can be illuminated by trying to understand the practice of interpretation generally.[6]

Social practices are not only meaningful human activities, but they are meaningful to those who take part in them. Participants act from an understanding of their actions (and interactions with others) as appropriate to the practice, and this understanding is in some way constitutive of the practice. Of course, one does not have to be a participant to wish to understand it. But it is a fundamental assumption of Dworkin's hermeneutical enterprise that the observer's perspective is logically parasitic upon that of the (self-identified) participant.[7] The observer of legal practice, Dworkin asserts, "cannot understand law as an argumentative social practice, even enough to reject it as deceptive, until he has a participant's understanding, until he has his own sense of what counts as good or bad argument within the practice" (LE 14).

It is tempting to infer from the participant-priority thesis that interpretation of social practices is always second order, a matter of offering interpretations of interpretations. This view is troubling for two reasons. (1) Where there is substantial disagreement within the community of participants about the nature or requirements of the practice, we may feel forced by it either to choose arbitrarily some particular participants as speaking for the practice, or to give up the search for any coherent meaning for the practice. And (2) where there is strong consensus, it seems to rule out the possibility of coherent internal critical challenge to the dominant understanding of the practice.

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[6] Actually, Dworkin thinks his theory applies as well to literary/artistic interpretation; indeed, interpretation of social practices is in some respects *modelled after* what he takes to be literary/artistic interpretation (LE 50–52, 55–62, MP 145–66). I will not venture to judge whether he has adequately portrayed criticism in these areas.

[7] See LE 55, 422. It is also central to Hart's theory of law. See H. L. A. Hart, *Concept of Law* (Oxford: Clarendon Press, 1961), pp. 86–88, 99–100; and *Essays on Bentham* (Oxford: Clarendon Press, 1982), pp. 144–47. I discuss Hart's views in 'The Normativity of Law', in *Issues in Contemporary Legal Philosophy: The Influence of H. L. A. Hart*, ed. Ruth Gavison (Oxford: Clarendon Press, 1986), pp. 81–104.

Especially sensitive to these problems, Dworkin rejects this inference (LE 55, 62–65). It confuses understanding the practice with reporting participants' beliefs about the practice (LE 54–55, 62–64). A social practice, he maintains, "assumes a crucial distinction between interpreting the acts and thoughts of participants one by one... and interpreting the practice itself", for the "claims and arguments participants make, licensed and encouraged by the practice, are about what *it* means, not what *they* [other participants one by one] mean" (LE 63, emphasis in the original). The starting point for all interpretation of what the practice means is the engaged activity of the practice and the perspective to which it gives rise, not any particular participant's *interpretation* of it.[8]

This, I believe, is an important clarification of the participant-priority thesis. But Dworkin adds a gloss on it which is disturbing. In interpreting their practice, he says, each participant "is trying to discover *his own intention* in maintaining and participating in that practice... in the sense of finding a purposeful account of his behavior he is comfortable in ascribing to himself" (LE 58, emphasis added). That is, Dworkin explicitly portrays social interpretation "as a conversation with oneself" (ibid.). These comments suggest that the "protestantism" of Dworkin's view of interpretation is clearly stronger than that which we noted earlier. They also seem curiously misdirected; they seem concerned with what one does in trying to understand *one's own* (private/individual) action, rather than with trying to understand common activity in which one takes part with others. It is not clear how seriously we are to take Dworkin's comments here, but it is useful at this point in our discussion to contrast it briefly with a quite different account of understanding a common practice.

Against the picture Dworkin suggests here, we might say that a

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[8] Dworkin says that the observer must "participate in the spirit of its ordinary participants..." (LE 422). By this he means, I take it, that one must *engage* in typical activities of the practice – make claims, take positions, advance arguments and the like, within it – and that, in time, one will find oneself taking (or committed to) quite general, interpretive views about the nature of the practice itself as well.

participant's own intention is no more (or less) authoritative than those of any other bona fide participant. Of course, ultimately one can only come to *one's own* view of the practice. In this trivial sense, even to defer to the view of the majority is to come to "one's own" view of the practice, viz., that its meaning is determined by the majority. If the practice is one in which the community is involved – if it is a collective practice, as opposed to the accidental convergence of individual practices – then the appropriate question for a participant seeking an understanding of the practice to ask is neither "What do I intend or believe about the practice?" nor "What do other participants 'one by one' intend or believe?" Rather, the question is "What do *we, participants*, intend or believe?"[9] For one to decide what to do, and to understand what one is to do, within the practice, is for one to consider what we, participants, do and how we understand what we are doing. To answer that question, the interpretations of fellow participants are directly and intrinsically relevant, though they may not be decisive. To participate in a social practice, on this view, is not simply to engage in behavior which, in the bulk, overlaps and effectively coordinates with that of others (and which happens to be meaningful to each of us). It is, rather, for one to take part with others in a collectively meaningful activity, in an activity collectively understood.

Now I do not believe Dworkin wishes to deny the collective character of meaningful social practices (see LE 63–64, 168–75, 263, 422–23). Participants, he argues, are engaged in "interpreting the practice itself, that is, interpreting *what they do collectively*" (LE 63, emphasis added). Rather, his theory of interpretation is proposed as an account of this enterprise of understanding the meaning of collective practices. However, while he regards the activity of the practice as public and collective, he seems to regard the enterprise of understand-

[9] Such practices give rise to collective beliefs or values. See my 'Collective Evils, Harms, and the Law', *Ethics* 97 (1987): 414–40. For a very useful account of this intersubjectivity see W. Sellars, *Science and Metaphysics: Variations on Kantian Themes* (London: Routledge and Kegan Paul, 1968), esp. pp. 188–89, 214–22.

ing that activity as private and individual; at least there is much in his discussion of interpretation pointing in that direction. Those features of his theory that seem to lead to a deeper "protestantism" are the concern of this essay. In the rest of this section I shall outline Dworkin's theory of interpretation and show why I think it commits him to this deeper "protestantism". In the second half of this paper, I shall argue that Dworkin's theory thus interpreted fails to describe adequately participant understanding of common social practices.

B. *Controvery and "The Semantic Sting"*

Dworkin introduces his theory of interpretation to pull the "semantic sting" – a crude picture of what argument and disagreement is or must be like – from our understanding of social practices (and legal practice, in particular).[10] According to this crude picture, argument is logically possible, and rational discussion is intelligible, when and only when there is consensus among the parties regarding the criteria for deciding when their claims are sound (LE 45). That is, the "semantic sting" rules out the possibility of fundamental, "theoretical" disagreement – disputes within the practice about these criteria themselves and about the nature of the practice. On this picture disagreement either is focused on whether the criteria have been properly followed, or turns out not to be genuine disagreement at all, the parties having

[10] "Semantic sting" is something of a misnomer, because it does not essentially depend on any *semantic* thesis (LE 32). According to Dworkin, "semantic theories of law" (e.g., Austinian positivism understood as a thesis about the meaning of "law") assume that general agreement about the rules of language determines the truth conditions for normative propositions within the practice; that grounds for propositions of law are, for example, established in semantic rules regarding the use of "law". But the "semantic sting", as Dworkin describes it, is a much broader assumption about the necessary conditions of intelligible argument and discussion. It assumes that *agreement* about criteria (semantic or otherwise) for deciding when propositions of law are true or false is necessary for intelligible argument and disagreement (LE 33, 43–46). Thus, in the case of law, the "project of digging out shared rules [determining truth/falsity of propositions of law] from a careful study of what lawyers say and do" is, according to Dworkin, "doomed to fail" (LE 43, see also LE 90–91).

failed to engage each other because they press their arguments according to different criteria.

But, Dworkin insists, genuine "theoretical" disagreement is not only possible, but in law and other social practices it is both common and a sign of the health and vigor of the practice. Dworkin's theory of interpretation is designed to give "sense to both agreement and disagreement about interpretation" (MP 171). The existence of rationally intelligible controversy within living practices sets the problem of Dworkin's theory of interpretation.[11]

C. *The Interpretative Attitude and the Stages of Interpretation*

Theoretical controversy – and interpretation, properly speaking – are, according to Dworkin, quite literally unthinkable in "static" or "mechanical" practices, i.e., in practices in which participation is a matter of "unstudied deference to a runic order" (LE 47). Interpretation is possible only when participants take up the "interpretative attitude" towards their own practice. This attitude is characterized by two mutually independent assumptions about the practice (LE 46–48): (1) that the practice has a "point" – serves some interest, purpose, or principle – which can be stated independently of the rules making up the practice; and (2) that the requirements of the practice, even those widely agreed upon, are "sensitive to its point", i.e., they are not fixed with any finality "by history and convention", but are open to modification motivated by a deeper or clearer understanding of the point.

The first assumption illustrates Dworkin's more general point that "the concept of intention... provides the formal structure for all interpretative claims". The interpretative attitude "proposes a way of seeing what is interpreted... as if this were the product of a decision to pursue one set of... purposes, one 'point', rather than another" (LE 58–59). But this purpose or intention is "constructive". It is not the

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[11] "This book is about theoretical disagreement in law. It aims to understand what kind of disagreement this is and then to construct and defend a particular theory about proper grounds of law" (LE 11).

purpose of anyone; rather it is "imposed on the practice" by the interpreter in an effort "to make it the best possible example of the genre to which it is taken to belong" (LE 52). Dworkin sharply distinguishes interpretation from a (fruitless) search for the author's, or speaker's, or agent's intention, especially if this is construed as a search for some psychological fact or mental event.

The second feature of the "interpretative attitude" reveals participants to be not only reflective, but also (at least potentially) critical about activities that by consensus fall within the practice. The interpretive attitude regards the history of the practice with a certain ambivalence: while the practice is in one sense constituted by this history, nevertheless the practice always transcends its history and agreed conventions. Since the point of the practice can be formulated independently of its accepted rules, participants can ask whether certain widely accepted rules adequately serve the point, and, more radically, whether the point or purpose widely assumed for the practice is indeed the point properly attributed to it ("shows the practice in its best light"). Moreover, a better understanding of what they are about will lead participants to a revised view of the specific requirements of the practice, and this, through their acting on it, will alter the practice itself. "Interpretation folds back into the practice, altering its shape, and the new shape encourages further reinterpretation, so the practice changes dramatically, though each step in the progress is interpretive of what the last achieved" (LE 48).

Dworkin distinguishes three "stages" in the systematic interpretation of a social practice.[12] At the *preinterpretative stage* the interpreter collects the rules, standards, and descriptions of characteristic behavior and activities of participants which are widely agreed among participants to be elements of the practice in question. This provides the "raw data" of the interpretive theory. Dworkin admits that this "data" is never, strictly speaking, "uninterpreted" (LE 66, 422), but, as we

[12] It is clear that Dworkin regards this as an idealization of the activities of interpretation of actual participants, analyzing the logical components of the enterprise.

will see later, it must be "raw" or "uninterpreted" relative to the practice. That is, it is behavior (or rules) abstracted from its meaning in the practice.[13]

At the *interpretative* stage, the interpreter "proposes a value for the practice by describing a scheme of interests or goals or principles the practice can be taken to serve or express or exemplify" (LE 52). This interpretation must both fit ("enough" of) the practice and show the practice to have normative appeal, i.e., it must provide a justification of its main elements and of participation in it. This interpretation, at least in the ideal case to which actual interpretations approximate, will take the form of an abstract or general theory (LE 90), a systematically ordered set of explicitly articulated general purposes, aims, or principles from which the various more concrete elements of the practice can be seen to "follow" (in some suitably wide sense of "follow").

Finally, with this theory in hand, interpreters at the post-interpretive or "reforming" stage may adjust their views of the requirements of the practice so as better to serve the justification outlined in the theory. Note that, on this view, it is misleading to describe the activity at this stage as "changing the practice". What the "reforming" interpreter regards as requirements of the practice may appear, from the pre-interpretive stage, to be substantial changes of (deviations from) accepted practice. But if the interpretative attitude has taken hold in a practice, consensus requirements collected at the preinterpretive stage have no final authoritative status. They are, relative to the practice, as yet (virtually) uninterpreted, a collection of actions, decisions, and even rules in search of an interpretation. Once the interpretive task is undertaken, views about what the practice requires may (and, when the practice is healthy, will) differ substantially. But these differing views must, on Dworkin's view, be regarded not as

[13] This is how I understand Dworkin's reference to "raw behaviorial data" at LE 52 and in personal conversation with him. I believe he is committed to this view of the "data" by his assumption, central to his account of the possibility of controversy in social practices, that the "data" are common, but the interpretations or theories of them are not. See below Section I.E.

proposals for changes in the practice, but as conflicting views about what the practice as presently constituted really is and what, as a result, it really requires of participants. In this respect, theory drives practice, for the practice is what the (best) general interpretive/justificatory theory says it is: claims about what in concrete cases the practice requires, permits, or sanctions are true in virtue of their following from the best such theory of the practice.

D. *Fit and Appeal*

Let us return now to the "interpretive stage" to consider more closely the complex relationship between the dimensions of "fit" and "substantive appeal". Dworkin imagines that deliberation at this stage proceeds by collecting or constructing plausible interpretive theories of the practice in question and testing them, first by straining them through a series of filters, then by assessing the relative merits of those which survive. Interpreters are, in the first instance, participants engaged in the practice in question, driven to interpretation by the need to make decisions in particular cases. The filters are designed to keep interpreters honest to the "text", to limit and substantially define the role their personal evaluative convictions play in their decisions (LE 255). Nevertheless, both fit and substantive appeal (political morality, in the case of law) figure directly or indirectly at each point in the process.

The first filter enforces a minimum level of fit. Since the interpretation offer accounts of the community's existing practice, not blueprints for some ideal practice, each must to some substantial degree account for the "preinterpretive data". Some theories will fit so poorly that the interpreter must reject them without considering their substantive appeal (LE 231, 242, 255).

However, it is likely that several interpretations will pass through this initial filter. At this point, while fit does not drop out of the picture, considerations of substantive appeal of the theory come into play. Again, a filter strains out certain interpretations, in this case interpretations which fail to provide what I shall call "formally adequate justifications". An interpretation may fail because it fails to state a justifying standard of sufficient generality, or because it rests on a distinc-

tion not plausibly connected to any more general justificatory consideration (LE 242). Or, again, it may fail to articulate an aim or value of the right kind, i.e., of a kind appropriate to the sort of practice in question.[14] For example, an interpretation of legal practice would fail, according to Dworkin, if it failed to interpret past practice in terms of principles, i.e., in terms of general considerations of justice, fairness, or individual rights (LE 242–44).[15]

Again, a number of eligible interpretations may survive this second filtering as well and contend for the interpreter's favor. At this point she must make a choice among the remaining competing accounts on the basis of her judgment of their substantive merits, for her aim is to make the practice appear in its best light viewed from the relevant normative perspective (LE 231, 257). Of course, it is possible that no interpretation surviving the initial filters is even minimally acceptable on substantive grounds. In that case, the interpreter would be forced to adopt some (internally) skeptical view of the practice.[16]

This judgment of the relative merits of the remaining eligible theories is complex in two respects. (1) A number of distinct, possibly competing, substantive background concerns may be implicated and surviving interpretations may appeal to them in different ways. Thus,

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[14] Surely, the question What *sort* of practice is this? is itself an interpretive question. Can we answer it without going some considerable distance down the road towards a full interpretive theory of the practice? If not, i.e., if we treat this question as one interpretive question among all the others to be settled ultimately by the overall success of the interpretation, then the formal constraint could no longer operate as a filter.

[15] Note that while Dworkin now takes the concept of integrity, rather than the concept of rights, as the focal concept of his theory of law, and integrity is defended in terms of "fraternity" and "community", his basic rights-oriented conception of adjudication (familiar from *Taking Rights Seriously*) remains, because he *defines* integrity strictly in terms of justice, fairness, and due process (LE 165–67, 219–25, 243, 404–05 447–48). Thus, it is an important interpretive question about law whether the justificatory aims in terms of which we propose to understand law should be limited to "integrity" thus defined, or should include a wider (or different) range of political aims.

[16] See LE 237 and generally LE 78–85, 101–08.

the interpreter's choice of an interpretation will represent her view about how the background principles should be ranked, when they may be compromised, and the like. (For example, an interpretation of legal practice may represent a compromise of considerations of justice, fairness, and due process.) (2) Here, again, considerations of fit may be weighed, but this time alongside and in competition with (other) substantive considerations (LE 231, 246–47, 257). Thus, of two surviving interpretations, one may be preferred if it provides a closer fit, requires less of the pre-interpretive data to be ruled "mistakes", etc., than its rival does. On the other hand, the competing interpretation may be preferred because, despite looser fit, it shows the practice in service to a more attractive ideal of political morality.

This weighing of fit against background substantive considerations is possible, on Dworkin's view, because the constraint of fit is not in fact different in kind from the background evaluative/normative considerations which it constrains. Rather, the "constraint fit imposes on substance, in any working theory, is... the constraint of one type of political conviction on another in the overall judgment which interpretation makes a political record the best it can be overall" (LE 257).[17] The relevant political conviction is integrity (LE 231, 246–47, 257). Convictions regarding fit, at both the initial threshold and later, express interpreters' commitments to integrity and their understanding of its relative importance as a matter of political morality.

Thus, Dworkin clearly maintains that "interpretive claims are... dependent on aesthetic or political theory all the way down" (MP 168). The constraint imposed by the practice on background considerations is not one of "external hard fact" or of consensus; it is itself theory dependent, "the structural constraint of different kinds of principle within a system of principle..." (LE 257). These different principles can insure that the substantive judgments of the interpreter are checked by the facts and history of the practice if the principles

[17] "Just as interpretation within a chain novel is for each interpreter a delicate balance among different types of literary and artistic attitudes so in law it is a delicate balance among political convictions of different sorts..." (LE 239).

are themselves sufficiently independent, that is, if these background considerations sufficiently check each other. "Whether any interpreter's convictions actually check one another, as they must if he is genuinely interpreting at all, depends on the complexity and structure of his pertinent opinions as a whole" (LE 237, see LE 239, MP 168–70).

Of course, it is precisely about such matters of background theory (political morality) that interpreters are likely to differ widely. And any particular interpretation of a text or practice is likely to remain highly controversial, not just because the enterprise of interpretation as Dworkin conceives it brings the interpreter's background normative (political) convictions to bear on the judgment of the relative merits of competing interpretive theories, but also and more deeply because the interpreter's own "working theory of interpretation" – her view of the complex relations of fit and appeal within an interpretation – rests on these background convictions.

The only general restriction on such working theories is that the theory must be sufficiently complex in structure to yield a genuine distinction between interpreting and inventing. A participant's working theory will be responsive to her background evaluative or normative convictions. It need not, as a general matter, be responsive to the views of other participants in the practice. The interpretive activities of other participants, according to Dworkin, are sometimes relevant for tactical reasons (LE 12, 380–81); or because, in the judgment of the interpreter, fairness requires that their opinions be taken into account (but only to the extent permitted by other competing background considerations like justice, as judged by the interpreter's theory of these considerations) (LE 247–49); or because of factors specific to a particular practice (LE 88). There is nothing in Dworkin's meta-theory of interpretation of social practices that requires attention to the interpretive activities of fellow participants. Herein lies the strong "protestantism" of Dworkin's theory. Not only is each participant encouraged to take up the interpretive enterprise (this is the "weak protestantism" we noted at the beginning of this essay), but each individual participant also has access to the truth, as it were, about what the practice is and requires, through private interpretation

of the practice-text. While Dworkin seems to recognize that the practice is common, he counsels participants to live as if each had a private understanding of his own. This "protestantism" is not restricted to his theory of law. It is intrinsic to the "interpretive attitude" in general, as Dworkin understands it.

E. *Consensus and the Conditions of Interpretation*

Despite the "protestantism" of the interpretive attitude we have just noted, Dworkin wishes to attribute "meanings" and "purposes" to social practices, and by virtue of these attributions to conclude that a community (in the first instance, and individual participants, in consequence of this) adopts or is committed to the principles implicit in the practices.[18] He seeks to do so without relying on appeal to shared understandings or social meanings of the practices in question, because, he believes, the fact of substantial internal dissensus vitiates any talk of "shared meanings",[19] though it does not undermine the possibility of interpretive argument.

Intelligible discussion and debate within social practices is possible, Dworkin claims, not by virtue of consensus among participants regarding the nature or meaning of the practice, but by virtue of the fact that they focus their (possibly conflicting) interpretations on the same object. Of course, this still assumes the existence of consensus, but the object of agreement is different. Interpretation starts from "pre-interpretive" agreement regarding the boundaries and typical elements of the practice. Consensus fixes the object of interpretation, but not the interpretation; it furnishes the terminus a quo of interpretive activity, but never its terminus ad quem. Dispute about the

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[18] See, especially, the discussion of the "personification" of the community required by use of the concept of integrity, LE 167–75, 182, 186–87, 221, 225, 296.

[19] In *Spheres of Justice* (New York: Basic Books, 1983), Michael Walzer argues that principles of distributive justice are determined by the "social meanings" of the goods to be distributed. But Dworkin counters: "What can it mean even to say that people disagree about social meanings? The fact of the disagreement shows that there is no shared social meaning to disagree about" (MP 217). See LE 425–26.

scope or interpretation of the practicerules is not ruled out by this consensus because it is "consensus of independent conviction" (LE 136). That is, the consensus, for Dworkin, represents merely a convergence of views across some range of actions about what the practice (when best understood) requires. The fact of agreement (i.e., the fact that there is a range of common conviction among participants), as opposed to the facts of the practice about which they agree, is not a matter of intrinsic relevance to any interpretation.[20] Far from ruling out dispute or controversy, agreement of this sort invites it. Each participant who takes up the "interpretive attitude" must "decide, for himself, what [the practice] really requires" (LE 64), and he may be led to an interpretation which substantially competes with those of other participants. The dispute, nevertheless, is genuine because the alternative theories are proposed as interpretations of the same practice.

How does consensus fix the object without fixing the interpretation? The answer, Dworkin claims, is found by asking: with respect to what matters must there be agreement in order for the "interpretive attitude" to flourish in a social practice? (LE 66, 67). He explicitly identifies four necessary areas of agreement. (1) Generic or background consensus: participants must share a language and understand the world around them in much the same way, have roughly similar interests and concerns, and, in general, participate in the same sufficiently concrete "form of life". This allows participants "to recognize the sense in each other's claims, to treat these as claims rather than just noises".[21] (2) Boundary consensus: they must also agree on the "extension" or domain of the practice, i.e., on what behaviors, actions, decisions, claims (or rather claimings) count as falling within the practice, and which fall outside it (LE 67, 91). (3) Paradigm consensus: they

[20] See, for example, LE 136, 145–46.

[21] LE 63–64. This consensus is "generic" in the sense that it may include nothing specific to the social practice in question. It merely supplies the environment within which the social practice exists. Dworkin seems to assume that it is possible to recognize that someone is *making claims* without recognizing these as claims *within the specific practice*. Is this possible?

must also recognize certain claims or propositions regarding what the practice requires to be true within the practice, if any are (LE 72, 88, 91–2). Finally, (4) fit consensus: while participants may disagree widely regarding substantive "background" values (e.g., ideals of political morality) (LE 68), there must not be "too great a disparity" among participants regarding the amount of fit necessary to provide a viable distinction between interpretation and invention. But, he adds, just how much disparity is "too much" is a question about the conditions necessary to sustain the "interpretive attitude", a question which only history can answer (LE 67, MP 171).

These four conditions[22] define what, in Dworkin's view, is necessary and minimally sufficient for intelligible interpretive activity within a practice. There may, of course, be far more extensive consensus within the practice community. He acknowledges that these and other related factors may promote a degree of convergence of interpretive theories, as well as convergence of particular convictions, at any particular time in the history of a practice.[23] But, Dworkin insists, "the dynamics of interpretation [also] resist... convergence". And, he adds, it is an "insidious and dangerous mistake" to exaggerate these forces of convergence, for too much convergence threatens the practice with the death of the interpretive attitude and collapse of the practice into "runic traditionalism" (LE 88–89). Dworkin's protestant theory of interpretation not only attempts to show how controversy within social practices is possible, but also actively promotes and celebrates it.

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[22] Dworkin also claims that in legal practice participants share a "concept" of law – i.e., a very abstract description of the point of the practice, if it has any point at all (LE 92–93, see also 96, 98). "Concepts", then, are very abstract interpretive beliefs. They can aid interpretation because they place interpretive argument on a certain plateau of consensus, from which competing conceptions of the practice can be advanced and defended (LE 109, and generally 70–72). But, despite the role of the "concept" of law in Dworkin's interpretation of legal practice, Dworkin clearly believes that interpretive activity/argument can flourish in the absence of shared general interpretive beliefs (LE 74–75, 93).

[23] At LE 88–89, also 247–49, 377–78 Dworkin observes that fairness may limit the novelty of judicial interpretations in some cases.

II. THE HERESY OF PROTESTANT INTERPRETATION

We can summarize the main points of Dworkin's theory of interpretation as follows. The only alternative to unreflective compliance with a practice is critical interpretation focused around a "purpose" or "point" defined entirely independently of the agreed-upon rules or recognized activities of the practice. To understand or learn a rule of a practice is to accept a general proposition which accounts for, but always transcends, the accepted instances of the rule. To understand a practice as a whole is to accept a general interpretive theory of that practice. Interpretation is the activity of an individual participant articulating a theory, a structured set of general principles and aims, which in her judgment puts the practice in its best light. The theory is offered as a general justification for the consensus elements of the practice which constitute its "raw data". But while the "data" is common ground, interpretations are private, and they may conflict widely. Logically speaking, theory precedes and determines practice; that is, interpretative theory at the ideal limit determines what the practice is and requires. That which appears common in the practice is merely the overlap of extensions of the (more or less explicit) interpretive theories of individual participants.

Two centuries ago, Bentham described common law practice in the following way. "From a set of data like these a law is to be extracted by every man who can fancy that he is able: by each man, perhaps a different law: and these then are the monades which meeting together constitute the rules which taken together constitute the. .. law".[24] Of course, this is an ironic caricature, meant to call attention to the absurdity of common law theory and practice, but the targets of his sketch are just those features which Dworkin's theory celebrates.[25] While I do not wish to endorse Bentham's

[24] J. Bentham, *Of Laws in General*, ed. H. L. A. Hart (London: Athlone Press, 1970), p. 192.

[25] While remaining a caricature, Bentham's description seems less an exaggeration of legal practice on Dworkin's view than on classical common law theory. See BCLT, chs. 1 and 2.3 on classical common law theory, and ch. 8 for Bentham's attack on common law theory and practice.

diagnosis of the defects of common law theory and practice, I do believe that this passage alerts us to problems in Dworkin's theory of law and the general theory of interpretation on which it rests.

This general theory of interpretation, I shall argue, is problematic, but not because it allows interpretative argument to turn on judicial whim or arbitrary choice (it doesn't), nor because it allows interpreters to "play politics" (it may not do so enough, if "politics" is properly understood). It is problematic because it makes interpretation of social practices insufficiently practical, insufficiently intersubjective, and thus (at least in the case of law) insufficiently political. While there is much language in *Law's Empire* that suggests otherwise, the details of Dworkin's theory of interpretation – with which he sought "to throw discipline" over the "mysterious" and "unstructured" idea of "law as craft" (LE 10) – threaten to reduce participants in a common practice to windowless social monads. It is this feature of Dworkin's theory which I shall challenge.

I must emphasize that, with Dworkin, I reject the view, often associated with legal positivism, that law by its nature rules out fundamental (in Dworkin's sense, "theoretical") disagreement within legal practice.[26] Dworkin, I believe, is right to find a place for fundamental (and inevitably moral-political) controversy squarely within practice. I shall not challenge this assumption. Rather, I shall challenge Dworkin's account of how such controversy is possible. Thus, I will be challenging Dworkin's theory of law only indirectly, by challenging the general theory of interpretation on which it rests.[27]

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[26] Hobbes made this the cornerstone of his theory of law: "Statutes are not philosophy as is Common Law and other disputable Arts, but are Commands or Prohibitions...". *Dialogue Between a Philosopher and a Student of the Common Laws*, ed. J. Cropsey (Chicago: University of Chicago Press, 1971), p. 69. Hume, too, insisted that the basic task of the conventions of justice is "to cut off all occasion of discord and contention". *A Treatise of Human Nature*, ed. L. A. Selby-Bigge, 2nd edn., revised by P. H. Nidditch (Oxford: Oxford University Press, 1978), p. 502. Bentham's view, it turns out, is much more complex; see BCLT chs. 5.2 and 9.3.

[27] The arguments in this part expand (and in some respects modify) arguments in section IV of my essay 'The Normativity of Law'.

A. *Practice as Discipline*

To begin we need to gain a sense of just how very rare the "interpretive attitude", as Dworkin describes it, really is. This is obscured by Dworkin's habit of contrasting it to "runic traditionalism", with its connotations of unreflective, mechanical performance of rigidly stereotypical actions.[28] However, even a superficial scan of the repertoire of everyday sociability reveals a thick texture of practice between the extremes Dworkin considers. Think of greeting friends or strangers; of buying a paper or a suit or a car or a house; of ordering a fine dinner or a burger and fries; of making a promise or a vow or a contract; of voting or campaigning; of club initiations or family reunions; of performing a Beethoven sonata or singing the blues; of worship or prayer or baptism; of healing the living or dealing with the dead; of giving gifts or defending one's honor; of engaging in a philosophical discussion or a political argument or a legal one; indeed, think of courtesy. These activities all involve or invoke meaningful social practices – some more important, and in that sense more "meaningful", than others. Some are relatively routine; some require social dexterity and savoir-faire; some are transparent, some highly reflective; some are both.

Consider gift giving and the recognition and protection of honor – both long-favorite studies of anthropologists.[29] The complexity of these practices can vary widely from community to community, but it is clear that learning one's way around in the practice of any particular community involves a good deal more than merely learning a set

[28] Dworkin recognizes that games are a middle case, since the "interpretive attitude" of players does not assume that the rules of the practice are sensitive to its abstract "point". But since the first of the two assumptions which characterize the interpretive attitude (see above pp. 290–291) is the focus of my concern here, for my purposes there is no difference in Dworkin's treatment of such practices and those which display the full interpretive attitude.

[29] On gift giving, the *locus classicus* is M. Mauss, *The Gift*, tr. Ian Cunnison (Glencoe, Ill. : The Free Press, 1954). On both gift giving and systems of honor see P. Bourdieu, *Outline of a Theory of Practice*, tr. Richard Nice (Cambridge: Cambridge University Press, 1977), pp. 6–16.

of routine responses to routinized situations (just as learning a language involves more than just memorizing phrase-book entries.) Rather, it requires practical mastery of a discipline. (There are, of course, degrees of mastery.) Bourdieu says of gift giving in an Algerian community, "only a virtuoso with a perfect command of his 'art of living' can play on all the resources inherent in the ambiguities and uncertainties of behaviour and situation in order to produce the actions appropriate to each case, to do that of which people will say 'There was nothing else to be done', and do it the right way".[30]

While the actions and responses of one who has acquired the discipline may appear in retrospect as "necessary" – the only thing to do – only the participant who has gained this practical mastery can understand this fact ex ante and act on it. Exercise of such practical mastery, says Bourdieu, is a kind of improvisation. The metaphor is apt. It brings to mind the fact that typical action within such practices involves innovation, a kind of creativity, which not only fills in the intersticies of the practice, but also can visibly transform it.

The metaphor of improvisation also calls attention to the kind and extent of reflectivity often involved in practical mastery. This reflectivity is often not articulated verbally, but it is evident in other ways. The jazz pianist works in, with, and around available and recognized forms – the rhythms, chord patterns, and "tunes" of this musical idiom. He quotes them, manipulates them, even violates them, and in the process reveals formerly unrecognized dimensions of them. Improvisation is free creative energy made possible by recognized forms – made possible not just by providing a point of contrast, but by supplying improvisation its necessary material and the structure of its meaning. Improvisation displays a sophisticated awareness of the practice as a whole, its structuring elements and its concrete detail. It blunders and fails without this grasp.

Thus, to understand a practice is first of all to grasp "how to go on", and that involves neither merely acquiring a repertoire of routine reactions to routine situations, nor grasping a general proposi-

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[30] Bourdieu, p. 8.

tion (let alone a systematic theory) logically independent of the practice activities. Rather, it involves learning a discipline or mastering a technique.[31] It involves the capacity to relate different items in the world of the practice and to locate apparently new items in that world, to move around with a certain ease in the web of relationships created by it.[32] This is interpretation, in the straightforward sense that it involves a sure grasp of the "meaning" of the various actions in the repertoire in question through their places in the practice, and a grasp of how the practice fits together, how it makes sense.

Furthermore, in many such practices it is possible to observe even more explicitly articulated and critically reflective interpretation, i.e., attempts to formulate verbally the point or meaning of the practice. But these typically do not take up the assumptions or modus operandi of Dworkin's interpretive attitude. Sometimes such explicit interpretations will take the form of stories or narratives, rather than general theories. There is nothing "primitive" in this manner of understanding. It shares with Wittgenstein's notion of "definition by example" a recognition of the concreteness of the practice technique. Also, at times interpretation may take a quite comprehensive view of the practice, and may address questions about the very nature or coherence of the practice as a whole. But even here such interpretation need not appeal to some conception of the point of the practice abstracted from its recognized components. Instead, the practice is typically related to other practices by analogy, or is fitted into the context of some larger practice of which it is a part, thereby enriching and deepening one's understanding of it and providing a context for criticism of some of its components.

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[31] "To understand a sentence means to understand a language. To understand a language, means to be master of a technique". L. Wittgenstein, *Philosophical Investigations*, tr. G. E. M. Anscombe (New York: Macmillan, 1953), §199.

[32] The figure is Charles Taylor's in 'Language and Human Nature', in *Human Agency and Language* (Cambridge: Cambridge University Press, 1985), vol. 1, 227–34.

The interpretive attitude as Dworkin describes it assumes that the point or purpose of a practice can be stated independently of the rules and activities that make up the practice. The rationale for this seems to be that if the abstract purpose of the practice can command allegiance independently of the particulars of the practice, then it can provide a basis for the normative demands of the practice and for its systematic and critical re-ordering. But this assumption of logical independence is true of few (if any) genuine social practices. (Consider, again, the list of practices on p. 302 above.) It is plausible only in the case of practices which are self-consciously fabricated and largely instrumental or utilitarian in character.

Practices with substantial histories and deeper roots in the culture and common life of a community are unlikely candidates for this sort of interpretation. These latter practices may encourage critical reflection on their meaning; indeed, such reflection may be an important aspect of participation in the practice. But it may not be possible intelligibly to separate that point from the activities and rules in which it is expressed. The same meaning may, conceivably, be expressed in some other way, but this does not imply that the meaning is logically independent of the medium of expression. Rather, it is to say that what is expressed admits of multiple formulations (some clearer, more illuminating, more direct or powerful, less ambiguous or misleading, than others). The fact that an abstract purpose or ideal can be met in a number of different ways does not make the ideal definable independently of its concrete manifestations, in the way that goals or ends are logically independent of the instrumental means available to achieve them. In fact, such abstract ideals may have no life outside the practical techniques or disciplines which provide the concepts, shape the perceptions, and inform the commitments of those who pursue them.

This logical inseparability may be obscured by the fact that sometimes it seems possible to isolate in thought the meaning or point from the activity. We may find such statements useful or illuminating, and we may even have a general term for this isolated point. But, unless one keeps in mind the concrete activities from which they are extracted, such formulations of the point will be radically incomplete, "a husk of meaning/From which the purpose breaks only when it is

fulfilled..."[33] Consider, for example, religious practices and rituals. Participation in them may not only be self-consciously meaningful, but may also involve critical reflection. We could say the point of such practices is "expressing devotion to God", or the like. But surely that concept is empty, or simply elliptical, considered apart from the ritual forms in which such devotion is acted out. And it is a mistake to think that in this abstract form it commands the allegiance of the pious.

B. *The Relation of Behavior to Theory*

But Dworkin cannot easily abandon the logical independence assumption, because it, or something like it, is the hinge on which turns his account of the possibility of fundamental conflict within social practices. According to Dworkin, genuine interpretive conflict within a practice is possible, because while the interpretations may differ widely, they are all focused on the same object. The object of interpretation is common, but the interpretations need not be. This presupposes that the object of the competing interpretations can be identified independently of any interpretation.

But there are serious problems with this assumption. First, the obvious question is how we are to understand the claim that each of the competing theories provides an interpretation of "the same object". A regularity of behavior is a regularity only relative to some rule, and for different rules, different regularities. Similarly, practice behavior and its consensus rules are meaningful, i.e., are the actions or rules they are, only within the web of the practice as a whole. That is, as Dworkin himself realizes, practice-meaning is holistic and the meaning of components of the practice is, in a sense, theory-dependent. But, then, will not different theories of that practice as a whole yield different actions, different objects?

Of course, there may be some description of the practice behavior under which consensus about the object could be achieved. Perhaps this is what Dworkin has in mind. But this description leaves the

[33] T. S. Eliot, 'Little Gidding', ll. 31–32.

behavior "brute" or "uninterpreted", at least relative to the practice. And, then, it is no longer clear why we should treat consensus regarding the behavior thus described as relevant to understanding the practice. The facts that people engage in such behavior (though they do not do so under that description), and that it seems to be coordinated in certain ways, now appear entirely accidental. However, while initiates learn by example how to engage in a practice, it is always under a practice-relevant description. One learns not only to do this or that, but also one learns what it is one is doing.[34] Furthermore, it is entirely mysterious, on Dworkin's account, why any one would think that such behavior should be thought to give rise to "common principles". That is, the behavior is logically separable from its interpretation only on pain of denying that the practice is common activity yielding common principles.

Second, this sharp separation of behavior and meaning does not comfortably fit Dworkin's view of action and intention. He rejects the idea that the intentions or purposes involved in purposeful action must be identified with some mental state or mental event prior to or contemporaneous with the action (LE 55–61, MP 156–57). Intentions are "constructive", the results of interpretation of the actions in question. Often an agent may only come to understand his actions long after he has performed them, or may later come to see his actions in a very different light (LE 60–61). But, if we accept this picture of purposeful action, we must recognize that the meaning/purpose of the action is not something which an agent brings to the behavior, in virtue of which it qualifies as action; rather, this meaning is uncovered from the action or work itself.

This view of intention in action has two important implications for interpretation which Dworkin does not fully appreciate. First, on this view, meaningful action is a primitive. Action is expressive of its meaning or purpose, but not resolvable into distinct behavior and

[34] "Teaching which is not meant to apply to anything but the examples given is different from that which 'points beyond' them", Wittgenstein, §208.

purpose (any more than the expression of disappointment on my face is resolvable into the physical behavior and the internal mental event). But, since this purpose or meaning may not be fully or clearly articulated, interpretation can be seen as the activity of re-formulating and articulating it. Second, the "meaning" of an action cannot be regarded as a private matter for the agent alone. On the contrary, it is publicly disclosed.[35] It is not just for the agent, but for us who may observe or learn of it.

But, then, if the activity in question is common, if it is the collective activity of participants in a social practice, then the point or meaning of that activity is common too.[36] And the task of interpreting our practice is the task of uncovering together the meaning of our common action. Interpretive activity of common practices is collective, and, while it is always carried on by individual participants (not by some collective mind), it is nevertheless essentially interactive.[37]

C. *Interpretation and Interaction*

We can perhaps see this best if we consider two examples. First,

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[35] See C. Taylor's notion of "public space" in 'Theories of Meaning', in *Human Agency and Language*, 259–66, and his review of J. Bennett's *Linguistic Behavior* in *Dialogue* 19 (1980): 290–301.

[36] Of course, the practice may have a special meaning for an individual participant. We mark such special meanings by use of words like "personally", or "for my part" and the like. Nothing in my discussion precludes the possibility of an individual participant "trying to discover his own intention in maintaining and participating in the practice..." (LE 58; see above p. 287). But this activity is distinct from (and to a degree parasitic upon) determining the meaning of the collective practice. The difference between these two activities lies in the difference between discovering the meaning of the practice *for us* and uncovering its meaning *for me personally*.

[37] "The language of rules and models... ceases to convince as soon as one considers the practical mastery of the symbolism of social interaction... presupposed by the most everyday games of sociability... . This practical knowledge... continuously carries out the checks and corrections intended to ensure the adjustment of practices and expressions to the reactions and expectations of the other agents". Bourdieu, p. 10.

consider friendship. Friendships are based on reciprocity, Dworkin observes. But this could not plausibly mean that each friend must do for the other just what the other thinks friendship requires, because then friendship would be possible only among people who already agree in detail about what friendship requires. Rather, we must see friendship as an interpretive concept. Thus, "each must act out of a conception of friendship he is ready to recognize as vulnerable to an interpretive test...". And the interpretation involved is directed to "what friendship means in our culture" (LE 199).

But "interpretation" in such relationships on Dworkin's model is doubly abstract and alienated. First, contrary to Dworkin's suggestion, the focus of "interpretive" attention in our friendship would not be on what our culture means by friendship, but what our friendship, our relationship, means or requires. That is, the "interpretation" would focus on the dynamics, the history, and the development of this specific relationship, not on the abstract concept of friendship, or the general practice of friendship in the culture (if there is such a thing). Moreover, friends would seek an understanding of what this specific relationship has come to mean, as they would say, *to us* – not to each of us individually (us *in sensu diviso*), but to us together (in sensu composito). The history of the friendship is a common history, and the complex meaning of the relationship is collectively constructed over the course of this history. When friends share a common history, Aristotle points out, it is not like cows sharing a pasture, for the shared life of friends engenders common perception, a common perspective, and common discourse. Friendship is characterized, ultimately, not by sympathy or consensus (*homonoia*), but by common deliberation, and thought.[38] It is the state out of which

[38] "It is manifest that life is perception and knowledge, and that consequently life together is common perception and knowledge [*suzēn to sunaisthanesthai kai to suggnōrizein estin*]", *Eudemian Ethics*, 1244b24–26. "Therefore, the friend must share his friend's perception/consciousness [of life as a good] and this is attained by living together and sharing in discourse and thought [*en tō suzēn kai koinōnein logōn kai dianoias*]", *Nichomachean Ethics*, 1170b11–12. (See note 47 below on the richness of the term "conversation".)

mutual or joint choice (*antiprohariresis*) of the good is made.[39]

But, then, a friend's understanding of the relationship could only be achieved through interaction with the other. Even when one reflects alone about the relationship, this reflection inevitably takes the form of an imagined dialogue, and will seem incomplete or inadequate until confirmed in real conversation or further concrete interaction. To regard the meaning of that relationship as the private interpretive construct of one or the other, or some ideal limit of such constructs, fails to recognize the common perspective and discourse which structures the relationship.

This phenomenon is not limited to intimate friendships. Self-conscious deliberative activity within the law is also essentially interactive. If this is not immediately apparent, this is due in part to the fact that a very crude picture dominates our thinking about typical law-applying and law-interpreting activities. Legislators (and sometimes judges) make laws, we say, and judges and other officials interpret them. The influence moves entirely in one direction: top down. Law-making and law-interpreting, we think, is an exercise of power, and legislators and judges have all the power. Interpretive activity in law, especially, is regarded as the province of judges. Lawyers, of course, must also engage in it, but this is imitative or predictive of the activity of judges.

But this unidirectional picture is distorted. The adjudicative process, and the process of understanding and applying the laws of which it is a part, is essentially interactive. Judicial interpretive activity, while prominent and powerful, is nevertheless dependent in many ways on the interpretive activity of other, professional and lay, participants in legal practice. In fact, courts, lawyers, and citizens are highly interdependent, and the lines of influence are multi-directional.[40]

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[39] *Eudemian Ethics*, 1237a30–36.

[40] Fuller emphasizes the interactional element in statutory interpretation. The statute is seen, he maintains, "not as a message addressed into a void, but as a message whose meaning is dependent upon the interpretation of its addressee, as a reasonable and sensible man, would put upon it". Lon L. Fuller, 'The Justification of Legal Decisions', in *Die Juristische Argumentation, ARSP Beiheft, Neue Folge* ≠7 (Wiesbaden: Franz Steiner Verlag, 1972), p. 78.

I cannot argue this general claim in detail here,[41] but perhaps I can motivate it intuitively by making use of Dworkin's own example of a chain novel (LE 228–38). He imagines a group of writers undertaking to produce a work, each novelist in the chain writing a new chapter after having been given the chapters completed by others earlier in the chain. Dworkin notes that "the complexity of this task models the complexity of deciding a hard case under law as integrity", though he does not draw out all the aspects this complexity. Each novelist in the chain wants to do her part in producing the best novel possible, but each (after the first) is bound by what has gone on before. Each, then, must first interpret what has been written and only then may set out to add to it, working out themes identified by the interpretation in the work to that point.

This much Dworkin clearly recognizes. But there is more. Each novelist must recognize that the success of her interpretation depends not only on the abstract merits of it as an account of work to that point, but also on the success of the chapter she writes on the basis of this interpretation. But the success of that chapter, and so the significance of her contribution to the novel as a whole, depends on whether the themes she develops in her chapter are taken up in appropriate ways by subsequent writers in the chain. But, then, the success of the interpretation is dependent inter alia on the interpretive activities of other participants in the enterprise. So the chain novelist must view the project as a collective project, to which she will make a contribution, the meaning and success of which is a product of the interaction (in both interpreting and writing) of all the participants. A novelist in the chain cannot regard herself in abstraction from the collective project in order to construct her interpretation of the work

[41] I have sketched out some of the lines of interdependency in law in my essay 'Coordination and Convention at the Foundations of Law', *Journal of Legal Studies* 11 (1982): 186–93. However, I would now rely less on the notion of coordination of individual expectations and more on the idea of reflective participation in a common public world, as I develop it below See also Fuller, 'Human Interaction and the Law', in *Principles of Order: Selected Essays of Lon L. Fuller*, ed. K. I. Winston (Durham, N. C.: Duke University Press, 1981), pp. 211–46.

without jeopardizing her contribution and the integrity of the work as a whole.[42] She must construct an interpretation, cognizant of the interpretive activity of other contributors, both past and future.

The chain novel illustrates some of the complexity of interpretive interaction in adjudication, but not all, for the judge carries on her interpretive activity simultaneously with many other judges, lawyers, other officials, and lay persons. Interpretive interaction extends both diachronically and synchronically. Judges undertake to decide what the law is by interpreting the practice of other judges, but that practice includes not only their decisions and actions, but also their interpretive activity. And her interpreting likewise will fall within the scope of their concern. They are active members of the practice, and their fellow participants extend both backwards and forwards in time. The integrity each judge must seek is the integrity of the law over time. That is a collective project, and a judge's interpretation of the law at any point in time must recognize this.

Interpretations of social practices, especially highly self-conscious practices like law and friendships, are public formulations of collectively meaningful activities. They are accounts of behavior that is meaningful to the participants as a common activity, a common work. Thus, they are formulations, or successive re-formulations, of shared understandings, proposals for a better understanding of their common activity. This does not entail that all participants must agree about how to understand their practice, but it does imply that one's own understanding must be addressed to other participants and sensitive to their understanding of it. Far from being "a conversation with one-

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[42] Actually, Dworkin puts the point rather nicely at one point when he says, "Hercules interprets history in motion, because the story he must make as good as it can be is the whole story through his decision and beyond" (LE 350). Also, Dworkin observes that "each judge's theories of what judging really is will incorporate by reference, through whatever account and restructuring of precedent he settles on, aspects of other popular interpretations of the day" (LE 88). These remarks are made largely in passing and Dworkin does not follow out their implications. A quite different theory of interpretation would have emerged if he had.

self", such interpretative activity is, when properly understood, essentially a conversation with other participants.

D. *Participating in a Common World*

Let me now draw together some of the themes discussed above. I argued that to understand a practice as a participant involves first of all mastery of a discipline. This does not rule out the possibility of more self-consciously reflective and critical interpretive activity. Often such interpretive activity is integral to the practice itself, and it can decisively alter the shape of the practice. However, such interpretation always presupposes some such discipline, and the discipline always outstrips the resources of the theory to meet novel situations.

Moreover, we can see as a result of the argument of the previous section that this discipline is social, a trained social sense. Not only is it socially acquired, learned through interaction and participation, but what is handed down and learned is itself a shared capacity. A social capacity is the capacity to move around with familiarity in the world of the practice common to its participants. To learn a social practice is to become acquainted through participation with a new common world; it is to enter and take up a place in a world already constituted. One does not bring an understanding (let alone a theory) to the practice; rather, through participation one comes to grasp, tentatively and uncertainly at first, then more securely, then critically, the common meaning of the practice. This common world, then, is not constructed out of individual participants' beliefs or attitudes or intentions or purposes. Instead, we participants have the beliefs and attitudes about it that we have – we understand it as we do – by virtue of our common participation in it. Similarly, moving about in this common world is not a matter of forming expectations about the behavior of other participants, and their expectations of one's own behavior, through observing their behavior or attempting to replicate their practical reasoning. Rather, we have expectations of the behavior and expectations of others because we recognize that we participate in a common world.[43] Participation in this common world

[43] As Niklas Luhmann has put it, "expectation of expectations is only possi-

is less like empathy or strategic reasoning and more like grasping a proverb, catching an allusion, or seeing a joke.[44]

There are suggestions of this view of practical reason in classical common law doctrine. We cannot expect justice and good practical judgment from moral philosophers and schoolmen, argues Sir Matthew Hale,[45] "because they are transported from the ordinary measures of right and wrong by their over-fine speculations, theories and distinctions above the common staple of human conversations". The best judges are "men of observation and experience in human affairs and conversation between man and man...".[46] (Such men, he claimed, were those trained in the common law, because the common law was the repository of the experience of the community, the memory of common life.) The enterprise of judicial reasoning was, for Hale, a matter of making particular judgments based on a concrete grasp of the intercourse and conversation[47] of common life. Judges learned the capacity to deliberate reflectively about concrete cases and to recognize their meaning or significance against the background of this experience. This capacity was, in the sense distinguished above, a social capacity, a capacity to judge what one has confidence that others in the community would also regard as reasonable or fitting. This confidence is possible not because one is a good predictor of behavior,

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ble through the mediation of a common world to which expectations are identically attached". *A Sociological Theory of Law* (London: Routledge and Kegan Paul, 1985), p. 62.

[44] C. Geertz, *Local Knowledge* (New York: Basic Books, 1983), p. 70.

[45] For an extended discussion see BCLT, chs. 1 and 2.3, revised slightly in 'Roots of our Notion of Precedent', in *Precedent in Law*, ed. L. Goldstein (Oxford: Clarendon Press, forthcoming).

[46] Sir Matthew Hale, 'Reflections by the Lrd. Chiefe Justice Hale on Mr. Hobbes His Dialogue of the Lawe', in W. Holdsworth, *A History of English Law*, 7th edn. (London, 1956), vol. 1, p. 503. I have modernized the spelling.

[47] OED lists the following among the uses of this word current at the time Hale was writing: "living or having one's being *in* or *among* persons"; "consorting or having dealings with others, living together, commerce, intercourse..."; also, "manner of conducting oneself in... society, mode or course of life".

nor because one can read minds, but because one understands in a detailed way the common life in which we participate.

E. *Conflict in a Common World*

But this view of interpretive deliberation, dependent on the notion of common meaning, seems to commit the same error with which Dworkin charged semantic theories of law. It seems to make intelligible disagreement about the nature or requirements of a practice depend on prior agreement, on consensus. Does not the fact that participants disagree about such things show conclusively that there is no shared understanding or common meaning?

Dworkin's claim that disagreement is conclusive proof of the absence of common meaning is clearly true only if we take "common meaning" to refer to consensus, i.e., explicit convergence of belief. But this is trivially true. "Common meaning", as I have used the term, does not entail consensus – agreement in belief among individuals – about that meaning. Of course, common meaning or a common world can be sustained only if there is some substantial degree of consensus. But to focus on agreement of individual beliefs is to miss the point; it is to speak of the common in an individual way. The common world is a matrix of collectively meaningful participation which equips one to articulate for oneself one's own understanding of the practice. This common world and its discipline is a common reference point,[48] from which possibly conflicting articulations of the practice and its requirements begin, and to which they must repair when challenged.

Consensus, as I have said, is necessary if a common world is to be sustained. The same is true, of course, for Dworkinian interpretation. But we should notice two features of this consensus not sufficiently recognized by Dworkin. First, it is not necessary that the consensus be (nearly) universal. That is, for something to be a matter of consensus – part of the "common world" – it is not necessary that nearly all parti-

[48] See C. Taylor, 'Interpretation and the Science of Man', in *Interpretive Social Science*, eds. W. Sullivan and P. Rabinow (Berkeley: University of California Press, 1979), p. 51.

cipants agree on it. In complex practices, many participants may not have experience with all aspects of the practice. In such cases, it is enough if there is a thick overlap of experience among participants, such that two parties on the opposite edges of the practice community as it were, can regard themselves as participating in a common practice by virtue of the continuity of practice experience that extends between them.

Second, I believe that Dworkin is mistaken to think that the question of how much consensus is necessary to sustain a practice is a factual question about what is necessary to sustain the "interpretive attitude" within the practice. It is, rather, in his terminology, an *interpretive* question specific to the practice in question. That is, the degree of consensus necessary for the health of the practice (alternatively, the amount of disagreement permitted or even encouraged by the practice) itself turns on the nature of the specific practice. This is evident if we compare, for example, different traditions of theological reflection and Scriptural interpretation (e.g., Protestant and Roman Catholic, or different traditions within Judaism). Interpretive traditions may be as closed to internal challenge and disagreement as many games or practices of counting and measuring,[49] and as open and encouraging of originality as modern traditions of artistic creation, say, poetry, painting, or musical composition.[50]

Disagreement, even substantial disagreement, then, has a place in a world of common meanings. Indeed, as Simmel observed, often the conflict is most severe amongst those who have the most in common

[49] "But what we call 'measurement' is partly constituted by a certain constancy in results of measurement". Wittgenstein, §242.

[50] Our modern, western tradition in poetry, as in music, puts a very high premium on originality, challenging accepted forms, and stretching the limits of the tradition itself. Thus, T. S. Eliot observes that "when we praise a poet", we tend to focus "upon those aspects of his work in which he least resembles anyone else". But, he argues, this "prejudice" can blind us to the deep dependency of the poet on the past. T. S. Eliot, 'Tradition and Individual Talent', *Selected Essays* (New York: Harcourt, Brace, and Co.; 1932, 1950), pp. 4–5.

(e.g., in political movements, labor unions, families).[51] This is due in part to the fact that, against a rich common background, what is temporarily different, and not what is common, tends to define the positions of the disputants.[52] But there is a second, deeper explanation. Disputes within such communities are never simply over standards, norms, or other issues impersonally considered; rather, they typically concern what we stand for (as members would put it), i.e., what we are doing and have done, what we are thereby committed to. That is, the identity and integrity of the community and its commitments are at stake.[53] Such disputes then presuppose a common point of view, a *koinōnein logōn.*

Such interpretive deliberation – reflective, critical discourse – is possible, not because parties already agree in detail, nor because they each focus attention on the same object which can be identified apart from their understanding of its meaning. Rather, it is possible because the parties recognize that they participate together in a common activity and move around in a common world, one which they recognize to be the product of common work. When they disagree, they disagree about how best to articulate, formulate, or express this common meaning. Interpretations, which may conflict, are advanced as proposals for understanding this common activity. They seek to articulate something between them which is already public.

A long tradition in philosophical jurisprudence – going back at least to Hobbes – insists that the unity and coherence of law, and the possibility of intelligible argument within law, depend on some formal, constitutive structure. For Hobbes and Austin, this was the sovereign and its commands; for Hart[54] this is a complex "rule of recognition"; for Kelsen it was the *Grundnorm.* Despite his rejection of this tradi-

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[51] "A hostility must excite consciousness the more deeply and violently, the greater the parties' similarity against the background of which the hostility rises". G. Simmel, *Conflict*, tr. K. H. Wolf (Glencoe, Ill.: The Free Press, 1955), p. 43, see pp. 43–50.

[52] Simmel, p. 44.

[53] I use "integrity" here in its ordinary sense.

[54] And Bentham, I would argue; see BCLT, ch. 7.

tion, Dworkin shares this basic assumption with it. For Dworkin, it is the "ground rules" of the legal practice – the principles which establish the "grounds" of (true propositions of) law.[55] Dworkin's dispute with the positivist/conventionalist tradition is a dispute over the nature of the constitutive structure of law, and the role of consensus in it. From Bentham onward, the conventionalist thesis has been that there must be consensus in the community at large (or at least among the law elite) regarding these ground rules. Dworkin rejects this thesis and insists that these ground rules are embedded in potentially conflicting, politically-nuanced, interpretive theories of legal practice as a whole (or determined by the best such interpretive theory). Consensus, on Dworkin's view, is necessary only to pick out the object of the interpretation.

But the lesson we can learn from the classical common law tradition[56] is that the assumption on which this debate rests is problematic. For some purposes it is useful to represent a social practice – especially one as complex as law – as composed of levels or orders of rules or principles, those at the higher levels structuring those below. But, this tradition teaches, it is a mistake to conclude that the existence or integrity of the system depends exclusively on the upper levels of this hierarchy. Rather, the entire system is holistic in nature. Its continuity and integrity depend on a shared capacity to move with confidence within its web and on agreement in the community on its components at each of the levels.

This alternative picture allows us to understand better how intelligible controversy within an integral social practice is possible. Conflict always presupposes consensus, but the consensus, on this view, does not take the form of agreement on a discrete set of formal, constitutive rules, nor on the behavioral "data" of the practice. Instead, consensus takes the form of a shared discipline and a thick continuity of

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[55] LE 4–6, 31–46, 87, 110–13; MP 134–37, 142–43.

[56] The lesson is at the heart of Wittgenstein's theory of language as well. For the classical common law doctrine, or at least Hale's version of it, see Hale, *A History of the Common Law*, 3rd edn., ed. C. M. Gray (Chicago: University of Chicago Press, 1971) and BCLT ch. 1.2.

experience of the common world of the practice. This consensus does not obviate the need for interpretations, nor does it guarantee univocality of the interpretations. But it does decisively shape the spirit in which interpretations are constructed and debated. Controversy, then, is possible, even at what we might call the "constitutional" level of the practice, without jeopardizing the practice as a whole (and it may even be healthy for it). It is possible because there is a deeper and broader continuity of experience and discipline. Where this continuity is threatened or weakened, there the practice itself is threatened.[57]

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