

The Rise and Decline of Integrity

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The idea of political integrity set out in Ronald Dworkin's 1986 book, *Law's Empire*, was at the time one of the most complex, interesting, and original conceptions in legal philosophy.¹ Dworkin believed that law and its distinctive features and modes of proceeding could not be characterized by a concern for justice alone. It was necessary, he said, to juxtapose our concern for justice with an additional concern for the importance of law remaining true to its existing commitments even when those commitments were arguably wrong or unjust. And integrity in this sense was not just posited. Dworkin developed a complex and fascinating account of it. What he presented in *Law's Empire* was not an easy argument to follow. But it opened up new vistas for jurisprudence and philosophical understandings of law and politics.

In 2011, Dworkin published *Justice for Hedgehogs*, which was by no means only a work of jurisprudence (in the sense that *Law's Empire* was).² *Hedgehogs* was a major synthesis of practical philosophy in all its fields—personal ethics, a theory of dignity, social morality, and political philosophy. In fact, it did not have all that much about law; and what little it had—in a sixteen page chapter nailed on at the end—barely mentioned integrity at all. Over the twenty-five years between the publications of these two books, Dworkin had said less and less about integrity, certainly less about the elaborate argument that he had set out in *Law's Empire*.

Did Dworkin lose faith in integrity? Did he lose interest? I'm not sure. I think it is a pity he didn't address integrity in 2011, because the thesis in legal philosophy that *was* defended in *Justice for Hedgehogs*—a thesis about the unity

¹ RONALD DWORKIN, *LAW'S EMPIRE* (1986), Chs. 5-7. This work is cited in the text by page-number as (LE xxx).

² RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (2011). This work is cited in the text by page-number as (JfH xxx).

of law and morality (on which we will have a whole separate panel tomorrow)—would have afforded an opportunity to illuminate integrity as a moral principle perhaps more clearly than in the cryptic argument in *Law's Empire*, and in ways that might have a salutary bearing on the incivility and polarization that we face today in the politics and practice of law. That is what I am going to describe: the rise and decline of integrity in Dworkin's work and the opportunity missed in the *Hedgehogs* book.

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The use of the term “integrity” in *Law's Empire* was derived from “a parallel ideal of personal morality” (LE 166). Even when someone disagrees with us on moral or ethical issues, we admire them if they stick with their principles, acting “according to convictions that inform and shape their lives as a whole, rather than capriciously or whimsically” (LE 166). That ideal—distinct as it is—can be transferred from moral rectitude to the political realm. “Integrity,” said Dworkin,

becomes a political ideal when we make the same demand of the state or community taken to be a moral agent, when we insist that the state act on a single, coherent set of principles even when its citizens are divided about what the right principles of justice ... really are. (LE 166)

Actually, though the analogy is suggestive, it is not particularly helpful in explaining why integrity matters in the political realm. The reasons grounding personal integrity, such as they are, are I believe quite different from those that Dworkin sets out for political integrity in Chapter 6.

His conception of political integrity is not entirely new. It resonates with the old idea of comparative justice: treating like cases alike.³ And of course it is connected to the defense of *stare decisis*, though it is quite unlike familiar defenses based on reliance or predictability. It's a new value, and this is significant, negatively, in the insinuation that justice cannot capture it, and, positively, in the connection it forges with community, associative obligation, and allied ideas. Integrity, as developed in *Law's Empire* was original, not because no one had ever

³ See Joel Feinberg, *Noncomparative Justice*, 83 *PHILOSOPHICAL REVIEW* 297 (1984) and C.J. Peters, *Foolish Consistency: on Equality, Integrity, and Justice in Stare Decisis*, 105 *YALE L.J.* 2031 (1996).

thought about the need to compromise one's own convictions about justice in order to keep faith with decisions already made in one's community, but because Dworkin promised to show that this necessity went to the heart of law's legitimate authority and also—maybe this is just my interpretation—to moral principles of respect for those with whom we disagree.

In 1986, we were in the midst of the liberal v. communitarian debate, and it seemed to some reviewers that in *Law's Empire*, Dworkin was trying to “steal the communitarian's thunder.”⁴ We would be less of a community, Dworkin argued, if we did not require judges to downplay their own individual convictions about justice for the sake of consistency with the decisions of other judges who had used different convictions to decide similar cases. But it wasn't any sort of fuzzy, Hegelian, ethical-life sense of community. Dworkin set his face against that when he argued, in a 1989 essay “Liberal Community,” that a society doesn't need integrity in its overall ethical character.⁵ We are talking about the political not the social dimension of community, and about the hard-edged fact (if it is a fact) that a system of rule “that accepts integrity as a political virtue ... becomes a special form of community ... in a way that promotes its moral authority to assume and deploy a monopoly of coercive force” (LE 188).

The argument to this effect is located in a thirty page section of Chapter Six of *Law's Empire*, entitled “Is Integrity Attractive” (LE 186-216). It is a long and serpentine argument. Some have called it “elegant.”⁶ Others say it's an argument “of almost Byzantine complexity.”⁷ It purports to work as a series of connections by way of necessary conditions and their transitivity: B is a necessary condition for A, C is a necessary condition for B ... Z is a necessary condition for Y, so Z is a

⁴ Jeffrey Abramson, *Ronald Dworkin and the Convergence of Law and Political Philosophy*, 65 TEXAS L.R. 1167-8 (1987).

⁵ Ronald Dworkin, *Liberal Community*, 77 CALIFORNIA LR 479 (1991), arguing that a society doesn't need integrity in its overall ethical character: “since the various individual acts and decisions that contribute to forming an ethical environment are no more the acts of government than the various individual economic decisions that fix the economic environment are, there is no question of government violating integrity by letting individuals make these decisions in different ways.”

⁶ James Boyle, *Anachronism*, _____, 505.

⁷ Silas Wasserstrom, *The Empire's New Clothes*, 75 GEORGETOWN L.J. 199, 202 (1986)

necessary condition for A. There isn't a sufficient condition in sight. The argument begins by asking us to consider a necessary condition for legitimate coercion, and it proceeds through political obligation, associative connection, community, diffuse responsibility, and relations of principle

So: the argument begins with a question in Chapter Three about the approach law takes to the legitimization of coercion:

Law insists that force not be used or withheld, no matter how useful that would be to ends in view, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified. (LE 93)

Why is this so? This is not a question about coercion's justification per se (*pace* Coleman, Gardner, and innumerable others); it is a question about the justification of *the particular approach that law takes to the justification of coercion*. What is the point of insisting that justifications of the use of force always have to have this reference back to past political decisions like enactments and precedents?

In Chapter 6, Dworkin pursues the hunch that the answer has something to do with political obligation, which is a necessary condition for legitimacy. He outlines three possible theories of political obligation and discredits two of those (tacit consent and natural duty), leaving only one possibility (Hart's argument about fair play). Using Robert Nozick's well-known critique of the fair play argument (the stranger in the sound-truck), Dworkin purports to establish that a defense of political obligation along these lines will work only against a background of associative responsibility. He says associative responsibility arises only in circumstances of genuine community; and genuine community means that members must view their obligations to one another in a certain light. Ronnie was sent to bear witness to that light. That light includes a shared sense of diffuse obligation not limited to duties laid down in a set of determinate rules. So the relevant sense of community must be what he calls "a community of principle," in which principles that have been used for recent decisions are respected as a basis for new inferences about our obligations to one another. Compressing all that, i.e., this series of a dozen or so necessary ("only if") conditions: the use of force in a society can be legitimate only in a community where already-established principles

are respected as the basis for inferences, including new inferences, about our obligations to one another. And *that* he identifies as integrity.

It is by no means clear or compelling as an argument. There are all sorts of gaps and lacunae. But there are important ideas here and it would have been good if Dworkin had elaborated them further.

Most critics of *Law's Empire* haven't developed full-blooded criticisms of this argument, intriguing though it is. As Denise Réaume put it, they haven't taken the trouble, preferring to "concentrate their efforts on determining whether Dworkin's interpretive approach [in the first half of the book] decisively refutes positivist theories of law."⁸

The application of integrity was illustrated in Chapter 7 of *Law's Empire* through the idea of a chain novel, and this has become very familiar in jurisprudence. We are to think of judges as being like guests playing a parlor game on a wet Sunday afternoon in an English country house. They are writing a novel, chapter by chapter, with each guest writing a separate chapter.

Each novelist aims to make a single novel of the material he has been given, what he adds to it, and (so far as he can control this) what his successors will want or be able to add. He must try to make this the best novel it can be can be construed as the work of a single author rather than, as is the fact, the product of many different hands. (LE 229-30)

Jurists have found this an attractive metaphor, and they seem happy to consider its application without troubling themselves too much about the underlying argument. But why is the law like a chain novel? Why isn't it like collection of short stories by William Trevor or Flannery O'Connor? The question is never broached by those who make use of Dworkin's image. A quick Westlaw survey finds that a number of authors refer to what they variously call Dworkin's chain novel metaphor or his chain novel theory of following precedent.⁹ But they

⁸ Denise Réaume, *Is Integrity a Virtue?* 39 UNIVERSITY OF TORONTO L.J. 380 (1989). I should add that Réaume's own essay did address the argument from Chapter 6, though I don't agree with her assessment of it; she treated it as though Dworkin were setting out sufficient conditions for political obligation.

⁹ For example: [Author?] *Thoughts on Referral to Foreign Law, Global Chain-Novel, and Novelty*, 21 FLORIDA JOURNAL OF INTERNATIONAL LAW, 1 (2009); Eliezer Rivlin, *The*

pay no attention to the real theory, which is the theory of integrity lying behind the chain novel image. They act as though the chain-novel idea could work as a theory on its own.¹⁰

This indifference on the part of Dworkin's readers to the detail of the argument about integrity in *Law's Empire* seems to be matched, curiously, by a similar indifference on Dworkin's own part in his writings subsequent to 1986. I should mention that Dworkin was working on other projects in the 1990s, at some distance from legal philosophy, most notably on beginning-of-life and end-of-life issues—the work that became *Life's Dominion*.¹¹

There is some discussion of integrity in the essays on constitutional politics collected in *Freedom's Law* (1996), but they are all about its applicability, not about its justification.¹² For justification, all we have are a few footnotes referring us to the discussion in *Law's Empire*.¹³

In his 2006 collection, *Justice in Robes* (2006), Dworkin published a response to H.L.A. Hart's "Postscript" to the second edition of *The Concept of*

Jurisprudence of Mediation: Between Formalism, Feminism and Identity Conversations, 11 CARDOZO JOURNAL OF CONFLICT RESOLUTION 1 (2009); Michal Alberstein, *On The Origins of Originalism*, 88 TEXAS LAW REVIEW (2009); Jamal Greene, _____. [Footnote needs work.]

¹⁰ This is true of one of the most extensive discussion. Stefanie Lindquist and Frank Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent* 80 NEW YORK UNIVERSITY LAW REVIEW 1156 (2005): briefest of mentions of integrity: at 1169 "the importance of relying on precedent for judicial integrity" – no exploration of what that might mean. At 1167, they say "A leading theory of the impact of precedent is Ronald Dworkin's chain novel hypothesis." They also call it a "metaphor for sequential judicial decisions." "Dworkin propounds the metaphor of the chain novel to illustrate the manner in which precedent may constrain judges." They go on: "The chain novel is an expressive metaphor for path dependence that allegedly exists in the law." And they call it "the chain novel hypothesis."

¹¹ RONALD DWORIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1993).

¹² See RONALD DWORIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996), 36, 83, 103, and 319. This work is cited in the text by page-number as (FL xxx).

¹³ For example, see FL 447n20: "I discuss integrity at considerable length in *Law's Empire*, Ch. 7." See also FL 373n6 and 411n13.

Law,¹⁴ where he (Dworkin) presented integrity as a conception of the rule of law, or as he called it, legality (JiR 176-8). But he said very little about it, and actually called in question his continuing commitment to the *Law's Empire* argument, saying that that argument is “only one way in which integrity and legality can be understood in each other’s terms, and readers who are dissatisfied with my own construction should not reject the general project for that reason” (JiR 178).¹⁵ He did, however, reaffirm the basic character of integrity, saying that legality, on his conception of it, is more sensitive than other conceptions “to the history and standing practices of the community ... because a political community displays legality ... by keeping faith in certain ways with its past” (JiR 183). Again, there is no explanation or elaboration of the 1986 explanation of why this is the case.

But there is one other passage in *Justice in Robes* that helps a bit with this. Dworkin said:

Every contemporary democracy is a divided nation, and our own democracy is particularly divided. We are divided culturally, ethnically, politically, and morally. We nevertheless aspire to live together as equals, and it seems absolutely crucial to that ambition that we also aspire that the principles under which we are governed treat us as equals. (JiR 73)

But there is still no explanation of *why* equality requires us to accept the discipline of keeping faith even with past decisions conceived as mistaken rather than enforcing with scrupulous consistency new principles which we think are better.

As for *Justice for Hedgehogs*, I have already said that the discussion of political integrity in that book is quite limited. There is extensive discussion of personal integrity. The personal ideal plays a prominent role now in Dworkin’s account of what it is to lead a good and responsible life,¹⁶ a life of dignity, and much of the book is devoted to that. But there is no obvious route from personal

¹⁴ Ronald Dworkin, *Hart's Postscript and the Point of Political Philosophy*, in JUSTICE IN ROBES, 140 (2006), responding to H.L.A. HART, THE CONCEPT OF LAW (Second edition, 1994), 238-76. JUSTICE IN ROBES is cited in the text by page-number as (JiR xxx).

¹⁵ There is also a cryptic reference to what Dworkin thinks is some congruence between his conception of integrity and Rawls’s theory of justice in an endnote in JiR 303.

¹⁶ See JfH 101.

integrity, which is a major theme of *Justice for Hedgehogs*, to political integrity, which isn't.

A chapter called “Law” comes at the end of *Justice for Hedgehogs*, just before a powerful epilogue. It is relatively brief and under-argued.¹⁷ Political integrity is not discussed explicitly, though it is briefly alluded to and it is mentioned directly in an endnote. Now, to be fair, Dworkin said that his “aim in this chapter is not to summarize my jurisprudential views in any detail but rather to show how these form part of the integrated scheme of value this book imagines” (JfH 400).

The closest he came to reiterating the argument about integrity was in a lengthy analogy to political community, using the example of a family. We are asked to consider what a parent might take into account in deciding whether to enforce some demand on a child (e.g., requiring the child to keep faith with an undertaking given to a sibling).

Are there conditions on your use of coercive authority beyond your conviction that [the child] should keep her promise? If so, what are those further conditions? How far are they supplied or shaped by your family's history? Does it matter—and if so, in what way—how you have exercised your authority on similar occasions in the past? Or, if you have a partner, how that partner exercised a similar authority? What makes a past occasion similar? What if you have revised your opinion about the importance of promising? (JfH 408)

Dworkin said that as the parents consider these questions, they are in effect constructing “a distinct institutional morality: a special morality governing the use of coercive authority within [their] family” (JfH 408). And that is supposed to be like, in microcosm, the construction of law in a society. He talks of the “structuring principles” of this special morality (JfH 409), a phrase he repeats later in Chapter 19 where he talks about “the special structuring principles that separate law from the rest of morality” (JfH 411)—citing “principles about authority, precedent, and

¹⁷ H. Baxter, *Dworkin's “One-System” Conception of Law and Morality*, in Boston University symposium (857): “The penultimate chapter in Ronald Dworkin's new *Justice for Hedgehogs* is entitled ‘Law.’ It may surprise Dworkin buffs to see that the chapter called “Law” covers only eight pages of a three hundred page manuscript,” 16 pages in final version of the book.

reliance” (JfH 411)—which he says are “themselves political principles that need a moral reading” (JfH 413). But as always now he fails to provide any explanation of why a special morality structured in this way is required, whether for the family or for the political community.

That “*why?*” is what the long argument in *Law’s Empire* purported to answer. To the extent that we get an answer now, it seems rather different from the answer in 1986. Now we are told that

the reasons that you ... have for deferring to this history are themselves moral reasons. They draw on principles of fairness that condition coercion—principles about fair play, fair notice, and a fair distribution of authority, for instance, that make your family’s distinct history morally pertinent. (JfH 408-9)

This is surprising because in *Law’s Empire*, integrity was supposed to be a value alongside and traded off against fairness (as well as justice), not the same as fairness. Now this may be just a matter of terminology. In *Law’s Empire*, “fairness” meant political fairness, as in majority rule (LE 164). In *Justice in Robes*, Dworkin briefly used the term “procedural fairness” (whatever that means) to talk about integrity’s requirement of fit (JiR 171). And actually, much much earlier, in the article “Hard Cases” (published in 1975), Dworkin had used the term “fairness” to capture something approximating what we might now call “integrity.”¹⁸

Finally, in *Justice for Hedgehogs*, there is an endnote marked for the end of the passage about family morality that I have been quoting from, where Dworkin says, “I drew a pertinent contrast between the justice and the integrity of a legal system. See my *Law’s Empire*, particularly chapter 11” (486). That is all he wrote. It has the decided feel of an afterthought; it might have been prefaced “I seem to remember...” Also it’s odd that he mentions Chapter 11 of *Law’s Empire* rather than Chapter 6, for Chapter 11 is where Dworkin considers the possibility of a higher justice beyond the trade-offs between justice, fairness, and integrity. It

¹⁸ Hard Cases: “The gravitational force of a precedent may be explained by appeal, not to the wisdom of enforcing enactments, but to the fairness of treating like cases alike. ... [T]his doctrine of fairness offers the only adequate account of the full practice of precedent.” (1090-1 in HARVARD LAW REVIEW; 112-3 in DWORKIN, TAKING RIGHTS SERIOUSLY.)

may make sense in a way, because Chapter 11 is the only chapter of *Law's Empire* where Dworkin approximates the idea of bringing justice, fairness, and integrity together in an integrated whole.¹⁹ While the importance of that sort of integration is the thesis of *Justice for Hedgehogs*, most of *Law's Empire* treated the three virtues as having to be balanced against one another. So it's all a bit of a mess.

This is not the first time that Dworkin seems to have backed off from an intriguing and attractive argument in his jurisprudence. Think of his discussion of legal principles and *Riggs v. Palmer* in "The Model of Rules."²⁰ The New York Court of Appeals in that case held against the claim of an individual to his grandfather's estate, based on the grandfather's will, on the ground that the putative beneficiary had murdered the testator. The grandfather's will satisfied the statute of wills, but a majority on the court held against the murderer nevertheless, for two reasons: first, that his inheriting could not have been what the legislators who enacted the statute of wills intended; and secondly, because law included certain non-enacted principles such as "No man should profit from his own wrongdoing." In the late 1960s, Dworkin made this second explanation the key to his new jurisprudence—attacking the idea that law consisted only of rules, insisting that it also comprised hybrid legal/moral norms such as principles. But at a conference at Fordham in 1997, Dworkin said: "I continue to think that the majority reached the right decision, in *Riggs v. Palmer*, in holding that ... those who created the Statute of Wills did not intend to say something that allowed a murderer to inherit from his victim."²¹ This prompted an outburst by commentators like Fred Schauer, who noted that this was emphatically *not* the point Dworkin had relied on in his original work in the 1960s. Schauer said:

The power of Dworkin's claim about *Riggs* is that it demonstrates that even the plain indications of laws plainly recognized by the rule of recognition may be set aside in the service of a larger and undifferentiated array of legal, political, and moral principles, an array that can be neither captured nor

¹⁹ In *LAW'S EMPIRE*, Chapter 11, "Law beyond Law" is short and swirly. It has section headings like "Law's Dreams" and "Law Works itself Pure."

²⁰ *Riggs v. Palmer* 115 N.Y. 506 (1889). See Ronald Dworkin, *The Model of Rules*, 35 *UNIVERSITY OF CHICAGO L.R.* 14, 23-4 (1967-8), or in *TAKING RIGHTS SERIOUSLY*, 14, 22-3.

²¹ Ronald Dworkin, *Reflections on Fidelity*, 65 *FORDHAM LAW REVIEW* 1799 (1996-7), at 1816.

recognized by a positivistically conceived rule of recognition. ... If Dworkin wishes now to deny authorship of the challenge to positivism that I have just outlined, then I want to claim it, and I do so here.²²

So there's that. I guess it would be unkind to conclude from these two cases, with Richard Posner writing in 1999, that sometimes "Dworkin has difficulty giving an accurate account of his own writings."²³

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Here's what I really think. In 2011 the task of reiterating the argument for integrity was pushed aside by Professor Dworkin's excitement over the new agenda concerning law and morality in *Justice for Hedgehogs*. I mean his new thesis that law is a compartment of morality. Brief though Chapter 19 is, it makes a momentous case: not only can the vaunted separation of law and morality be bridged, but law and morality can actually be united, with the first (law) as a distinctive branch or tributary of the second. I don't want to go into this in detail; we have another panel devoted to it, with Mark Greenberg and Ben Zipursky. But the overall idea of Chapter 19 is that every element that makes legal judgments look different or work differently from first-order moral judgment can itself be explained morally. So if Dworkin *had* fully discussed political integrity in *Hedgehogs*, he would have had to show that integrity is indeed what morality requires in the complex circumstance of a pluralistic and indeed antagonistic society struggling to be a true community.

If law is a branch of morality, it seems to be a branch of morality concerned with the moral significance of the kind of past political decisions that preoccupy lawyers. This distinguishes it from other branches of political morality. Much of political morality is (quite properly) pragmatic and forward-looking.²⁴ It looks to

²² Schauer, *Constitutional Invocations*, 65 *FORDHAM LR* 1295 (1997), at 1306n.

²³ Richard A. Posner, *Reply to Critics of the Problematics of Moral and Legal Theory*, 111 *HARV. L. REV.* 1796, (1999) at 1798

²⁴ This is the very broad sense of 'pragmatic' defined in *LAW'S EMPIRE*, Ch. 5; it comprises forward-looking moral improvements of all kinds, not just utilitarian moral improvements. Look especially at LE 162-3, where Dworkin openly acknowledges that pragmatism has to be the default position from a moral point of view, suggesting that substantial argument is necessary to shift it.

deploy the force of the state to make things better for the future—for example, to make society freer, more prosperous, more equal, or more democratic. But law as a branch of political morality has this additional preoccupation: ‘Legality is sensitive in its applications ... to the history and standing practices of the community.... [A] community displays legality ... by keeping faith in certain ways with its past.’²⁵ So the claim has to be that, as a particular branch of political morality, law concerns itself with the moral significance of keeping faith with certain events in the past.

What events? Well, obviously general enactments, *legislative events*, where representatives of the whole community enact a new array of norms in some area of concern. And then there is also the significance of previous decisions made in particular cases in the name of the community about individuals’ rights and responsibilities—the significance of those as precedents, which we are committed to honor as a matter of consistency as we go forward. The *Hedgehogs* thesis requires that the happening of these events must be treated as having moral significance, and that law, on this account, is the part of morality tasked with paying attention to the moral significance of events of this kind.²⁶

What is this moral significance and how do we account for it? Well, whatever it is, it attaches to these events not just because they constitute a history (*our* history), but because they occurred and are remembered in a context of political disagreement. This is what always intrigued me about Dworkin’s argument in *Law’s Empire*: integrity (keeping faith with past decisions) matters for those who care about justice, who disagree about justice, and who have a recent history complex enough to have yielded decisions from more than one political source. As you may know, I have long had an interest in relating the claims of law to the fact of our disagreement about justice, policy, and rights, and in both legal

²⁵ DWORKIN, *JUSTICE IN ROBES*, 183.

²⁶ Law is not the only branch of morality concerned with the moral significance of past events. Personal morality is concerned, among other things, with promising and with the moral significance that is to be attached to the past events we call promises. The fact of a promise having been made has moral significance and affects what it is right for the individuals concerned to do now—an effect that could not be figured out without reference to that past event. So equally, the fact of a series of particular decisions having been made in the past in the name of the community affects what it is right to do about a new case now in front of us—again, an effect that could not necessarily be figured out from the merits of the case alone.

theory and political theory I have been interested in aspects of the organization of our life together in which we come to terms with the need for decision in the midst of disagreement.²⁷ So, for example, I have taken an interest in (1) the demands of political civility;²⁸ (2) the authority accorded a majority-decision by one who voted against it;²⁹ (3) the principle and practice of loyal opposition;³⁰ (4) the argument in *Planned Parenthood v. Casey* about the law not changing every time one party manages to secure a change of personnel on the apex court of a political system (like the Supreme Court of the United States);³¹ and, above all, (5) the constitutional rule that keeps legislation in force indefinitely even after those who enacted it have lost office, so that law becomes a sort of archeological midden of judicial and legislative decisions made from all sorts of standpoints that over the years have outlasted the controversies that one surrounded them.³² It is in this domain of practice that we should expect to find the moral significance of respect for precedent and the requirement to honor the past life of a community in its present and its future.

In his *Law's Empire* argument, Dworkin said this was all about community and he introduced a tantalizing analogy. The relevant idea of community, he said, “commands that no one be left out, that we are all in politics together for better or worse, that no one may be sacrificed, like wounded left on the battlefield, to the

²⁷ See JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

²⁸ Jeremy Waldron, *Civility and Formality*, in *CIVILITY, LEGALITY, AND JUSTICE IN AMERICA* 46 (Austin Sarat ed., 2014) and “Polls Apart: Reclaiming Respect in a Time of Polarized Politics,” 10th Annual Sir John Graham Lecture, Maxim Institute, Auckland, New Zealand.

²⁹ WALDRON, *LAW AND DISAGREEMENT*, 105-116.

³⁰ Jeremy Waldron, *The Principle of Loyal Opposition* in my collection *POLITICAL POLITICAL THEORY: ESSAYS ON INSTITUTIONS* 93 (2016).

³¹ *Planned Parenthood v. Casey* 505 U.S. 833, 866 (1992): “There is ... a point beyond which frequent overruling would overtax the country's belief in the Court's good faith. ... There is a limit to the amount of error that can plausibly be imputed to prior courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.” See also Dworkin's comments on this in FL 124.

³² See Jeremy Waldron, *The Circumstances of Integrity*, in *LAW AND DISAGREEMENT* 188, and Jeremy Waldron, *Dirtying One's Hands by Sharing a Polity with Others*, 101 *MONIST* 216 (2018).

crusade for justice overall” (LE 213). And he contrasted that with “the different story ... in which each person tries to plant the flag of his convictions over as large a domain of power or rules as possible” (LE 213). In our thirst for justice we are to prefer the first story to the second. It is a challenging analogy, because “the wounded” who might be left on the battlefield in our successful quest for justice are not our veterans, who laid down their lives for justice as we understand it, but our opponents who fought and lost in the name of their opposite convictions. There they are strewn on the battlefield at Gettysburg or Antietam, and what Dworkin is demanding that we answer is: what respect can their predicament possibly command?³³ The decision-procedures with which we approach disagreement about justice, ideological conflict, and political competition leave us with winners and losers. One side gains the right to speak, for the time being in the name of the whole community. I am interested and I thought Dworkin was interested in the question: how do we reconcile the losers to that and to the resulting political outcomes?

One possibility is that we do this by appeal to the fairness of the political process—fairness of majoritarian politics. But Dworkin has never been a great majoritarian (to say the least), and anyway it doesn’t actually help much with anything like common law adjudication.

In his jurisprudence, Dworkin suggests that the business of reconciliation lies in the manner in which we administer controversial decisions. You could imagine a society, where victors pick and choose which of the persons to whom a given edict applies will actually have it applied to their case—making exceptions (to quote John Locke) in order “to License his own, or the Miscarriages of any of his Dependents.”³⁴ Or you could imagine a society in which political victories are cherished by whatever side secures them only for the impact they have on the particular conflicts that elicit those victories. In other circumstances—for example, when the boot is on the other foot—the decision which settled the earlier dispute is simply and cynically abandoned. Or, thirdly, you can imagine a community in which a major victory by one faction is pursued by the victors in a sort of year-zero fashion, so that it is as though their opponents never existed

³³ See Waldron, *The Circumstances of Integrity*, 206.

³⁴ Locke, *Second Treatise*, §94.

politically, never had any achievements; their statutes—along with their statues—are all torn down.

Political integrity rejects these possibilities. People who disagree must be able to see themselves alongside their more or less successful opponents as members of a genuine community in which political decisions are turned into principles. Integrity requires winners to moderate their self-righteousness, to accept a principled understanding of their victory, and to be willing to submit to a principled understanding of their opponents' victories too, when they happen. When the tables are turned, they are submit in the same spirit to their erstwhile opponents' new decisions, while their own decisions continue to honored alongside them in an integrated whole. (All this is true, even when the name of one of the parties is Trump.) By treating the legacy of our victories and our opponents' victories as common ground for us all, we change the meaning of what it is to suffer a political defeat, and we mitigate the antagonism and resentment on one side or the other that political conflict involves.

It's a nice image of reconciliation. Is it a moral idea? I think it is, inasmuch as it conveys the notion that in the exercise of political authority we need to be *respectful* of one another, not only in there being limits on what can be done to anyone who loses, but also in our continuing to respect people and their ideas, demands, and proposals, even when we think other ideas, demands, and proposals ought to prevail. Our opponents' decisions and enactments have standing in determining our law just as ours do, because the law is going to be making forceful demands on the compliance of us all. The heritage of the laws is everybody's; the burden of it is everybody's too. Each person is entitled to the benefit of protection if there is protection available, but equally each must bear the burdens if there are burdens to be borne.

That's as far as I have been able to get in elaborating the argument and the imagery that Dworkin set out so tantalizingly in *Law's Empire*. It is by no means complete.

One last question is whether this account provides the right sort of value (deontically speaking) to ground something like *stare decisis*. The account I have extrapolated from Dworkin's writings in 1986 and to a lesser extent 2011 seems to involve saying "this would structure us a nicer and more respectful community."

All very good, but *stare decisis* is often construed as a more compelling and thorough-going discipline than that. I don't mean it is an absolute. We all know that it is not. But it is a "demanding kind of integrity" (JiR 268); it has a pervasive and insistent character—keeping lawyers up into the small hours of the morning wrestling to find what integrity demands, and what would be an interpretation that respects all sorts of past decisions.

I have two things to say about that. The first goes back to a point we made about community earlier in this paper. Integrity is not just a soft and fuzzy communitarian ideal. We are talking about the political, not the social dimension of community, and about the hard-edged fact that a system of rule "that accepts integrity as a political virtue ... becomes a special form of community, special in a way that promotes its moral authority to assume and deploy a monopoly of coercive force" (LE 188). As something related to respect, it is presented as a moral condition on the legitimacy of our being able to enforce the law and on people having an obligation to obey it.

Secondly, we are talking not just about an ethical idea, but the basis of a practice. Looked at in slow motion, the account of reconciliation amidst antagonism is just the uncovering of a deep value commitment. But we are talking about that *as a way of grounding a practice*. Speeded up from our slow-motion analysis, the practice is regularized and institutionalized, established as part of the ethos of lawyers and judges. And the ordinary operation of this practice doesn't just give us some rather good ideas about how to treat one another. It licenses talk about rights—people having *rights* that arise out of the legal heritage of their society.

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I hope you hear all this as my continuing to hunger for more along the lines of what Dworkin gave us in *Law's Empire*, Chapter 6. I wish that he hadn't been so casual about integrity in his later work. The formulations in *Law's Empire* were enormously suggestive—on matters that we now see to be of massive importance (maintaining political community in the midst of polarization and resentful antagonism). But they were unwieldy, and often allusive rather than explicit in their assumptions and implications. There was more to be done. I have tried to sketch out a few ideas that further elaboration might have pursued. I do think that it

would a pity if we were to lose sight of this argument and, in jurisprudence, revert to the same sterile squabbles about positivism and anti-positivism. Integrity promised a more fruitful and substantive connection between law and political philosophy, which we desperately need. So I shall continue plugging away at the argument; hopefully others can join me.