INTEGRITY AND JUSTICE OR WHEN IS INJUSTICE MANDATED BY INTEGRITY?

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[*Dworkin's idea of 'law as integrity' is a way of explaining judicial decision making as constrained by the requirements of justice in the individual case, conformity to substantive and procedural legal precedent, and to the expectations of the community a judge serves. The author explores the tension this necessarily involves because the determination of what is the community may exclude members whose mores it nevertheless binds, and because those mores may not correspond to ideas of justice. By contrasting Dworkin's work with that of Kennedy, it becomes clear that rather than serving our unequivocal community interest, a judge must bear responsibility for mediating between conflicting community interests.*]

> Justice Hercules might think that the best interpretation of the equal protection clause outlaws distinctions between the rights of adults and those of children that have never been questioned in the community, and yet he might think it would be politically unfair . . . for the law to impose that view on a community whose family and social practices accept such distinctions as proper and fundamental.[1]

INTRODUCTION

The passage quoted above epitomizes the complexity of Ronald Dworkin's theory of law and the tension between 'law as integrity' and justice. An exploration of the issues raised by it and a deconstruction of its multiple meanings and allusions is, for this reason, an exercise which has a great deal to offer. In many ways, even locating the source of the tension is both difficult and fraught with ambiguity. Can we, for example, say either that, under some circumstances, justice ought to trump integrity, or that conversely, integrity ought to trump justice? Might it not be preferable to suggest that neither is quite the case, that something rather different is involved, something which centres upon the nature of the moral responsibility of the judge and the characterization of the political community? In suggesting that the 'best interpretation' of the

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1 Dworkin, R., *Law's Empire* (1986) 402. The equality provision of the United States Constitution is Amendment 14 [1868] the relevant part of which reads as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein the reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

The passage quoted above is significant because it illustrates precisely the way in which Dworkin believes that the judge's interpretation of the positive legal text, in this case a constitutional provision, is constrained by his interpretation of certain communal texts, such as the community's belief that children are not entitled to the equal protection of the law. *Cf.* Fish, S., 'Interpretation and the Pluralist Vision' (1982) 60 *Texas Law Review* 495. As Fish notes, Hercules' beliefs concerning the best interpretation of the constitutional text are, for Dworkin, 'held in check and neutralized by the authority of institutional rules and principles' (495). Essential to Dworkin's effort to legitimate judicial decision making is his insistence that the judge is constrained by the authority of both the positive legal text and the communal text.

equal protection clause prohibits distinguishing between the rights of adults and those of children, Hercules is suggesting that, should circumstances arise in which a minor is denied rights which are available to adults within the jurisdiction, although the 'right answer' (at least in terms of justice and individual rights) would be that such a distinction is prohibited, to impose this 'right answer' upon the community would be unfair because its traditions understand the position of children very differently. On this interpretation, any given decision might represent both the 'right answer' as a matter of strict constitutional interpretation, and possibly justice, and the 'wrong answer' because the distinction relied upon is one which is generally accepted within the community and one which has, in the past, been institutionally enforced.[2] As we explore the possibilities and consider 'right answers' which are simultaneously 'wrong answers', we will be albeit in very different guise, touching upon some very old and significant conflicts within liberalism: those between the individual and the community and between the right and the good.

READING THE TEXT

Dworkin argues that the source of the tension lies in the ever present possibility of conflict between substantive integrity and procedual integrity; that the conflict is inherent in the notion of law as integrity.[3] According to Dworkin, '[l]aw as integrity . . . not only permits but fosters different forms of substantive conflict or tension within the overall best interpretation of law'[4] and this is inevitable because it demands an account which seeks to comprehend justice, fairness and procedural due process in one coherent and integrated vision. Justice, fairness and procedural due process are distinct political virtues and although they inevitably conflict at times, the judge has an obligation to attempt to take all of these virtues into account in decision making and achieve the appropriate balance between them. According to Dworkin,

> justice . . . is a matter of the right outcome of the political system: the right distribution of goods, opportunities, and other resources. Fairness is a matter of the right structure for that system, the structure that distributes influence over political decisions in the right way. Procedural due process is a matter of the right procedures for enforcing rules and regulations the system has produced.[5]

Justice, then, is forward looking, a matter of outcome and distribution, of a comparison of what is with what ought to be. Fairness has become a technical term, one which gives pride of place to democratic institutions and processes, but which, as we shall see shortly, may readily yield outcomes which might seem 'unfair' to particular individuals. It attempts to balance the individual and the

[2] Central to Dworkin's methodology is the image of external constraints upon judicial decision making. In interpreting the legal text the judge is in no sense at large. Rather his/her interpretation must be constrained by supplemental texts, most particularly the beliefs and traditions of the political community he/she serves. As Fish has noted '[i]f one conceives of the interpreter as free to choose his beliefs and therefore to choose his interpretations, then one must always imagine a constraint on that choice so that it won't be irresponsible or whimsical.' Fish, S., 'Wrong Again' (1983) 62 *Texas Law Review* 299, 311.

[3] Dworkin, *op. cit.* 402.

[4] *Ibid.* 404.

[5] *Ibid.* 494.

community, to sustain individual rights while affirming the community's democratic right to pursue its own conception of the good. Fairness is a matter of the correct allocation of institutional responsibility, of the appropriate distribution of power between the branches of government and of respect for the democratic process. Procedural due process is, as the term implies, formal, getting the machinery of government to function effectively and efficiently and in a way which maintains the appropriate balance between fairness and justice.

Returning to our text, Dworkin's preferred interpretation emphasizes that while justice requires that no distinction be made between the right of adults and the rights of children, fairness demands that such a distinction be upheld because our political traditions, our history of legislative and judicial decisions and our social practices recognize that distinction as valid and beyond question. Thus Hercules must allow procedural due process to trump justice (or substantive due process) on such an issue. To do otherwise would be unfair because it would deny the community its democratic right to influence certain sorts of political decisions and to have its political decisions respected by the courts. I might, of course, put that interpretation in very different terms and suggest that what is at stake is whether or not we 'take rights seriously' as Dworkin once argued we must. If children and adults ought to have, as a matter of justice, the same rights before the law, and these rights ought to be taken seriously, and if, as seems fairly self-evident, influence over political decisions is distributed in a way which seeks to ensure that adults have an equal voice in political decision making (despite ongoing failures in practice) while children have no voice in political decision making, fairness mandates that we fail to take certain rights seriously even while justice commands us to respect them. Another way of putting the matter would be to suggest that while justice insists that no reason exists (at least in terms of the equal protection clause in the American constitution)[6] to distinguish between the rights of children and those of adults, our communities and institutions deny that children possess such rights and integrity demands that the courts uphold this view.

One of the reasons that Dworkin's text seems unexceptional, perhaps even self-evident, is because children are involved and, where children are involved, paternalism and the rights of parents over their children also seem unexceptional and self-evident. What I wish to emphasize is that this particular fact ought not influence our interpretation of that text. The unexceptional and self-evident are often simply the product of deeply entrenched stereotypes and prejudices which are embedded in our culture and reflected in its traditions. Hence it is that our next task is to rewrite the text, introduce other, very different, players and explore whether and why our reading changes. Not very long ago, less than 100 years in fact, both Native Americans and women were, in the United States, denied the equal protection of the laws. They were denied a voice in the political process, routinely denied certain sorts of employment opportunities and subject

6 I believe the same might be said of liberal theory more generally, in that the notion of equal protection is implicit in the rule of law.

to a wide range of paternalistic protections which were believed to be both necessary and legitimate. Indeed, when the newly emancipated slaves were granted the right to vote by constitutional amendment following the civil war, the amendment made it plain that women were excluded by constitutionally distinguishing for the first time, between women and persons. Let us, therefore, turn to history and recast Dworkin's text as it might have read during the period between 1860 and 1900.

Justice Hercules might think that the best interpretation of the equal protection clause outlaws distinctions between the rights of [Native Americans] and those of [other Americans] that have never been questioned in the community and yet he might think it would be politically unfair . . . for the law to impose that view on a community whose . . . social practices accept such distinctions as proper and fundamental. Dworkin's text might also have read thus: Justice Hercules might think that the best interpretation of the equal protection clause outlaws distinctions between the rights of [women] and those of [men] that have never been questioned in the community and yet he might think it would be politically unfair . . . for the law to impose that view on a community whose . . . social practices accept such distinctions as proper and fundamental.[7]

Other, more contemporary recastings of that text are also available, drawing upon a wide range of social and legal contexts. One might readily imagine a new South African constitution which, while granting certain rights to Black South Africans nonetheless made distinctions between the rights of Black South Africans and white South Africans which were accepted as proper and fundamental. Similarly, many Islamic nations continue to make distinctions between the rights of men and those of women which are likewise believed to be fundamental and proper. One might even suggest that the equal protection clause requires that no legal distinction be made between domestic violence and other forms of criminal assault and that to make any such distinction is to deny to the victims of domestic violence the equal protection of the laws, even while a majority of the community continues to believe that such a distinction is right and proper and even while its legal and political institutions routinely continue to make such a distinction. If these beliefs are essentially unquestioned within the community over which Hercules presides as judge, ought he allow them to trump his contrary convictions concerning justice?[8]

[7] Recast in these terms, it should be noted that Dworkin's statement amounts to an acknowledgement of MacKinnon's argument that '[t]he state is male in the feminist sense: the law sees and treats women the way men see and treat women.' It is important to recognize that no alteration has been made to either the form or the substance of Dworkin's text, only the cast has been changed, and, after all, the meaning of equal protection is that the law ought to fall equally upon all. See MacKinnon, C. A., *Toward a Feminist Theory of the State* (1989) 161-2. See further, and more generally, Minow, M., *Making All the Difference: Inclusion, Exclusion and American Law* (1990). Her account of the Becker case at 341-9 is particularly revelant. A similar argument is put by Eisenstein, Z. R. in *The Female Body and the Law* (1988) 42-78.

[8] Minow, *ibid.* 219-24 emphasizes the necessity for judges to strive to assume the perspective of those they judge. She emphasizes not beliefs which are unquestioned within the community, but the moral necessity for the judge to question the unquestionable and to attend to the implications of paternalism. As she notes, 'claims to act on behalf of another have often been used to justify exclusion, deprivation, and attributions of difference that stigmatize and hinder acceptance' (223).

Dworkin once suggested that certain propositions, such as that slavery is wrong, have the status of 'moral facts' irrespective of the beliefs and traditions of any particular community.[9] What distinguishes their foundational 'wrongness' from the propositions explored above? Perhaps it is simply that, given our present social practices, we acknowledge the fundamental wrongness of slavery as a 'moral fact', and find it difficult to believe that arguments to the contrary could ever convince us, whereas we might be more ready to accept that children (or Muslim women) could, in good faith, be denied rights available to others. The distinction apparently relied upon by Dworkin is the nebulous idea that paternalistic protection is believed by many to be benign, even appropriate and consistent with some plausible interpretations of equality, while slavery, particularly the form of chattel slavery practised in the United States during the last century, clearly denies equality and indeed the humanity of its victims. On careful examination this is far from being as self-evident as Dworkin assumes. Slavery, as understood in the Greek world, was very different from that practised in the southern states, and paternalistic protection such as that which routinely denied Kooris even the right to determine where they wished to reside or to control their own earnings could hardly be described as benign whatever the beliefs of those who believed it to be morally right and even beneficial.[10] One might also note that one consequence of the routine denial of equal protection to juveniles is the fact that they may be declared wards of the court for trivial misconduct or status offences, and that they may be denied basic legal safeguards such as the requirement that guilt be established beyond reasonable doubt and the right to a trial by a jury of their peers. Similarly, disabled individuals have been upon occasion confined in a mental institution for an indeterminate period as a consequence, not of conviction of any offence nor even a finding that they represent a danger to themselves or to others, but of a finding that they were unfit to stand trial. Are we as ready to accept in these contexts that it is right and proper to allow procedural due process to trump substantive due process? If we are not, it remains to ask why.

IDENTIFYING THE COMMUNITY

Our efforts to recast and revise the text, to discern the degree to which our interpretation is context-dependent, ought to caution us against allowing the fact that in the community something appears beyond question to influence our judgement.[11] The need to protect Kooris was, in the 1800's, almost beyond question, as was the denial of the vote to women and Native Americans. Today

9 Dworkin, R., *A Matter of Principle* (1985) 138.

10 See *e.g.* An Act to provide for the Protection and Management of the Aboriginal Natives of Victoria 1869 (Vic.).

11 In a telling critique of Dworkin's account of adjudication Robin West argues that, in an account such as that advocated by Dworkin, 'the morality of judicial obedience to an objective text depends entirely upon the morality of the objective text which is obeyed. An obedient, pliant attitude toward the text is no more a guarantee against the evils of chaotic power than is fascism a moral alternative to anarchy.' See West, R. L., 'Adjudication is not Interpretation: Some Reservations about the Law-as-Literature Movement' (1989) 54 *Tennessee Law Review* 203, 214. In a lengthy argument using Mark Twain's novel, *Pudd'nhead Wilson*, as her text, West explicates the way in which community morality supplements the positive law of the community in the Dworkinian account, and emphasizes

such practices are seen as profoundly unjust and immoral. The belief that juvenile offenders required treatment on a welfare model and the associated routine denial of legal safeguards was unquestioned until very recently. The belief that domestic violence ought to be handled very differently from other instances of criminal assault is still well entrenched. We find it easy to identify and castigate wrongs in retrospect but less easy to confront the consequences of our own deeply held and 'unquestionable beliefs'. Issues such as these compel us to examine much more closely terms such as 'rights', 'community' and 'fairness', and the role they play in 'law as integrity'.

It is essential to begin with the idea of community and the role community plays in Dworkin's theory as a whole. Dworkin alludes to distinctions between the rights of adults and those of children which have never been questioned in the community. Because this distinction is self-evident, beyond question, it would be unfair for Hercules to disregard it. What is this community? Who are its members? Whose voices count; whose are silenced? What does it mean to state that this distinction has never been questioned within the community? Unless Hercules is excluded from the community by virtue of his position on Olympus, the constitutional warrant for distinguishing between the rights of children and those of adults has, in fact, been questioned. Hercules believes that as a matter of constitutional interpretation it is groundless, and it may well be that others believe so as well even if their voices command no present authority. At most it is proper to say, not that the distinction has never been questioned, but that a majority, perhaps an overwhelming majority, of those who participate in the political process believe it to be beyond question, a very different statement. We, and our communities, believe many things to be beyond question which subsequently become the subject of profound dispute. Some of these beliefs represent nothing more than deeply ingrained prejudices. Second, those whose rights are diminished are not yet participants in that political process whose fairness Hercules is concerned to affirm. Whether or not some of those excluded (perhaps older children and adolescents) do question the distinction is not an issue which can be resolved by any examination of the political process and the outcomes it generates. The law as it is found in the statute books and in judicial precedent is of no help. Those whose rights are diminished are voiceless, even mute, once fairness is interpreted in a way which emphasizes communal practices and institutional constraints. The community may include them as 'members', even while it excludes them as participants and condemns them to silence.[12]

that our attitude towards the role of Wilson depends upon our view of the nature of law. If, in company with Dworkin, we regard law as interpretive, Pudd'nhead becomes a hero. If, as West argues we should, we regard law as imperative, as an act of power, we will regard him as complicit in the evil of the community. See 219-44, esp. 240-3.

[12] As West has noted, the expressed preferences of the political community, most particularly those beliefs and traditions which are unquestioned within it, are likely to reveal more about the dominant ideology and about current oppressive practices than about our actual interests, let alone any question of what is or is not fair. See West, R., 'Taking Preferences Seriously', (1990) 64 *Tulane Law Review*, 659, 670-9. She comments '[t]he relatively powerless prefer outcomes that are often detrimental to their true interest because they have been unduly influenced by a world view . . . that is the product of illegitimate, capitalist, racist, professionalist, and patriachal power' (678).

Much the same might have been said of the Native American population prior to the turn of the century, of women during the same historic period, and might today be said of Black South Africans, of Islamic women within Islamic nations, and of Kooris at least until 1967 and perhaps even today, given that voting is not compulsory for our Kooris as it is for every other Australian citizen. Are they members in good standing of the community whose traditions fairness demands that Hercules respect? Is it their community too? Do they have standing?

In developing his conception of associative obligations and of the social practices essential for such obligations to exist, Dworkin argues that four features are essential. The community must view the obligations its members owe one another as unique and special to community members. They must run from member to member rather than to the group as a whole. They must emerge from the concern of each member for each other group member, and the members must assume that the practices of the group reflect equal concern for all members.[13] Dworkin emphasizes that a sincere conception of equal concern is not incompatible with paternalistic practices. While such practices would not be just, they would be fair, and the obligations inherent in the practice would be morally binding upon its members.

Two separate questions are relevant here, First, in what sense is it proper to identify the beneficiaries of such protection as members, irrespective of the assumptions of the group? To what extent are their voices heard, and even if heard, how can their voices be said to be their own? Rousseau recognized long ago that 'if . . . there are slaves by nature, it is because there were once slaves against nature.[14] One might equally argue that if there are those who require paternalistic protection by 'nature',[15] the 'need' for this type and level of protection may have arisen as a consequence of the cultural practices which deem it legitimate. Second, it becomes critical to understand what is involved in membership. Can membership be simply a matter of birth, of geographical proximity, of nationality? Was the relevant community in ancient Athens, for example, the community of adult male Athenian citizens, or did it include the slaves and *metics* and women permanently resident within the city state? Did the political community in the United States between 1860–1900 include the Native Americans and women who were legally denied any voice in the democratic process and many rights the white male population took for granted? In the case of Native Americans neither they nor the political community which had dispossessed them believed that they formed one political community despite the fact that Native Americans were subject to the laws of the United States. In their case there were no shared assumptions. Under such circumstances, the idea of

13 Dworkin, *Law's Empire op. cit.* n. 1, 199-201. It is perhaps noteworthy that in recent writings Dworkin has abandoned the notion of equal concern and respect and now prefers simply equal concern. Paternalistic practices, even where 'legitimated' by communal practices and traditions, may be reconciled with equal concern but are much more difficult to reconcile with any meaningful conception of equal respect.

14 Rousseau, J. J., *The Essential Rousseau* trans. L. Bair (1974) 10.

15 The actual example used by Dworkin was that of a culture whose family practices sincerely assumed that equal concern required paternalistic protection for girls and women in all aspects of family life: Dworkin, *Law's Empire*, *op. cit.* n. 1., 205.

community becomes difficult and ambiguous. Were Native Americans resident within the borders of the United States under any obligation (other, perhaps, than that imposed by treaty) to obey the laws of the United States, and from where did their obligation arise? Perhaps the imposition of American law upon them was no more than organized brutality, and if this were the case, what effect might that have had upon the associative obligations obtaining within the wider community? What group assumptions are relevant here? Did the political community include those freed slaves denied a voice in the democratic process because of property or educational requirements? Who is entitled to define the bounds of the relevant community? What institutional constraints are relevant? An internal point of view in ancient Athens might well have identified the relevant community in a way which excluded women and slaves and *metics*. Similarly, in the United States in the last century, the political community was identified in a way which excluded women and, *a fortiori*, Native Americans. They might be the objects of legal action and the beneficiaries or victims of paternalistic protection, but they were not participants. Their voices remained unheard and played no part in the assumptions generated by the practices of the group. Similarly, Dworkin's own example suggest that children are in important and significant ways not fully members of our political community.

Dworkin assumes, but neither argues for nor makes clear, an inclusive conception of community. His example of a patriarchal family emphasizes that girls and women are among its members, bound by the obligations the practice generates. It seems inescapable that those who are relatively powerful identify the bounds of the relevant community and impose its traditions and the obligations generated by them upon the powerless. This need not involve law or the exercise of state power. A community such as that in ancient Athens, or one such as those in contemporary Islamic nations, might be perceived as inclusive upon similar reasoning. Surely the bounds of the relevant community can only be ascertained from within, from the perspective of the participants in the practice. Dworkin's argument depends upon an internal point of view, that of the participants in the practice. I do not believe the question of community to be so self-evident and so devoid of tension nor do I believe we ought to so readily place our faith in the assumptions generated by the group. The dynamics of power are too easily concealed thereby. One might plausibly suggest that a kind of community is generated by the master-slave relationship, or by a brutal husband-wife relationship, and while it might be incapable of generating obligations, its incapacity tells us nothing whatever about the obligations which obtain within a community of slave owners or of men who are legally and culturally entitled to chastise their wives.

If the search for community is the starting point, our interpretive journey has only begun. A great deal turns upon the interpretation placed upon fairness, and Dworkin's conception of fairness is simultaneously at odds with many aspects of our ordinary common sense interpretations of what is fair. This oscillation, this sense of a conception being at once self-evident and natural and yet radically at odds with our common sense understandings is significant. Dworkin's conception of fariness in the political context gives pride of place to our democratic

traditions, to the fact that our traditions require that certain significant political choices be remitted to the people themselves. It emphasizes institutional spheres of influence and the proper allocation of authority between the branches of government. Dworkin notes that 'legislative supremacy ... is a matter of fairness because it protects the power of the majority to make the law it wants'.[16] Yet other conceptions of fairness also resonate in Dworkin's writings, such as the idea that it is unfair for some individuals to be denied rights to which others are entitled for morally arbitrary reasons such as race or religion or perhaps age. Hercules believes, after all, that the equal protection clause does not distinguish between the rights of children and those of adults. His convictions in this regard, which surely involve fairness, are required by law as integrity to give way to a very different conception of political fairness which emphasizes that it is unfair for the court to impose such views upon a community which does not share them. Here the tension is between fairness and what he once characterized as the 'familiar idea of political equality ... [which] supposes that the weaker members of a political community are entitled to the same concern and respect ... as the more powerful members have secured for themselves'.[17] In communities such as our own children are, without doubt, the weakest members of the community and those most urgently in need of equal concern and respect. Despite this, where justice and fairness conflict as Dworkin concedes is inevitable, it seems that fairness will be allowed to trump justice where to do otherwise would violate traditions most members of the community believe unquestionable. Implicit in Dworkin's example and in the elaborations offered is the possibility that some of the weaker members of a political community can, under some circumstances, be sacrificed to fairness where substantive due process and procedural due process conflict.[18] Alternatively one might suggest that in certain circumstances, deeply held communal assumptions concerning the nature of the good life must be allowed to prevail over abstract and universal standards of justice if they can plausibly be legitimated by a 'shared' conception of equal concern. The alternative is that the community does not fully include some of its apparent members. They are at once 'members' in a truncated and perverse sense, and outsiders. Their voices have been drowned out by the dominant discourse. Such an approach is supported by the concrete history and traditions of our political practices.[19]

16 *Ibid.* 405.

17 Dworkin, R., *Taking Rights Seriously* (1977) 198-9.

18 *Cf.* West, R., 'Adjudication is not Interpretation' *op. cit.* n. 11. Professor West argues that a theory such as Dworkin's is ultimately conservative and that its moral conservatism arises out of an undue optimism concerning community and from its view that interpretation is primarily an act of discovery rather than an act of power. Judges in this view, in interpreting the law, strive to discover what the law really requires, not to make new law.

19 The alternative account suggested in the text is almost certainly accurate with respect to the position of Native Americans during the 1800's and perhaps even today. Whether it was and is also plausible with respect to women and children is a much more difficult and ambiguous question. Certainly during much of the history of the United States women and children were believed to be outside the political community as such, even while they were citizens in the formal sense and subject to the laws of the nation state. Much of the difficulty arises because terms such as 'community' are far from unambiguous and self-evident.

JUDGING IN AN UNJUST WORLD OR THE MORAL JUDGE AND UNJUST DECISIONS

As we have seen Dworkin's account of institutional roles and of the adjudicative process is complex and sophisticated. Throughout his work[20] he has argued that the judge has an obligation as a political official to attempt to discern the one 'right answer' for every legal case and to decide accordingly. The stature of this 'right answer' has always been fraught with ambiguity and the potential for tension and conflict. Dworkin emphasizes that adjudication is both a moral and a political enterprise; the judge has an obligation to interpret the legal materials relevant to the case before him in light of the principles of political morality fundamental to the community, and in light of his own understanding of what those principles require. He distinguishes carefully between the personal moral standards of the judge and the judge's interpretation of what the political morality of the community requires.[21] Thus, in discussing the way Hercules might have decided the 'snail darter' case,[22] he emphasizes that even if Hercules believes that the loss of any species is an immeasurable evil, and even if he believes that the language of the act is open to an interpretation which will sacrifice an almost completed dam to preserve the snail darter, he will permit the dam to go ahead. The judge is constrained by the fact that he knows his own views to be eccentric and by his recognition that the vast majority of the members of the community does not share them. The fate of the snail darter does not, according to Dworkin, involve any question of principle or of the rights of individuals against others or against the community as a whole. Thus

> Hercules' convictions about fairness place important obstacles between his own preferences, even those that are consistent with the language of the statute, and his judgment which interpretation is best, all things considered. Since his judgment in this situation is sensitive to general public opinion, it is also sensitive . . . to the expressed concrete convictions of the various legislators who spoke in the debates.[23]

I want to emphasize the fact that the reasoning Dworkin attributes to Hercules in deciding the snail darter case and the reasoning Dworkin suggests will govern his interpretation of the equal protection clause of the constitution follow precisely the same pattern. In the snail darter case, institutional constraints and Hercules' convictions concerning fairness and the fact that this case is a paradigm of the sort of decision which ought to be remitted to the people as a whole are critical to his decision. In his imagined constitutional case under the equal protection clause, Hercules' personal convictions, including the conviction that on the best interpretation of the equal protection clause no distinction ought to be made between the rights of children and those of adults, must ultimately give way, on

20 Dworkin, *Taking Rights Seriously*, *op. cit.* n. 17; *Law's Empire*, *op. cit.* n. 1.

21 *Cf.* Fish, S., 'Working on the Chain Gang: Interpretation in Law and Literature' (1982) 60 *Texas Law Review* 551, 559. Fish argues that '[Dworkin] assumes that history . . . has, at some level, the status of a brute fact; and he assumes that wayward or arbitrary behaviour in relation to that fact is an institutional possibility.' This tendency is particularly marked in the passage being examined. Dworkin clearly assumes that Hercules' potentially wayward and idiosyncratic interpretations of the constitutional text are somehow externally constrained by the history and traditions of the political community.

22 Dworkin, *Law's Empire*, *op. cit.* n. 1, 340-1.

23 *Ibid.* 341.

grounds of fairness, to the contrary belief of the community as a whole. The fact that the former, is characterized as a policy decision, while the latter, involving as it does the rights of children, is an issue of principle, becomes irrelevant. Hercules is constrained, even where the issue clearly involves a matter of principle, by the 'assumptions' of the community as a whole. The principles of political morality which weigh in his decision are those implicit in the beliefs and practices of the community as a whole on the best interpretation he can offer. They are simply another text which he must interpret.

It is for this reason that the institutional constraints demanded by fairness require that the judge upon certain occasions enforce laws which he or she believes to be contrary to the demands of justice, and this is the case even when, as a matter of interpretation, such a decision is not mandated by the formal text before the court and even when a matter of principle is clearly involved. In such a case, the moral dilemma confronting Hercules seems identical to that confronting a positivist judge faced with an immoral and unjust law. Indeed, I would suggest that the moral dilemma confronting Hercules is even more acute, given that he believes 'the law' or some aspects of the law to be at least potentially just even while the community remains unjust.

What has been characterized as the moral-formal dilemma[24] takes both a more subtle and a more acute form for the Dworkinian judge. In some sense, Hercules believes the 'law', given the best interpretation of which he is capable, to be just. The equal protection clause as he understands it gives no warrant for the exclusion of children from its ambit. He also believes that the demands of his role and the constraints of fairness require that he interpret it otherwise, giving that clause as legal text less than its best interpretation because the best interpretation of which he is capable conflicts profoundly with deeply embedded communal traditions which have never been questioned within the community. Hercules must reconcile what he believes to be a fundamentally 'moral' constitutional principle with an 'unjust community', and fairness demands that his personal convictions concerning justice and morality give way to communal practices. These practices generate obligations which constrain Hercules in his role as judge whereas, as a private individual, he might deny their legitimacy and engage in an act of civil disobedience.[25]

A couple of points are worth noting here. First, while Hercules believes that the best interpretation of the equal protection clause and the requirements of

[24] In a remarkable book dealing with the role of abolitionist judges in ruthlessly enforcing the fugitive slave act, Cover noted the always present danger of conflict between 'the demands of role and the voice of conscience', suggesting that judges caught by this dilemma serve a critical legitimating function for they clearly act out of impersonal duty. Cover comments that

> the judge caught between law and morality has only four choices. He may apply the law against his conscience He may apply conscience and be faithless to the law. He may resign. Or he may cheat: He may state that the law is not what he believes it to be and, thus preserve an appearance (to others) of conformity of law and morality.

It is this that Cover characterizes as the moral-formal dilemma. Cover, R., *Justice Accused* (1975) 6-7.

[25] *Cf.* West, R. L., 'Adjudication is not Interpretation' *op. cit.* n. 11, 242. In describing Twain's fictional lawyer and comparing him to Dworkin's Hercules, West argues that, like Hercules, he 'learns to read the law through the prism of the town's values,' thereby ensuring that he has no moral responsibility for the 'law' he enforces.

justice (or substantive due process) mandate granting equal rights to children, these are his beliefs. Other equally sincere and morally serious judges might hold beliefs to the contrary. For them, the requirements of the equal protection clause, even given the best interpretation of which they are capable, might well be in accord with communal practices and deny, as a matter of both justice and fairness, that children have such rights.[26] Justice, like fairness, is open to multiple interpretations, and reasonable and morally serious judges may well differ. Like law, justice is interpretive all the way down. There are no natural rights, no fundamental human needs, no account of justice outside of the best interpretations and arguments of which we are capable, to which we may have recourse. The internal point of view is all there will ever be, a profoundly sceptical conclusion.

JUDGING IN AN UNJUST WORLD OR PURSUING JUSTICE

A very different account of adjudication and of the moral responsibility of the judge, one which gives a certain priority to the judge's personal convictions concerning justice and political morality, may be found in Duncan Kennedy's work. While I believe that one could not distinguish, by examining the actual recorded texts, between a judgment rendered by Justice Hercules and one by Justice Kennedy, I do believe that contrasting two very different accounts, both of which emphasize the moral role of the judge, will offer useful insights and help conceptualize what is at stake. Kennedy asks us to imagine a situation in which

> the rule that seems to apply is bad because it strikes the wrong balance between two identifiable conflicting groups, and does so as part of a generally unjust overall arrangement that includes many similar rules, all of which ought in the name of justice to change.[27]

One might very easily imagine such a conflict concerning rules curtailing the rights of children, one which might be heard as a constitutional matter under the equal protection clause. Kennedy as judge perceives himself as having a vocation of social transformation and seeks to direct his efforts in order to 'bring about an outcome that accords with my sense of justice'.[28] He argues that it is the fact of

26 *Cf.* Dworkin, *Law's Empire*, *op. cit.* n. 1, 299, where Dworkin characterizes libertarianism and equality of resources as competing conceptions of political equality. Likewise, while judges may differ in their interpretations of what the constitution requires, these different interpretations are competing conceptions of what the 'right answer' is as a matter of political morality. *Ibid.* 357-9. No court of appeal exists capable of finally declaring what the 'right answer' is. Justice, like fairness, is ultimately a matter of interpretation, and arguments about justice, like arguments about law, are arguments about which interpretation is preferable. After the arguments have been concluded, nothing remains to be said. *Cf.* West, R. L., 'Adjudication is not Interpretation' *op. cit.* n. 11, 242 where West comments about just such a decision making process that

> he reads the objective legal text through the 'prism' of the town's moral values, and he interprets the resulting supplemented text in accordance with the disciplining rules that govern the town's interpretive practices He performs as both 'a servant of the law and a servant of the community.' He holds the community's values — not his own — paramount in his legal analysis ... And, it is the town's morality — not the lawyer's — which must supplement the text of the positive law, and discipline its interpretation. Consequently ... Hercules, . cannot be held responsible for the results the legal system, supplemented as it must be by the town's morality, generates. ... [He] simply supplies the most coherent, most correct, and most powerful interpretation of the community's texts.

27 Kennedy, D., 'Freedom and Constraint in Adjudication: A Critical Phenomenology' (1986) 36 *Journal of Legal Education* 518, 519.

28 *Ibid.* 522.

having to work to produce an outcome which defines the role or situation of a judge, that 'it is neither a matter of being bound nor a matter of being free' but rather a consequence of the fact that the judge is institutionally required to test his or her intuitive perceptions regarding a just outcome against the best possible arguments for the other side, to 'play around' until time runs out and a decision must be made. Kennedy argues that this process of argument and counter-argument is morally mandatory, that 'what would betray legality would be to adopt the wrong attitude at the *end* of the reasoning process, when I've reached a conclusion about "what the law requires" and found it still conflicts with how-I-want-it-to-come-out.'[29] Implicit in this last statement is an acknowledgement that if, at the end of the day, 'what the law requires' and justice remain irreconcilable, for the judge to prefer justice above law would to be betray legality. It should be noted that the conflict arises at a very different point for Kennedy's judge. Hercules apparently believes that the equal protection clause of the constitution, given the best interpretation, gives no warrant for distinguishing between the rights of children and those of adults, but that fairness demands that this distinction be upheld because it is fundamental to the traditions of the community and has never been questioned. Legality offers conflicting messages; the constitutional text and the communal text are at odds. The conflict is implicit in his attempt to obey the demands of law as integrity, present in his reasoning at every stage. For Kennedy's judge, the conflict only crystallizes at the point at which he has run out of arguments and remains unable to reconcile law and justice. Kennedy suggests that the structure of a judge's argument is constrained by the legal medium in the same way the use of bricks as a medium of construction constrains a builder. The medium limits the choices available but simultaneously, leaves the craftsperson free to pursue his or her chosen project, in his case 'how-I-want-it-to-come-out'.

At this juncture, it is important to emphasize a number of critical differences between Kennedy's account and that offered by Dworkin. First, Kennedy's account is outcome oriented while Dworkin's is process oriented. The legal materials, the 'rules, cases, policies, social stereotypes, historical images'[30] available constrain the structure of the argument but do not of themselves determine the outcome. Rather, given the judge's project and his or her sense of what justice requires, the legal medium sets limits to the arguments it is possible to construct. The judge alone determines and must bear moral responsibility for the concrete outcome. Hercules, by contrast, is constrained by the medium itself. His task is to generate the best possible interpretation of the legal materials themselves, to impose meaning on them, and to subordinate his personal sense of justice and morality to the outcome required by the interpretive project. Second, the 'constraints' implicit in Hercules' project and the constraints by which Kennedy perceives the judge as bound are very different. Hercules is constrained

[29] *Ibid.* 523, emphasis in the original. Kennedy's account parallels that of Fish in this respect. See generally, Fish, S., 'Wrong Again', *op. cit.* n. 2. Directly to the point is Fish's comment in 'Working on the Chain Gang', *op. cit.* n. 21, 553 that 'he is neither free nor constrained ... but free *and* constrained'.

[30] Kennedy, D., 'Freedom and Constraint in Adjudication', *op cit.* n. 27, 526.

by 'law as integrity' as an 'objective' force, a force which is outside himself. His interpretive project requires that he provide the best possible interpretation of the legal materials, treat the law as a seamless web, and while his convictions about justice and fairness inevitably play a role in his interpretations, his personal convictions concerning a just or appropriate outcome are strictly subordinated to the interpretive project of making the legal story the best it can be given the materials available in the community.

Kennedy's account is more subtle in a number of respects. On one level he argues that the judge perceives the law as a medium which may be either plastic or resistant or oscillate unpredictably between the two but which is in necessary and productive tension with his or her convictions about justice. On another level even this perceived opposition or creative tension is an oversimplification. As he acknowledges,

> I simply don't have intuitions about social justice that are independent of my knowledge of what judges and legislators have done in the past about situations like the one before me. Other actors in the legal system have influenced, persuaded, outraged, puzzled, and instructed me, until I can never be sure in what sense an opinion I strongly hold is 'really' mine rather than theirs.[31]

Even the judge's convictions about justice have been shaped in part by the legal environment. The judge is both independent of the field of legal argument and embedded in it. 'To the question "who is the field" the answer has ultimately to be that the field is me, resisting myself',[32] and it is for this reason that within the practice of legal argument the judge both determines the outcome and cannot escape personal moral responsibility for it.[33]

As is the case with Hercules, the potential for conflict between law-as-it-is and the judge's sense of social justice is ever present. When conflict arises a moral dilemma is inescapable. Kennedy's account of the possibilities in such a case is revealing. Five possibilities exist. If I as judge go along with the law-as-it-is, the 'crucial question is how I explain my obedience, that is, my willingness to act as the instrument of injustice'. If I withdraw from the case, the 'crucial question is how I justify begging off while insisting that someone else do the dirty work, if I intend to stick around for the more attractive assignments.' If I override the law on the basis of my convictions about justice, the 'crucial question is who authorized me to take the law into my own hands.' If I mount an implausible argument in an effort to secure a just result, I must confront 'the dishonesty of bad faith argument.' Finally, if I lie about the facts, present an account I know to be false in an effort to secure a result I believe to be just, I must justify to myself my willingness to subvert an account of the facts I know to be true to attain an outcome I believe to be just.[34] If, as Rawls once asserted, 'justice is the first virtue of social institutions, as truth is of systems of thought'[35] the judge must ultimately choose between speaking truth and doing justice. Depending upon the circumstances any one of these possibilities might be appropriate, given the

[31] *Ibid.* 548.
[32] *Ibid.* 551.
[33] *Ibid.* 557.
[34] *Ibid.* 558-9. This account ought to be compared with that cited in n. 24.
[35] Rawls, J., *A Theory of Justice* (1972) 3.

position of the judge, his or her life project, the legal materials and facts of the case, and the work done. Whether the law-as-it-is accords with the law-as-it-ought-to-be or whether the conflict between them is irreconcilable, the judge must assume moral responsibility for the resulting decision on an individual and wholly personal level. Ultimate responsibility cannot be remitted to any conception of institutional role, nor alleged to reside with the legal materials available. The field of law may appear objective and immovable; it may appear manipulable. It is in no meaningful sense either one or the other. Rather the judge gives it determinate shape as a matter of free ethical or political choice.[36] The legitimating claim that the judge simply acted out of impersonal duty is false, a convenient fairy tale. If Hercules can withdraw into an institutional justification and assert that the law compelled a given outcome, Kennedy cannot.

TRACING THE DIFFERENCES

While Dworkin and Kennedy both emphasize the moral and political character of adjudication, their accounts are very different and those differences are worth spelling out with some care. Dworkin emphasizes that while the judge must adopt the internal point of view and reason as a participant in the political and legal practices of his or her community, law as integrity is, in important ways, an external, even quasi-objective constraint upon judicial reasoning and upon the arbitrary exercise of state power. The judge is constrained by the legal texts available within the community and by the principles of political morality implicit in these texts and in the practices of the community. The goal of the judge is the best interpretation of which he or she is capable, and while personal convictions inevitably play a part in interpretation, they must be subordinated to 'the law' as an external force. For it to be otherwise would render adjudication immoral, dependent upon the arbitrary will of individual judges and subverting the ideal of rule by law and not by men.

For Kennedy, by contrast, 'what the law requires' is, to the extent that it may be viewed as a constraint, an internal constraint in precisely the same sense that the judge's intuitions or convictions concerning the just outcome are an internal constraint. The judge's convictions concerning justice compel him or her to work with the legal materials to attempt to produce an outcome which has the capacity to reconcile 'what the law requires' with what is just. The judge looks at law 'as a person who will have to apply it, interpret it, change it, defy it, or whatever . . . in the context of the legal and lay community that follows what . . . judges do, and with the possibility of appeal always present to [his or her] mind.'[37] If the judge may be said to be externally constrained, the constraint arises not from the law as an entity, but from the social practices in which and upon which the law operates, the legal and lay community both as presently constituted and as it will be constituted in the future. This sort of constraint arises, not from 'the law' itself but from the judge's desire to legalize a preference for a particular outcome and

[36] Kennedy, D., *op. cit.* n. 27, 562.
[37] *Ibid.* 519.

thereby legitimate it both internally and to others.[38] A similar, and equally internal constraint arises out of what Kennedy terms the potential 'legitimacy cost' of a given decision. A judge's perceived legitimacy may be enhanced in a number of different ways. Where it is known that a particular decision goes against the judge's deeply ingrained personal beliefs, perceived objectivity may be enhanced thus bolstering future credibility. Likewise, even where an unconventional or unpopular decision is given, if the judicial opinion has the capacity to persuade others that this was a correct or plausible understanding of the law all along, perceived legitimacy has been enhanced.[39] If a given decision is both out of step with prevailing legal mores and fails to persuade, the judge's legitimacy in future decisions is decreased. Yet even this is not simply an external constraint. Rather, to the extent that the practice of adjudication and the life-project of the judge compel the pursuit of just outcomes, it is also and far more significantly an internal constraint. The judge's capacity to attain just outcomes in the future will be decreased or enhanced by present decisions. Not only may the law be seen at one moment as plastic and manipulable while at the next resistant or obdurate depending upon the course arguments have taken, but also the judge's sense of social justice may change in response to the normative power of the legal field thus bringing 'how-I-want-it-to-come-out' into congruence with the field. The authority and moral weight of those who have gone before, who have decided matters similar to that before the court, also exerts a profound normative pull and operates as a constraint.[40] Ultimately, the constraints exist, to the extent that they do, not externally but as an integral part of the work or project of the judge, as the combined force of the constraints subjectively perceived and the strategies chosen. In reaching a decision, the judge develops arguments in continual tension with convictions concerning justice and with the arguments already deployed. These forces and vectors operate *within* the judge rather than constrain from without.

For Dworkin, the judge imposes meaning upon something outside of himself or herself. Such objectivity as judicial argument possesses derives from the experience of imposing meaning upon a more or less plastic medium, striving to attain integrity. For Kennedy, such objectivity as judicial argument possesses arises out of the experience of legal argument itself, an experience

> in which I take up and work with the message of the field and maybe end up espousing it against my current correct and virtuous position, [and which] looks like working in a nuclear plant at the risk of radiation sickness. It looks like fooling around with heroin: you think you have it under control, and one morning you wake up already addicted. You've gone from one (good) state to another (bad) state without ever having a moment of choice about it.[41]

Such meaning as is created and such legitimacy as is obtained emerge from within the judge, the outcome of legal argument and the (creative) tension between the judge's perceptions of the field of law and of social justice and the strategies through which the field is manipulated and out of which its felt

[38] *Ibid.* 527-8.
[39] *Ibid.* 529-30.
[40] *Ibid.* 549-50.
[41] *Ibid.* 554.

resistance or plasticity is created. For Dworkin, only the idea of law as integrity as a constraint upon the potential arbitrariness of the judge's individual convictions concerning justice and of appropriate outcomes has the capacity to legitimate what would otherwise be the exercise of coercive force devoid of legitimacy. For Kennedy, both legitimacy and constraint are inherent in the work of the judge — they are a matter of method, of the fact that the judge has to work to achieve an outcome, and that the way that legal argument, is deployed imposes further and sometimes unexpected constraints. The creative tension suggested by Kennedy's account is internal to adjudication as a life project, generated by the fact that it is work towards a particular outcome, and while its final form depends upon the legal materials deployed, it is not determined by them in advance. Ultimately the judge is constrained, not by any outside objectivity, but by the pre-conceptions with which the judicial project was begun and the choices and decisions made in the course of developing the project.

While Dworkin's account subordinates the personal convictions of the judge concerning justice to the best account which can be offered given the legal materials available, Kennedy's emphasizes those same convictions and the free ethical and political choices through which the judge fashions the constraints which condition rather than determine particular outcomes. The question of whether the law operates as a constraint upon the exercise of state power remains open; indeed Kennedy suggests that to the extent his account of the experience of legal argument is correct, answers concerning the nature of law and the degree to which it, in fact, operates as a constraint upon the exercise of state power must come from outside the practice of legal argument. From within the practice, no answers, right or otherwise, are available.[42] Thus for Kennedy, an external point of view is essential both for an account of the nature of law and for the criticism of the law itself. Dworkin on the other hand, denies precisely this. He argues that an internal point of view is essential both for a meaningful account of the nature of law and for its criticism. Only arguments which are or can be developed within the practice of law itself are relevant to its critism. Those which persuade within the practice remain persuasive when the role of critic is resumed.[43]

LAW AND LEGITIMACY

Dworkin's jurisprudential project is devoted to legitimating the role of the judge, to denying the apparent law-making role of the courts, and transforming this 'illegitimate' (because undemocratic) exercise of state power into one which

[42] Here, of course, Dworkin is in complete agreement with Fish. Ultimately, the distinction is simply that between 'a persuasive interpretation and one that has failed to convince.' Fish, S., 'Working on the Chain Gang', *op. cit.* n. 21, 559. The internal point of view is all there is.

[43] Dworkin, R., *A Matter of Principle* (1985) 139-40. *Cf.* West, R.L., 'Adjudication is not Interpretation' *op. cit.* n. 11, 278. West comments: 'By focusing on the distinctively imperative core of adjudication, instead of its interpretive gloss, we free up meaningful criticism of law. Adjudication, like all of law, is imperative — it is a part of politics. Politics, like all of history, is contingent — it is part of that which is — and interpretation of law is and should be grounded in this historical, contingent, and positive text. The *criticism* of law, by contrast, must be grounded in a different text. It cannot be grounded in yet another interpretation of that which is . . . . It must be grounded in the text we didn't write — the text of our natural needs, our true potential, our utopian ideals. Criticism of law must be grounded in the natural and ideal text, not the contingent text, if it is to be truly critical.'

is 'legitimate' because the judge is always and forever constrained by a conception of law which comprehends within it not only the overt legal material but the principles of political morality implicit in those materials and the practices of the community as a whole. The judge does not and cannot pursue personal beliefs concerning justice. To do so would betray legality. Rather, he or she has a moral obligation to subordinate personal convictions concerning justice and even concerning the 'best interpretation' of particular constitutional guarantees to the demands of integrity, to the idea of law as comprehending within it justice, fairness, and procedural due process in one coherent conceptual scheme. In this way, the judge remains the servant of the community and not its master. Both the obligation to subordiante personal convictions concerning justice to the 'best interpretation' of the law as it is and the still more fundamental obligation of impartiality in dealing with all members of the community arise out of the fact that political officials, including judges, act as agents of the community as a whole in discharging its responsibilities towards its members.[44] In an important sense, the obligations which attach to their political roles are dependent upon and derivative from the associative obligations generated by the practices of the community as a whole, and it is those obligations which must be enforced by judicial decisions. Because the obligations involved are internal to the practice and arise out of shared assumptions and beliefs and practices, the judge must subordinate personal convictions, even those concerning justice, to law as integrity.

Ultimately, the coherence of law as integrity depends upon the plausibility of Dworkin's account of associative obligations and upon our willingness to accept the idea that a judge may, under some circumstances, have an obligation to subordinate his or her convictions concerning justice to the sincere beliefs of the community as a whole even on what must surely be seen as a matter of principle. While considerations of justice, like those of fairness and procedural due process, play a role in legality, the appropriate considerations emerge from the community as a whole. The judge merely interprets the laws and principles of political morality implicit in the traditions of the community. While the personal convictions of the judge inevitably have a role to play in interpretation, they must remain subordinate to law as integrity. The judge is the agent of the community, the vehicle through which the community realizes itself in practice.

In seeking to dispel the persistent belief that, particularly in the case of constitutional adjudication, the role of the judge is fundamentally anti-democratic, because it inevitably involves judicial law-making, Dworkin has developed an account which gives the beliefs of the political community as a whole a certain primacy and casts the judge as its agent. Justice, in the abstract sense, must in the end be remitted to political philosophers and other dreamers. The judge is not entitled to impose his or her convictions about justice upon a comunity which does not share them. This remains problematic precisely because it reflects what I believe to be an undue, indeed unwarranted, optimism about community.[45] No

[44] Dworkin, *Law's Empire*, *op. cit.* n. 1, 174-5.
[45] *Cf.* West, R. L., 'Adjudication is not Interpretation', *op. cit.* n. 11, 219.

matter how sincere the assumptions of any 'group', be it a family or a political community, to the extent that those assumptions are flawed and unjust (as those of many of our existing communities assuredly are) and conceal rather than redress the profound inequalities extant within the community and the dynamics of power which prevail within it, the use of political and particularly judicial power to incorporate those same assumptions within its conception of law and to enforce those assumptions remains immoral. It seems both frightening and perverse to suggest that a judge may, upon occasion, have a moral obligation to engage in an immoral exercise of power. When responsibility for an immoral exercise of power ultimately devolves, not upon the one who exercises power, but upon an external force, be it law as integrity or a positivistic conception of law, the internal ethical constraints upon the exercise of power necessarily diminish. Hercules is absolved by his fidelity to law, ultimately by his role in the institutional power structure of the community. He would have violated his obligation only were he faithless to law and true to his personal convictions about a just outcome. Kennedy's judge, by way of contrast, cannot be absolved, cannot shift responsibility for the outcomes concrete decisions generate and the exercises of power those decisions authorize, or even legitimate. Whether, when a moral dilemma arises, the judge remains faithful to legality and betrays conscience, or remains true to conscience and betrays legality, the responsibility for the decision remains with the judge. Surely such a view is ultimately morally preferable; it maximizes the internal ethical constraints upon the exercise of judicial power and recognizes that

> [l]egal interpretation takes place in a field of pain and death. . . . Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. . . . Neither legal interpretation nor the violence it occasions may be properly understood apart from one another.[46]

[46] Cover, R. M., 'Violence and the Word' (1986) 95 *Yale Law Journal* 1601. [Footnotes omitted].