POWER, INTERPRETATION AND RONALD DWORKIN

by Ian Duncanson*

(1) DWORKIN

(a) Hart, it may be remembered, objected to one of the looser slogans of American Legal Realism, that law is what the courts decide.[1] It neither helps the judge to know that what s/he decides is what the law is, nor accurately describes the process by which issues are decided in courts he said, for judges do not regard themselves as free to reach whatever decision they like, and it is certainly not how they articulate what they do.

Dworkin applies a similar argument to Hart's account of the meaning of legal rules.[2] Where Hart saw a solid core of meaning established by past decisions, and a peripheral area in which an official had to be seen as exercising a discretion[3] - is a skateboard within the prohibition upon wheeled vehicles in the park, for example - Dworkin refuses such indeterminacy.

Echoing Hart's objection to Realism, Dworkin argues that 'discretion' describes neither what officials do when they make a decision, nor what they appear to suppose themselves to be doing.[4] If they themselves consider their task to be that of searching for the right answer, we can either dismiss what they say as mere rhetoric, or as a delusion, or we can take them seriously and consider what kind of theory of law would make sense of their claims. Dworkin's theory takes them seriously. Not only is it possible to produce the right answers in a case of disputed rights, according to Dworkin, but the justification for law as an ultimately coercive force confronting the individual is constituted by its doing so.[5]

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1 H L A Hart, *The Concept of Law* (1961), Ch VII, ss 2 and 3. See John Chipman Gray '... the Law is made up of the rules for decision which the courts lay down: citing Bishop Hoadly: 'whoever hath an *absolute authority* to *interpret* any written or spoken laws, it is *he* who is truly the *Law-giver* to all intents and purposes and not the person who first wrote or spoke them'. J C Gray *The Nature and Sources of the Law*, 2nd ed (1921), Ch V. Also O W Holmes Jr 'The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the Law'. *The Path of the Law* (1897) 10 Harvard Law Rev 457 at 460.

2 R M Dworkin, *Taking Rights Seriously* (1977) esp Ch 3.

3 H L A Hart (1961) 124 *et seq* ... 'open texture' of the law.

4 R M Dworkin (1977), 71. Also Dworkin, 'Is There Really No Right Answer in Hard Cases?' in R M Dworkin (ed), *A Matter of Principle* (1985).

5 R M Dworkin, *Law's Empire* (1986), 222-3.

Finding correct answers is a complex task which begins with the structure of rights, fundamental among which are the rights to concern and respect, to equal treatment, and rough equality, something -

> ... not captured by the general characterization of rights as trumps over collective goals except as a limiting case, because it is the source both of the general authority of collective goals and of the special limitations on their authority that justify more particular rights.[6]

Elsewhere[7], Dworkin refers the issue of rights against government to -

> ... one or both of two important ideas. The first is the vague but powerful idea of human dignity. This idea, associated with Kant, but defended by philosophers of different schools, supposes that there are ways of treating a man (sic) that are inconsistent with recognising him as a full member of the human community, and holds that such treatment is profoundly unjust. The second is the more familiar idea of political equality ... that ... weaker members of a political community are entitled to the same concern and respect of their government as ... more powerful members ...

This account describes, as it were, the terrain upon which legal meanings are to be deployed. It provides a good deal more than Hart's solitary natural right[8], or his minimum natural law content[9], but falls short of the kind of detail which an official requires in order to realise a correct answer in any specificity. The next step is to confront the material pressed upon the official as authoritative, material described in literacy criticism, upon which Dworkin draws from time to time, as the text.[10] First, however, we should notice how the site for interpretation is constituted.

(b) Law, as a practical activity, is 'argumentative', Dworkin says. It has to be observed from the participant's point of view, that of 'every actor in the practice', if the arguments and the nature of the contested propositions on which the arguments turn are to be grasped.

> People who have law make and debate claims about what law permits or forbids that would be impossible - because senseless - without law and a good part of what their law

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[6] R M Dworkin (1977), XV; R M Dworkin (1986), 108-113.

[7] R M Dworkin (1977), 198-9.

[8] H L A Hart, 'Are There Any Natural Rights?' in A Quinton (ed), *Political Philosophy* (1967) ie, 'the equal right of all men to be free', p 53.

[9] H L A Hart (1967), 189.

[10] R M Dworkin, (1985), Chs. 6 & 7.

> reveals about them cannot be discovered except by noticing how they ground and defend these claims.[11]

The actors in the practice and the people who have law include, besides 'judges in black robes':

> legislators, policemen, district attorneys, welfare officers, school board chairmen, a great variety of other officials ... people like bankers and managers and union offices who are not called public officials, but whose decisions also affect the legal rights of their fellow-citizens.[12]

Again:

> Citizens and politicians and law teachers also worry and argue about what law is, and I might have taken their arguments as our paradigms rather than the judges.[13]

In short, the entire population of a jurisdiction is envisaged as engaged in constructive interpretation and argument about the purposes and requirements of the law.[14] Dworkin focuses on 'judges in black robes':

> because the structure of judicial argument is typically more explicit, and judicial reasoning has an influence over other forms of legal discourse that is not fully reciprocal.[15]

It is not clear how far Dworkin has changed his position. In an earlier essay he was prepared to equate the capacities of judge and non-judge to debate questions of law, but with the rider that 'someone who has had no legal training ... would be incompetent to form opinions about what participants do'.[16] This seems to rule out 'citizens'.

Whether or not this is important is something I shall return to. If it is important it is because Dworkin makes use of the literary notion of a text in his exposition of law and its empire. The device works well to the extent that the identity of a text can be fixed in advance. *Hamlet, 'Ulysses* by James Joyce', or *'The Big Sleep* by Raymond Chandler', are all

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[11] R M Dworkin (1986), 13. This is not an inspiring piece of prose. Plainly it would be senseless to make claims about the content of law without law. What Dworkin is trying to say, presumably, is that the character of law and of the actors is best delineated by observing how the latter use the precepts of the former.

[12] R M Dworkin (1986), 12.

[13] *Op cit*, 13.

[14] *Op cit*, 48.

[15] *Op cit*, 15.

[16] R M Dworkin (1977)., 284. And, indeed, lawyers are identified as the interpreters at p. 91 of Dworkin (1986).

examples of what we might agree to treat as texts. But suppose we cannot agree upon the proper boundaries of the text?

The position of the critic/interpreter then becomes crucial. Whom shall we choose to believe? If the choice is to be made upon only one dimension of difference among them, namely competence, our criterion for selection is obvious. But then the question arises, competence is what? In the case of a pre-determined text, like *Hamlet*, we could rule out an illiterate person or someone who has not read any Shakespeare plays, including *Hamlet*. But on what ground can a person be excluded, or preferred, if it is the very identity of the text which is the first issue to be decided?

One answer may be 'power' in the form of which Foucault discusses it in *Power/Knowledge*[17], and that is something to which we shall return. We might also introduce the notions of class or gender, and the choice of critic/interpreters becomes one which must be made along a multiplicity of dimensions.

There is a further difficulty, and that relates to Dworkin's assumption that the process of interpretation at its best produces some form of narrative cohesion. But some texts are not coherent. There are those who argue that 'law' taken by itself, and without the gloss of power and/or gender and class analysis, is such a text.[18] There are, too, critics/interpreters who argue that the best procedure is one of disruption and subversion of texts. In order to examine these matters it is necessary to consider Dworkin's analogy, his law/text, or text/law.[19]

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[17] C Gordon (ed) *Michael Foucault: Power (Knowledge Selected Interviews etc)* (1980).

[18] P Goodrich, *Reading the Law: A Critical Introduction to Legal Method and its Techniques* (1986); *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (1987); P Carlen,*Magistrates Justice* (1976); D McBarnet, *Conviction: Law, State and the Construction of Justice*, (1981).

[19] I use the term 'law/text' in this chapter in, perhaps, an odd way. Gadamer's model of interpretation involves a movement from a written text - a poem, a novel, or, perhaps, a number of historical documents - to an interpretation, the meaning. Dworkin's adaptation involves a movement from preinterpreted law to *its* meaning. I have retained both terms as a reminder - thus 'law/text'. For Gadamer, the tradition to which the meaning belongs constrains the interpreter, otherwise he cannot understand. For Dworkin it is integrity and the background rights of justice fairness and due process which constrain the judge if he is to discover the right answer.

Gadamer has been criticised for, *inter alia*, supposing there to be only one tradition. My criticisms of Dworkin include the argument that the preinterpreted law, the law/text as I have called it, will have a different content, depending upon the social position of the interpreters. For a working class wife suffering domestic violence it must include police practices in such cases, housing authority policy on rehousing battered women, retraining and child-care facilities, social security agency policy on immediate income provision - and so on.

(c) He adopts an epistemology from the German philosopher, Hans-Georg Gadamer. Gadamer's hermeneutics differ from traditional hermeneutics by transforming what he terms the Enlightenment's 'prejudice against prejudice.[20] Rather than approaching the text in terms of its own history, in terms of the conditions and assumptions governing its production, or as contemporaries of it might have done, Gadamer argues that the critic first understands it as a participant. Richard Palmer, a commentator on Gadamer, amplifies this. Participation, he said,

> Emphasises the fact that one does not so much go out of his own world, as let the text address him in his present world; he lets it become present to him, contemporaneous. Understanding is not a subjective process as much as a matter of placing oneself in a tradition, and then in an event that transmits tradition to him ...
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> The subjectivity of neither author nor reader is the real reference point, but rather *the historical meaning itself, for us, in the present.* (My emphasis)[21]

The 'hermeneutic circle' generally involves the interpreter in understanding the whole in terms of its parts, and the parts in terms of the whole. Here, to understand the tradition disclosed by the event - the-text - one must already be part of the tradition disclosed. Any response to the text is an engagement with the text, but an intelligent engagement is one which is self-conscious, which constitutes meaning with an awareness of its own presence and its present concerns. Who is it, for Dworkin, who represents Palmer's 'us'? The plethora of critic/interpreter candidates early in *Law's Empire* has dwindled by Chapter 3, resolving the difficulty of identifying the boundaries and identity of the text:

> Law cannot flourish as an interpretive enterprise in any community unless there is enough initial agreement about

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Within jurisprudence it is quite proper to contemplate the massive redistribution - and the social preconditions of them - required to ensure that disempowerment on the scale suffered by such a woman is uncommon. If judges, lawyers and courts are capable of accomplishing such changes there is no evidence of it. If they tried they would swiftly be replaced. A more sensible approach is to leave to them the task of finding a temporary solution, and to attempt to find more enduring solutions in political, social and economic realms.

[20] H G Gadamer, *Truth and Method* (J Barden and G Cumming transl) (1986), 239-240: 'the fundamental prejudice of the enlightenment is the prejudice against prejudice itself, which deprives tradition of its powers'.

[21] R Palmer, *Hermeneutics: Interpretation Theories in Schleiermacher, Dilthey, Heidegger and Gadamer* (1969), 185.

> what practices are legal practices so that lawyers argue about the best interpretation of the same data.[22]

What is not clear from Dworkin's own text is the precise relation of lawyers and jurists, or legal philosophers. The latter are clearly crucial to the interpretive task. Dworkin says:

> Any practical legal argument ... assumes the kind of abstract foundation jurisprudence offers, and when rival foundations compete, a legal argument assumes one and rejects others.

But are legal theorists important to the task of identifying the text in the first place, or are they assimilated to 'lawyers' for this purpose? The question is worth asking for the following reason. If jurisprudence is taken very broadly to include all kinds of study of legal phenomena - and the list at the outset of *Law's Empire* suggested that Dworkin might intend that - then the possibility of rival texts is a real one. Gadamer's model of interpretation could produce a different result from the one Dworkin wishes to remain unique, where an actor who is located in a different place from 'us' seeks a best possible result. The law/text for a group of Aboriginal Australians, or for Derbyshire miners could be very different from the one recognised pre-interpretively by legally-trained people, and Dworkin gives no reason in *Law's Empire* why one should be given priority over another.

This in turn may affect, in some degree, Dworkin's response to what he terms 'the semantic sting'. The semantic sting is the conviction that in order to disagree about the content and future direction in which the law should go, lawyers must first of all have in common semantic criteria about the proper use of the word law. The interpretive approach accepts that disagreement takes place precisely because those who disagree, disagree about what law is and what it is *for*. They occupy different and opposed foundational positions. In each case of disagreement, however, the apparatus with which the interpreter/critic is equipped enables him (it is a him it appears) to discern who is correct, Dworkin tells us, and we shall return to this. A question for now is, how different from the 'semantic sting' is the precondition for rival interpretations, namely that all interpreters should agree upon their text or talk past each other?

(d) How the interpretation should take place provides a methodology for producing the right answers on ideal occasions. On non-ideal occasions, which are actually all occasions, it provides Dworkin with an expository device, which demonstrates the nature of both law and jurisprudence, property conceived.

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[22] R M Dworkin (1986), 90-91.

The identities of law and lawyers are given. Lawyers are people who have had legal training, as opposed to historians[23] or philosophers.[24] Law is initially a preinterpreted text, produced by 'legislatures, courts and administrative agencies ... (and) reported in a canonical way'.[25] However,

> ... nothing in the mere fact that his nation has law in the preinterpretive sense provides any litigant with any right to win what he seeks in its courts.[26]

Interpretation must take into account the rights of the individual which we noted at the beginning of the chapter, to respect, to equal treatment and rough equality, and Dworkin broadly subsumes these under the headings of justice, fairness and procedural due process. Imbricated with these are two concepts which focus the task of interpretations so as to produce outcomes which are specific to time and place. These are integrity and community.

Among the meanings currently ascribed to the word integrity and wholeness and moral soundness. The latter meaning does more obvious work in Dworkin's scheme, but there are overtones of the former in the recurring suggestion that interpretation should try to articulate a coherent statement of community principles. Integrity as an interpretive principle requires that overt standards and rules be taken as the expression of a more deeply structured meaning. Working back from the overt to the hidden fills out the meanings of fairness and justice *in situ*:

> The integrity of a community's conception of fairness requires that the political principles (which are - I W D) necessary to justify the legislature's assumed authority be given full effect in deciding what a statute it has enacted means. The integrity of a community's conception of justice demands that the moral principles (which are) necessary to justify the substance of its legislature's decisions be recognized in the rest of the law.[27]

The procedure recognizes the moral basis of the community and reconstitutes it at the level of new rules. It grasps what Dworkin admits may not be a 'single,coherent scheme of principle'[28] and attempts to render it consistent. The right answer can emerge only from active engagement of this kind with what Dworkin has elsewhere termed 'the enterprise as a whole'.[29]

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[23] R M Dworkin (1986), 13-14.

[24] R M Dworkin (1977), Ch 13.

[25] R M Dworkin (1986), 91.

[26] *Op cit*, 105.

[27] *Op cit*, 166.

[28] *Op cit*, 217.

[29] *Op cit*, 338. See also R M Dworkin (1977), 104.

It is as a mutual enterprise, rather than as a metaphysical or hypothetic entity, that Dworkin wishes us to view the community. At one level, especially in the context of the United States, it is easy to see where the idea of 'the community', even 'the community ... as a moral agent'[30] originates. There is an historical 'we' who held certain truths to be self-evident, who wrote of inalienable rights, and who self-consciously set about the task of constructing a nation-state to be governed in accordance with the moral principles listed in the Federal and State constitutions. It is a move J G A Pocock[31] associates with a tradition of republicanism stretching from the time Italian city-states detached themselves from the German Emperor, through the aspirations of the Agitators on Putney Heath, to the *sans-culottes* in Paris in 1789. Dworkin indeed equates fraternity and community.

A community is, for him, a fraternal political association. The authority of its institutions derives from their basis in the moral scheme of the mutual enterprise as a whole. As he is aware, there are some problems. If fraternity and community and awareness of the mutuality of enterprise connote a high degree of personal contact, or emotional sympathy of one person with another, or even just acquaintance with one another, it cannot describe a political state of even modest size.

Michael Taylor observes that:

> If it were stipulatively required of 'community' that a person's relations with most of many of the other members of the community were (emotional, intense, or loving) then few communities would qualify, and those which did would be short-lived.[32]

He, too, invokes the ideas of friendship and fraternity. But there are, for Taylor, three essential features of any body which could reasonably be considered to be a community. The people who compose it must have beliefs and values in common; the relations between them must be direct - 'unmediated by representatives, leaders, bureaucrats, institutions such as ... the state, abstractions and reifications' - and many-sided. The requirement of many-sided relations excludes such putative communities as the academic community, or perhaps, professional associations. Finally, a community properly so-called, would be characterised by reciprocity-mutual aid, solidarity and exchange.[33] As he admits, on these criteria:

> ... a community must be relatively small and stable ... each of the three characteristics must become diluted or attenuated

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[30] R M Dworkin (1986), 187.

[31] J G A Pocock, *The Machiavellian Moment.*

[32] Michael Taylor, *Community, Anarchy and Liberty* (1982), 31.

[33] *Op cit*, 26-32.

> or restricted as size increases and to that degree there is less community.[34]

Dworkin's requirements of community are rather different since he wants to use the term to assist with the project of interpreting his law/text, and that means jurisdiction-sized communities of millions rather than dozens. What could bind them?

They are bound together by four characteristics of fraternal obligation, Dworkin says. Members:

> first, must regard the group's obligations as *special*, holding distinctly within the group, rather than as general duties its members owe equally to persons outside it. Second, they must accept that these responsibilities are personal ... they run from each member to each other member.[35]

Members must share concern for the 'well-being' of other members. Specific obligations, for example, to help someone in need, are to be seen as derivative from the general duty. Finally, there must be 'conceptual egalitarianism', a kind of egalitarianism consistent with, for example, military (or, puzzlingly, Dworkin says, family) hierarchy, but in which 'no one's life is more important than anyone else's'.[36]

A true community 'deploys (responsibilities which are) special and individualised and displays a pervasive mutual concern that fits a plausible conception of equal concern'. However, the existence of these concerns is to be deduced from the behaviour of members of the group, in requiring and accepting responsibility among themselves, rather than sought as a 'psychological property of some fixed numbers of actual members'.[37] The members need not have any self conscious 'emotional bond' with others: the community may be vast, Dworkin says, and still meet the conditions.

(e) We have to notice a complexity imposed by Dworkin's requirement of reciprocity and interaction among his interpretive concepts. The interpretation of law, which is the process of translating it into a right-generating text, is a multi-phase process. First we approach the text with the concepts of fairness and justice, the correlates of the individual's rights to respect, equal treatment and concern, and rough equality. We then try to identify a community within the jurisdiction claimed by the text. If, using the criteria of special intra-group obligations felt by each member to be owed personally to each other member including general concern for the well-being of all members, and a

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[34] *Op cit*, 33.

[35] R M Dworkin (1986) 199.

[36] *Op cit*, 200.

[37] *Op cit*, 201.

'conceptual egalitarianism', we find one, we search for its moral basis. If it is isomorphic with the jurisdiction of the text, we use the standards and rules of pre-interpreted law in our search, trying to produce a coherent scheme of justice and fairness. Armed with all this, we return again to the law/text.

Law, then, must conform both with the standards of justice and fairness, and with the moral basis of the community as corrected by the standards of justice and fairness focused by the concept of integrity. The augmenting sense of precariousness is confirmed as the interpreting agent, the black-robed judge, is transformed into a hero of classical mythology. The American Realist portrayal of the judge as father-figure has really been out-franked.

Before passing on to Hercules and the common law a number of puzzling features of Dworkin's argument can be isolated, and returned to in the next section. There is the matter of the individual's rights. It is, we might say, one thing to accept that such a view of the individual is a desirable one to adopt, and to follow reasoned assertion with political steps towards its realization. Dworkin's insistence upon the existence of such rights, Alasdair MacIntyre wrote[38], cannot be repudiated, but that puts them in a class of assertion along with propositions about the existence of witches and unicorns.

Secondly, there is the community. Or, perhaps, there is not. Suppose we have a law/text, identified in its pre-interpreted form: Dworkin supplies us with apparently empirically-oriented criteria for identifying the presence of community. If the conditions of its presence are not satisfied for an area governed by a political state, it is not clear how that affects the process of interpreting the law/text itself.

Thirdly, whilst Dworkin is convinced that the process of community-creation within nation-state boundaries - where it has arguably been accomplished - is separate from the phenomenon of aggressive nationalism, he does not argue his case at all. This might seem merely unworldly, given that *Law's Empire* was presumably in preparation whilst the United States invaded Grenada on flimsy pretext, and continued its policy of funding gangsters and fascist dictators in Central and South America, the UK launched perhaps its last imperial task force, and France, in the name of *its* community based on the famous principles of *liberte, egalite, fraternite*, strengthened its hold upon a colonial outpost by means of repression, further poisoned the Pacific with its nuclear weapons testing, and engineered murder and destruction against Green Peace in Auckland harbour.

A book concerned to explicate questions of justice and fairness by reference to political communities could well have proved its relevance in

38 Alasdair MacIntyre, *After Virtue*, 2nd ed, 1985, 69.

relation to such questions, having provoked them by reference to 'more wholesome ideals of national community'[39], rather than by discussions of endangered species of fish, which, though interesting to some, do not rejoin the controversial matters of nationalism and jingoism.

Jurisprudence is not unique in this: in sociology, Giddens says, the student will not

> ... discover any discussion of military institutions or of the impact of military violence and war upon modern society ... yet who, living in the twentieth century, could for a moment deny the massive impact which military power, preparations for war, and war itself, have had upon the social world?[40]

The peculiar irony in the present case, however, is that Gadamer's 'presentist' interpretations, and his refusal of the Enlightenment's 'prejudice against prejudice', are horribly appropriable by militant nationalism, as Gadamer's own 1941 Paris lecture indicates[41] with its references to the *'volk'*.

Finally, there is, as I have suggested, the difficulty of the identity and identification of the law/text itself.

(f) Assuming, with Dworkin, that the difficulties of the previous subsection have been dealt with, we reach the final state of producing meaning from the text, of forming a -

> view of what rights and duties flow from past political decisions ... restating this ... as a thesis about the grounds of law. According to law as integrity, propositions about law are true if they figure in, or follow from the principles of justice, fairness and procedural due process that provide the best constructive interpretation of the community's legal practice.[42]

In this spirit, judges constitute law, which always has a 'history' as a present meaning consistent with other meanings contemporaneously produced. The analogy Dworkin uses to illustrate his argument is that of the chain novel, or soap opera. A judge is like the member of a team of writers who have each week, or even each day, to produce the script of a serial. The history of the characters and the environment created for them are of importance because they indicate what sort of people and

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[39] R M Dworkin (1986), 206.

[40] Anthony Giddens, *The Nation-State and Violence* (1985), 22.

[41] G Warnke, *Gadamer, Hermeneutics, Tradition and Reason* (1987), 71-72. Gadamer contrasts the authentic voice of the *'volk'* with 'the slogans of democracy'.

[42] R M Dworkin (1986), 225.

what kind of environment. More important than diachronic consistency, however, is an interpretation that tries to capture the overall meaning of the present so as to create new events which belong.

If no single meaning or set of meanings can be derived, the writer must, Dworkin says -

> judge which of (the) eligible meanings makes the work in progress best, all things considered.[43]

Likewise the legal judge must search for meanings, as we have seen, using the theoretical apparatus Dworkin supplies him or her with, and where coherence fails or where he discovers principles which conflict with justice, fairness or integrity, he must make the best possible construction consistently with those requirements.

> Judges who accept the interpretive idea of integrity decide hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political and legal doctrine of their community.[44]

The ideal judge, who can perform all the necessary calculations in the time available, can form a 'comprehensive' or total theory. Compared with this figure, whom Dworkin calls Hercules, real judges can achieve only partial theories, and subject only one or two possible meanings to the complex set of tests required, rather than all possible meanings. Hercules is a construction like the perfect vacuum in physics, or the figure in Rawls' metaphysics who must choose a moral order from behind the veil of ignorance. Or we might see him as a *ceteris paribus* clause: *if* other things were equal - though we know they are empirically not, nor will ever be - then certain propositions would be true. In assessing his utility it will be necessary to decide whether impossibility of matching his performance outweighs his value as a thought-experiment, or an 'as-if'.

(2) A RESPONSE TO DWORKIN

(a) I want to respond to the Dworkin project on three levels. On the most abstract level, one can only sympathise with its concern with such issues as fairness, justice and human dignity, and with its insistence that a meaning of law must incorporate ethics and politics. Terms like justice and fairness and human dignity are not Platonic forms, or essences, nor are they amenable to positivist verification. They are ways of thinking about institutions, behaviour and their outcomes. They belong to

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[43] *Op cit*, 231.

[44] *Op cit*, 255.

discourses which are, in Dworkin's terms, argumentative. It is important that both institutions and critical appraisals of them should incorporate that form of argumentation.

On a second level, I disagree with the starting point of Dworkin's analysis and prescription, whether one wants to call it liberalism, social democratic theory, or something else. There is only one sense, 'an enterprise as a whole' in which 'we' are all located, and I don't believe it is the sense that informs Dworkin.

The Dworkin enterprise is like Hume's rowing boat. The rowers may have different capacities, they must occupy different positions in that boat, and they will have different goals and ambitions, separate reasons for making their journey. Nevertheless, they have in common both the desire and the means of reaching landfall. Where Dworkin differs from Hume is in recognising that the means which they all have in common may not be obvious to them. They may make mistakes about what the various bits of equipment are for, and how best to use them. The coxswain may assist by explaining, co-ordinating and using the boat and its crew in a manner consistent with the basic principles of navigation and boating, but also by remembering that he must accord the rowers fair and just treatment and basic dignity.

By contrast it seems more plausible to me to regard the enterprise of the political state as more like a vessel whose control and destination are governed by one giant corporation, whose cargo belongs to another, and in which some people are stokers, deckhands and stewards, some are officers and some are passengers. The relative positions of the people aboard cannot be changed since the passengers cannot steer nor the officers stoke. The destination cannot be changed because the vessel would be repossessed by the owner from the charterers: besides the cargo has to be delivered or the consignee will not pay the freight and the consignor will sue.

If the population of the ship decide to reconstitute themselves into a community governed by the principles of fairness and justice they would find themselves propelled into a new situation. They would indeed be making history, one whose unfolding it would be difficult to anticipate.

Now people do perform feats of radical innovation although not usually with the agreement of all those from whom sacrifices are required. Moreover, neither the basic principles of the old organization nor the routines based upon them can be relied upon to accommodate to the changes. New bases, new routines have to be established.

The third level on which I want to respond concerns the detail of Dworkin's interpretive exercise. I have foreshadowed some of the reservations which might be expressed, and I will expand upon them.

(b) Since the Dworkin apparatus of interpretations is a closely integrated whole, deconstruction of it can only appear episodic and, perhaps unappreciative of its ingenuity. If we take first the question of the background rights, there seems to be no advance upon the situation summed up by MacIntyre.[45] We may hold that it is wrong to treat people in certain ways - in contradiction, for example with the view of man as bequeathed to us by the Enlightenment, - but the next step is a political practice.

The revolutions of 1688, 1776 and 1789 articulated varying degrees of rights programs. To understand the successes and failures of those revolutions, and thus the nature of the citizenship which emerged from them, it is necessary to analyze the material circumstances in which they were made and upon which, in turn, they impacted.[46] To go beyond them requires a similar analysis of our own times and places. There is no reason why this could not be a jurisprudential task, but it is not clear that Dworkin's is a performance of it. The primary significance he accords the black-robed judge is only part of the problem.[47]

If we examine two more of Dworkin's pieces, the community and the law/text, the problem can be delineated more clearly. A number of differences of a suggestive kind emerged in the comparison between Taylor's[48] and Dworkin's ideas of community. Taylor's community involved the deliberate, self-conscious holding of values and beliefs in common. That, and the unmediated nature of relations within the community implies small size.

Many-sidedness of relations within a true community implies small size, too, but also equality of a more than conceptual kind. The greater the material inequalities among people, the less likely they are to find many-sided relations attractive or practical. Reciprocity also implies equality and shared experiences and lifestyles.

By contrast with Taylor's, Dworkin's community may be visible only to the interpreter who is able to observe that the members do in practice derived their institutions land practices from deep political and moral

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[45] *Op cit*, note 38.

[46] The rights announced by each revolution seem quickly to have alarmed the new rulers. A classic case is the speed with which the champion of the American Revolution became 'the disgusting Paine' in the thirteen states. See P Miller, *The Life of the Mind in America* (ie the USA - IWO): *from the Revolution to the Civil War* (1965), 197; R M Nye and J E Marpurgo, *The Birth of the USA* (1970), 215-217. It is ironic with what horror the heirs of earlier revolutions viewed later ones. H Dickenson, *Liberty and Property: Political Ideology in Eighteenth Century Britain* (1978); P Miller, *ante*.

[47] As Nigel Simmonds notes: N E Simmonds, 'Imperial Visions and Mundane Practices' (1987) 46 *Camb Law Journal* 465.

[48] M Taylor, *Community, Anarchy and Liberty* (1983), Ch. 1.

values about their mutual obligations. The criterion that members must share concern for the well-being of co-members is much weaker than solidarity. Nevertheless, it is not a condition satisfied by the patterns of behaviour available in many nation-states, the dominant political form, to some examples of which Dworkin wishes to assimilate the notion of community.

Thus urban geography has changed since the industrial revolution so as to remove the employed from the employers, the poor from the affluent, and the affluent family from sites of work.[49] The two parts of each overlapping dichotomy are reintegrated in the process of surveillance[50]: the personal file[51], the medical[52] and the social work dossier[53], charity.[54] Concern is very attenuated in the vocabularies of eugenics, economics, planning and disciplining. In the vocabularies of charity and welfare it is heavily manipulative.

Conceptual egalitarianism, meaning that no one's life is more valuable than anyone else's, can also be missed in many urban landscapes. The arrangements of health care, welfare, nutrition, education and conditions of work trace out differential rates of morbidity, mortality, infant mortality and industrial injury on class, gender and ethnic lines.[55] Some lives

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[49] John Rule, *The Labouring Classes in Early Industrial England, 1750-1850* (1986), ch 3; L Davidoff and C Hall, *Family Fortunes: Men and Women of the English Middle Class,* 1780-1850 (1987), ch 8.

[50] Generally, M Foucault, *Discipline and Punish: the Birth of the Prison*, transl A Sheridan (1975); R Kinsey, A R Baldwin, *Police Powers and Politics* (1982), ch 3; C Aubrey *Who's Watching You? Britain's Security Services and the Official Secrets Act* (1981); T Bunyan, *The History and Practice of the Political Police in Britain* (1977); J Coxsedge, K Coldicott and G Harant, *Rooted in Secrecy: The Clandestine Element in Australian Politics* (1982), P Gordon, 'Community Policing: Towards the Local Police State?' in P Scraton, (ed), *Law, Order and the Authoritarian State* (1987).

[51] Dietrich Rueschmeyer, *Power and the Division of Labour* (1986).

[52] M Foucault, The Birth of the Clinic; *The History of Sexuality, Vols 1 and 2* transl R Hurley (1978 and 1985); D Armstrong, *Political Anatomy of the Body: Medical Knowledge in Britain in the Twentieth Century* (1983).

[53] V George and P Wilding, *Ideology and Social Welfare* (1976), H Throsall, A Critical Appraisal of Social Work' in P Boreham, A Pemberton and P Wilson, *The Professions in Australia* (1976).

[54] Gareth Stedman Jones, *Outcast London: A Study in the Relationship Between Classes in Victorian Society* (1971) ch 13; Rob Watts, 'As Cold as Charity', in V Burgmann and J Lee (eds) *Making a Life: A People's History of Australia Vol 2* (1988).

[55] See the Federal Government Health Targets and Implementation Committee Report (1988), reported in the Melbourne *Age*, 6.4.88 under the heading 'Health linked with wealth ...' 'death rates among men in the lowest occupational class are 1.54 times higher for cancer than for men in the highest class, 4.88 times higher for mental disorder; 2.86 times higher for accidents'. Poor suburbs have higher rates of still-births than richer suburbs. Aboriginal life expectancy is 20 years less than the average for white Australians. Also Nicholas Jones, 'Britain - A Dangerous Place to Work', *The Listener* 12.11.87 (Factory

attract heavy investment and some virtually nothing.[56] In the circumstances it will scarcely do to appeal to 'best interpretations', for to find these in the Dworkin scheme we first have to find a community, and this is in doubt.[57] Invitations to assume what we set out to test should normally be refused.

The identification of the law/text is in the end unsatisfactory. Drawing the semantic sting, we saw, involves rejecting the apparatus of Hart's core-penumbra thesis. Disagreement about law does not proceed from a settled area of definitional consensus to a core area of controversy and unsettled meaning. It is, says Dworkin, more basically about the grounds or justification of law, and appears in the movement from pre-interpreted law to the interpreted, rights-generating law.

But how are we to locate pre-interpreted law? It seems to be constituted by a prior agreement about what legal practice is, and on closer inspection resembles the list of sources familiar to legal process students: legislation and delegated legislation, judicial decisions and, perhaps, texts, counsel's arguments and, maybe we should add customary practices which have generated expectations.[58]

It seems curiously truncated if we judge by the list at the beginning of *Law's Empire* of people who argue about law. Why are the arguments of some of them silenced in favour of 'canonical' announcements of the pre-interpreted text, and agreements, presumably among lawyers, about what constitutes legal practice? I will suggest several ways in which it is possible to expand conventional accounts of the initial text.

(c) Lawyer's 'know-how' blends the p,re-interpreted rules with *ad personam* knowledge of judges, familiarity with procedural rules and the bargaining practices of a potential opponent, and the quantity of money with which it is worth taking risks. From the time of Orlando Bridgeman in eighteenth century England[59], through the corporate practitioners in

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Inspector numbers fell 1980-1986 from 660 to 550. Serious work place injuries rose from 18000 to 20000. See also Gib Wettenhall, 'Deaths in the Workplace: The Double Standard', *Australian Society*, November 1988, 14.

[56] D Holly, (ed) *Education or Domination - A Critical Look at Educational Problems Today* (1974), P Wedge and H Prosser, *Born to Fail?* (1973). (Not to be confused with human capital theory: see A Westoby and D Holly (ed) *op cit*).

[57] Why the idea should ever have been accepted that nation states might be communities in anything but an ideological sense is bewildering, given the ample evidence of involuntary inequality, exploitation etc. In what substantial sense could Ireland, Wales and Scotland form a community with England?

[58] R M Dworkin (1986), 91.

[59] See W G Ruben and O Sugarman (eds), *Law, Economy and Society: Essays in the History of English Law* 1750-1914 (1984), Introduction.

the nineteenth century United States[60], to the modern financial strategists, capital accumulation has been a principal service provided by lawyers.[61]

As 'organic intellectuals' of capital[62] it has been their job to combine technical knowledge with *savoir-faire* in a way that makes some social practices seem natural and some not. Their text has been much broader than codes, decisions and customary practices with the outcomes with which we are familiar. Their work has been largely at the bar, and even in the High Street office, but numbers of them have also become judges.[63]

Second, as Dworkin observes, ordinary people argue about how the law will affect them, too. For many people the form of regulation which has most effect is that generated at the work place by negotiation with management, and the codes practiced by welfare, education, immigration, or other bureaucracies. Where people are well-organised, in trade unions for example, or by affiliation with political parties, they have had considerable accomplishments. Where they have had to rely on test cases,on civic-minded lawyers and on judges, they have generally faired badly. Even when they have won their cases, the wider impact of sporadic cases may be limited, for bureaucracies are tireless, relatively well-resourced, and can operate well beyond the scrutiny of judicial agencies across a wide range of activity even if they face defeat on a particular issue.[64] The law/text with which many non-lawyers must work is a fluctuating proportion of a much wider schedule of power which must be identified and accommodated,or confronted.

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[60] R Jeffrey Lustig, *Corporate Liberalism: the Origins of American Political Theory 1890-1914* (1982).

[61] M Galanter, 'Meg a-Lawyering', in R Dingwall and P Lewis, *The Sociology of the Professions: Lawyers, Doctors and Others*, (1983).

[62] I owe the phrase to Maureen Cain. It is, of course, a Gramscian concept.

[63] The role of lawyers in commodifying land and assimilating it to the financial sector of the economy - building societies, banks and the whole complex of secondary finance - needs investigation. It has obviously been vital. See A Davidson and A Wells, 'The Land, Law and the State: Colonial Australia 1788-1890', (1984) 2 *Law in Context* 89; A Buck, 'The Logic of Egalitarianism: Law, Property and Society in Mid-Nineteenth Century New south Wales' (1987) 5 *Law in Context* 18; A Buck, 'The Politics of Primogeniture: Metropolitan Law in Colonial New South Wales', in D Kirkby and I Duncanson, *Law and History in Australia Vol II* (1986); Benwell C D P (ed) *Private Housing and the Working Class* (1978).

[64] Social security, taxation and immigration bureaucracies are examples. Where courts are much more effective and aggressive is in the area of *political* decisions to which they are opposed in the local state. See H Branson, *Popularism: George Lansbury and the Councillors' Revolt* (1979). More recently in the UK the judiciary has been in the van of Thatcher's assault on local democracy: see *R v Greater London Council ex parte Bromley London Borough Council* (1983) 1 AC 768, and the discussion in J G Griffith, *The Politics of the Judiciary* 3rd ed (1985). Local democracy can occasionally be seen to be a good thing: *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* (1976) 1 WLR 641.

What puzzles the concerned social scientist who is trying to interpret the Dworkin text from his or her theoretical standpoint - rejecting, even, with Gadamer, the Enlightenment's prejudice against prejudice - is the one-dimensionality of its social universe. People are distributed across a plane surface, as though bigness and smallness, weakness and power were relativities of a moment, not the consequences of a structure which reproduces itself over time. Hermeneutics itself flattens the terrain for the observer, too, but we shall come to that.

The ordinary person confronts the law/text not as a person, more or less competent, who makes a good or bad assessment and use of what there is, but as the occupant of one or more positions. As Dworkin says, what is, is a matter of producing, or interpreting something and at the same time producing an effect now and for the future. What is encountered at the outset is a matter of position, or in Foucault's term, of the 'disposition' of a subject across a number of dimensions. It is not a matter of 'subjectivity' or of idiosyncrasy, nor one which is entirely imposed. On the other hand social formations are structured and the structures have effects.

At the most general level, social agents encounter/delineate law/texts as historically and geographically placed.[65] They have direct and socially mediated experiences with which they can identify the treatment they have received and the remedies which have been available to them in situations felt to be unfair. They live in places which differ in terms of the work, education, health care and other utilities, including competent legal services.[66]

Rather more specifically agents can be traced along class, ethnic and gender dimensions. These forms of differentiation are socially produced and maintained and as a consequence already dispose people to experience other social institutions in different ways. The social fractures which they represent relate to the existence of power, and they inter-relate in complex ways. In the case of class the division is between those who control the means of production and those who do not.

This control, whilst it exists, imposes a logic which limits political or ethical choices about justice or equality.[67] The issue is not that the wage-

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[65] See Giddens on 'Time, Space, and Regionalisation' at ch 3 of A Giddens, *The Constitution of Society* (1984).

[66] UK Community Development Project, (ed) *Gilding the Ghetto: the State and Poverty Experiments* (1977); Benwell C D P (ed) *The Making of a Ruling Class: Two Centuries of Capital Development on Tyneside* (1978); C D P Inter-project Editorial Team, *Limits of the Law* (1977).

[67] As Marx points out, 'right can never be higher than the economic structure of society and its cultural development conditions thereby', K Marx, 'Critique of the Gotha Programme', in K Marx and F Engels, *Selected Works Vol 3.* I am grateful to J E Grbich for drawing my attention to this passage.

earner, in the course of a day, produces more value than he or she receives in the form of wages: all social organisations differentiate between what can be consumed or not as a matter of choice today and what must be invested for the future. It is rather that control over the future lies much more substantially in the hands of one group of people than in the hands of another. When and where to invest, the levels of taxation and pay, hence the levels of social wage and quality of environment are the consequences of decisions largely made by one class rather than another.[68]

The logic of capital is not a benign one, although there have been benign results.[69] But fluctuating profitability and speculation on stock and money markets, combined with a rationality in which commodified services are seen to be superior to needs-based provision, has led and does lead to inefficiencies and inequalities in a broad field. Health, education and transport are examples. Legal services are another. (The rationality of public expenditure cuts can, of course, be more persuasive where the separation of classes and class allies is more geographically pronounced.)[70]

Ethnicity describes another dimension of existence from which people encounter social institutions. This in turn has an historical dimension - in the status of non-hegemonic cultures within a wider framework, deriving from the slave, guest-worker or dispossessed origins of the members of it.[71] Contemporary aspects of ethnic deprivation are not reducible to class but can be understood in relation to it. Thus blacks in the UK, the US and Australia form a largely unskilled group at the bottom of the working class, often geographically separated from other citizens, and with worse social facilities available to them. The lack of skill is thus reproduced over time, although individual members may escape to become professionals, bureaucrats or controllers of capital, entering a

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[68] Arguments about the disappearance of the working class notwithstanding. See A Callinicos and C Harman, *The Changing Working Class: Essays on Class Structure Today* (1987); J Gibson, 'The Working Class under Thatcher', in (1987) Vol 2 *Confrontations* 31. Hence, of course, the curious paradox that controllers of capital need lower taxation as incentives, whilst wage earners need lower social security benefits as incentive.

[69] See R Peet, (ed) *International Capitalism and Industrial Restructuring: a critical analysis* (1987).

[70] In the UK before it began to be undermined by Thatcher, the National Health Service derived equally good health care, much more broadly, at half the cost per head of the US health care systems. On these issues generally, see G Hodgson, *The Democratic Economy: A new look at planning, markets and power* (1984); M Sawyer, Australia and the New Right (1982); M Loney, *The Politics of Greed: the New Right and the Welfare State* (1986); J Rentoul, *The Rich Get Richer: the growth of inequality in Britain in the 1980's* (1987).

[71] M Banton, *Racial Theories* (1987); G Bird, *The Civilising Mission-Race and the Construction of Crime* (1987); S Hall, C Critcher, T Jefferson, J Clarke land B Roberts, *Policing the Crisis: Mugging, the State, and Law and Order* (1978).

world in which discrimination and its putative prohibition may be more amenable to legal regulation of some form.

Finally, gender is neither reducible to class nor to sex - men and women. In white, western, societies, gendering takes the form of constructing women as the other. Just as non-whites are, so are non-men, defined negatively.[72] A complex of regulatory practices and rules disempowers women, although, again, individuals may escape, or even embrace dependency. Labor market segmentation, wage structures, and the absence of child care facilities disadvantage women at work, leaving aside personal hostility and discrimination.[73] Planning and transport disadvantage women who stay home and care for children.[74] Differential standpoints produce not merely different interpretations of the same text, but the construction of different texts.[75]

A constructive analysis of the situation of the agent, from his or her point of view, or from that of the social scientist, is concerned with goals and with strategies for achieving them. An agent is located at the focus of regulatory practices of all kinds, not all of which are of his or her own choosing.[76] What is taken to be the initial law/text could perfectly intelligibly be quite different, depending upon the structural location he or she starts from. To suppose otherwise is either to allow positivism in at the back door, or to (in this case) privilege lawyers' own understandings of legal practice.

If positivism is indefensible, lawyers' practices as organic intellectuals of capital makes their understandings unreliable, too, for others' purposes. The black youths of Stuart Hall's study can sensibly begin with policing practices which assume the criminality of public assemblies of black unemployed adolescents. Miners struggling in the United Kingdom for a right to work in the sense of some share in the decisions affecting the industry in which they work, could sensibly begin with a text including

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[72] Sexually, of course - L Irigaray, *Speculum of the Other Woman* (transl G Gill) (1985) - biologically, C Gallagher and T Laquer, *The Making of the Modern Body: Sexuality and Society in the Nineteenth Century*, esp T Laquer, 'Orgasm, Generation and the Politics of Reproductive Biology', in *op cit* (1987). See generally E Marks and I de Courtivon (eds), *New French Feminisms: An Anthology* (1981).

[73] See the summary in R W Connell, *Gender and Power: Society, the Person and Sexual Politics* (1987) ch 1; C Baldock and B Cass (eds), *Women, Social Welfare and the State* (1983); J E Grbich, 'The Position of Women in Family Dealing: The Australian Case', (1987) 15 *Int'l Journal of the Sociology of Law* 309.

[74] See N Redcliff and E Mingione (eds), *Beyond Employment: Household, Gender and Subsistence* (1985); R E Pahl, *Divisions of Labour* (1984).

[75] M Cain, 'Realism, Feminism, Methodology, and Law' (1986) 14 *Int'l Journal of the Sociology of Law* 255; S Harding, *The Science Question in Feminism*, (1986) esp ch 6. K Salleh, 'Contribution to the critique of Political Epistemology', (1984) 8 *Thesis Eleven* 23.

[76] A Giddens, *The Constitution of Society* (1984) ch 1; *Social Theory and Modern Sociology* (1987) esp ch 3.

police procedures designed to assist the other side by defining as a right to work the right to break strikes.[77]

A person conventionally seeking a legal remedy could begin with a text including the rationing policy built into the practices of legal aid provision. A woman responsible for caring for children on a low budget must need a text containing first, politics on urban planning and transportation, and second, the quasi-private enterprise organisation of legal service provision, which combine to prevent her from reaching the office of a lawyer relevant to her needs. A proper and thorough interpretation of the regulatory practices affecting her, delineating, *inter alia* the law/text, could well be that she must stay with her violent husband. Let us note the obstacles: her low self-esteem and sense of powerlessness; the logistical problems of identifying, making an appointment and reaching a lawyer; the impossibility of finding alternative accommodation for herself and her children.

What we encounter in all these cases is, I argue, the principle that liberal-democratic social orders are constructed around overlapping areas of exploitation. Where the ill-effects can be ameliorated without a threat to the operation of the social order itself, whether or not by the successful assertion of legal rights, amelioration in particular cases is perfectly sensible. Where what is required is a massive transfer of resources and/or a radical restructuring of decision making procedures in order to bring the exploitation to an end, it is sensible to recognize both the logic of the capitalist profit circuit and the limited altruism of those from whom sacrifices are required.[78] The way non-legal actors characterise the law/text is, in this context, perfectly rational.

(d) The influence of Gadamer's somewhat conservative position on interpretation is clearly strong in Dworkin's latest offering, although William Blackstone and Edmund Burke are important, too.[79] One major problem with the use of Gadamer's hermeneutics outside literary criticism is, I have suggested, the identification of the text. Dworkin's use of the chain novel example does not help, for chain novels - and soap operas - are projects clearly defined by external forces. Their future direction may be open for discussion, and resolvable in terms of integrity to the enterprise, but this precisely because the questions 'integrity to what?' or

[77] See P Scraton and P Thomas (eds), *The State v The People: Lessons from the Local Dispute* (1985) (12 *Journal of Law and Society*, special issue); B Fine and R Millar (eds) *Policing the Miners Strike* (1985). B James, Anarchism and State Violence in Sydney and Melbourne 1886-1896: An argument about Australian labor history (1986).

[78] The concretisation, in short, of the quotation from Marx, *supra*, note 67.

[79] See D H MacCormick, 'Dworkin as Pre-Benthamite', in M Cohen (ed) *Ronald Dworkin and Contemporary Jurisprudence* (1984)

'what enterprise?' or '*whose* enterprise?' *can* be given 'canonical' answers.[80]

But even where the text itself can be agreed upon without imposing silence, there is a supposition in Gadamer's approach which is surely open to question. Terry Eagleton says:

> Gadamer can equably surrender himself and literature to the wind of history because these scattered leaves will always in the end come home - and they will do so because beneath all history, silently spanning past present and future, runs a unifying essence known as tradition. As with T S Eliot, all 'valid texts' belong to this tradition.[81]

This is Gadamer's:

> appeal to established consensual values; assumed to lie so deep - so close to the sources of articulate thought - as to preclude any radical critique.[82]

An alternative, as Norris summarises it is that:

> Theory can claim to have a knowledge of narrative structures and devices beyond the kind of first order story-telling interest that most narratives provide. It may likewise claim to unmask (or deconstruct) elements of textual ideology which the narrative is unable to acknowledge in itself since to do so would be to destroy its own (illusory) coherence. Theory, in short, presumes a knowledge of the text which the text makes possible only in so far as it lends itself to a different, more rigorously argued, form of discourse.[83]

The tradition upon which Gadamer relies, in turn relies, as I have suggested, upon a 'we' whose exclusive voice is heard at the cost of imposing silence upon other 'we's'. The 'unending dialogue of human history' may be, and I argue it is, in Eagleton's words,

> as often as not a monologue of the powerful to the powerless, or ... if it is indeed a dialogue, then the partners - men and women for example - hardly occupy equal positions.[84]

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[80] Moreover, the intimate and minute surveillance of the characters by the authors and the audience in pure Panopticism.

[81] T Eagleton, *Literacy Theory: An Introduction (1983)*, 72.

[82] C Norris, *Contest of Faculties: Philosophy and Theory after Deconstruction*, (1985), 25.

[83] C Norris (1985), 27.

[84] T Eagleton (1983), 73.

Traditions are constructed and meaning produced and actors placed within them. Gramsci analysed this in terms of hegemony.[85] Political action can be undertaken in order to resist and replace a dominant culture, but it does this by criticising the disposition of people in and by the dominant culture[86], and building upon the inchoate dissatisfactions and partially formed alternative perspectives which already exist.

Relevant to an understanding of this counteraction is an appreciation of the operation of power. At the simplest level, where civil libertarian discourse and jurisprudence have often been content to remain, power is exerted when A compels B to do what A wants, contrary to B's wishes. B enjoys negative liberty, according to Berlin, when she is free from A's constraint or compulsion.[87]

However, power is exercised in other ways. When B is free to choose from a range of possibilities selected by A, she is still subject to A's power, although it is of a more diffuse kind.[88] Choices do have to be circumscribed or ordinary life could not proceed, but the finality of the power to which objection may be taken, consists in its unaccountability, or its concealment.

Finally, where B is convinced that she wants what A wishes her to want, power is being exercised. This is the most diffuse and least easily identifiable form of power, and the most relevant to Gadamer's hermeneutics, for it describes the process by which traditions are produced, dissent silenced, and resistance stifled. Most difficult of all to accept, for those who wish to linger with the simplicities of Berlin's framework, there is no culprit. There is no address to which to direct *habeas corpus,* no plaintiff, and no defendant, although there are of course, human actors whose conduct is guided by reference to a rationality which reproduces the situation.

The analyst him or herself is caught up in all this, and the problem with Gadamer's view of interpretation is that it seems to offer no way out. We can argue only when we understand, and we understand as part of, or as someone within the horizon of, that with which we are arguing. The closure may not be so obvious as, for example, Dworkin's identification of legal practices - the constituents of the pre-interpreted law/text - with lawyer's recognitions of them, and of lawyers as competent experts in legal practices: but it is a closure nevertheless.

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[85] See, eg, A Gramsci, *Prison Notebooks* ed and transl Q Hoare and G Nowell-Smith (1971), ch 3.

[86] There is an excellent summary of the Foucaultian position in H Dreyfus and P Rabinow, *Michael Foucault, Beyond Structuralism and Hermeneutics* (1986).

[87] I Berlin 'Two Concepts of Liberty', in A Quinton (ed) *Political Philosophy* (1967).

[88] S Lukes, *Power - A Radical View* (1974).

(c) The Dworkin project is, as Simmonds says[89], subtle and ingenious, but in the end implausible. It shares with professional discourses the conviction that underlying plurality there is a unity accessible to expert understanding and, indeed, forming the 'cognitive base' of professional organisation. Despite Dworkin's use of Gadamer, whose rejection of Enlightenment rationality constitutes a major disagreement with Habermas, his epistemological imperialism recalls the Enlightenment.[90]

What is Hercules, after all, but a philosophical counterpart of Pierre Laplace's 'daemon' who, knowing the position and laws of motion governing all the particles in the universe, could predict the future with complete accuracy? The daemon turned out not simply empirically non-existent, but useless as a hypothesis, since total knowledge is impossible. One cannot measure the world without interfering with it and altering it.[91] In the social sciences one cannot have all the past and the present simultaneously for, as Dworkin concedes, the past is reciprocated in the present: but as he overlooks, there is not just one, but many presents. Moreover, the 'double hermeneutic' operates in social science. As soon as the objects of knowledge of social science themselves find out about knowledge they can escape from it. Social scientific 'laws' unlike those of physics, can become instruments in the hands of those whose behaviour they explain or describe.[92]

The conscientious judge who does his human best to emulate Hercules may find that, if he makes his procedure plain, those who do not share with him the power of performative utterance by virtue of their gender, class or ethnicity, will be clearer about the sources of their disempowerment. He may be invited by his colleagues to adopt the principle by which Chancery barristers are said to distinguish themselves from their common law brethren, that of thinking without speaking. The disempowered,meanwhile, are certain to find less circuitous routes to an understanding of, and a remedy for, their condition.

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[89] Ted Benton, 'Realism, power and objective interests', in K Graham (ed) *Contemporary Political Philosophy: Radical Studies* (1982).

[90] A Giddens, 'Reason without Revolution: Habermas's "Theory des kommunikativen Handeln"' in R Bernstein (ed) *Habermas and Modernity* (1985).

[91] J Bronowski, *Commonsense and Science* (1978)

[92] A Giddens (1987) ch 1.