common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well. We may grasp the magnitude of this enterprise by distinguishing, within the vast material of legal decisions that Hercules must justify, a vertical and a horizontal ordering. The vertical ordering is provided by distinguishing layers of authority; that is layers at which official decisions might be taken to be controlling over decisions made at lower levels. In the United States the rough character of the vertical ordering is apparent. The constitutional structure occupies the highest level, the decisions of the Supreme Court and perhaps other courts interpreting that structure the next, enactments of the various legislatures the next and decisions of the various courts developing the common law different levels below that. Hercules must arrange justification of principle at each of these levels so that the justification is consistent with principles taken to provide the justification of higher levels. The horizontal ordering simply requires that the principles taken to justify a decision at one level must also be consistent with the justification offered for other decisions at that level.

Suppose Hercules, taking advantage of his unusual skills, proposed to work out this entire scheme in advance, so that he would be ready to confront litigants with an entire theory of law should this be necessary to justify any particular decision. He would begin, deferring to vertical ordering, by setting out and refining the constitutional theory he has already used. That constitutional theory would be more or less different from the theory that a different judge would develop, because a constitutional theory requires judgments about complex issues of institutional fit, as well as judgments about political and moral philosophy, and Hercules' judgements will inevitably differ from those other judges would make. These differences at a high level of vertical ordering will exercise considerable force on the scheme each judge would propose at lower levels. Hercules might think, for example, that certain substantive constitutional constraints on legislative power are best justified by postulating an abstract right to privacy against the state, because he believes that such a right is a consequence of the even more abstract right to liberty that the constitution guarantees. If so, he would regard the failure of the law of tort to recognize a parallel abstract right to privacy against fellow citizens, in some concrete form, as an inconsistency. If another judge did not share his beliefs about the connection between privacy and liberty, and so did not accept his constitutional interpretation as persuasive, that judge would also disagree about the proper development of tort.

So the impact of Hercules' own judgments will be pervasive, even though some of these will be controversial. But they will not enter his calculations in such a way that different parts of the theory he constructs can be attributed to his independent convictions rather than to the body of law that he must justify. He will not follow those classical theories of adjudication I mentioned earlier, which suppose that a judge follows statutes or precedent until the clear direction of these runs out, after which he is free to strike out on his own. His theory is rather a theory about what the statute or the precedent itself requires, and though he will, of course, reflect his own intellectual and philosophical convictions in making that judgment, that is a very different matter from supposing that those convictions have some independent force in his argument just because they are his.

[pp. 115–118]

R. DWORKIN

Law as Interpretation

(1982)[37]

In this essay I shall argue that legal practice is an exercise in interpretation not only when lawyers interpret particular documents of statutes, but generally. Law so conceived is deeply and thoroughly political. Lawyers and judges cannot avoid politics in the broad sense of political theory. But law is not a matter of personal or partisan politics, and a critique of law that does not understand this difference will provide poor understanding and even poorer guidance. I propose that we can improve our understanding of law by comparing legal interpretation with interpretation in other fields of knowledge, particularly literature. I also expect that law, when better understood, will provide a better grasp of what interpretation is in general.

Law

The central problem of analytical jurisprudence is this: What sense should be given to propositions of law? By propositions I mean the various statements lawyers make reporting what the law is on some question or other. Propositions of law can be very abstract and general, like the proposition that states of the United States may not discriminate on racial grounds in supplying basic services to citizens, or they can be relatively concrete, like the proposition that someone who accepts a check in the normal course of business without notice of any infirmities in its title is entitled to collect against the maker, or very concrete, like the proposition that Mrs *X*. is liable in damages to Mr *Y*. in the amount of $1150 because he slipped on her icy sidewalk and broke his hip. In each case a puzzle arises. What are propositions of law really about? What in the world could make them true of false?

The puzzle arises because propositions of law seem to be descriptive—they are about how things are in the law, not about how they should be—and yet it has proved extremely difficult to say exactly what it is that they describe. Legal positivists believe that propositions of law are indeed wholly descriptive; they are infact pieces of history. A proposition of law, in their view, is true if some event of a designated law-making kind has taken place, and otherwise not. This seems to work reasonably well in very simple cases. If the Illinois Legislature enacts the words, "No will shall be valid without three witnesses," then the proposition of law, that an Illinois will need three witnesses, seems to be true only in virtue of that historical event.

But in more difficult cases the analysis fails. Consider the proposition that a particular affirmative action scheme (not yet tested in the courts) is constitutionally valid. If that is true, it cannot be so just in virtue of the text of the Constitution and the fact of prior court decisions, because reasonable lawyers who know exactly what the Constitution says and what the courts have done may yet disagree whether it is true. (I am doubtful that the positivists' analysis holds even in the simple case of the will; but that is a different matter I shall not argue here).

What are the other possibilities? One is to suppose that controversial propositions of law, like the affirmative action statement, are not descriptive at all, but are rather expressions of what the speakers wants the law to be. Another is more ambitious: controversial statements are attempts to describe some pure objective or natural law, which exists in virtue of objective moral truth rather than historical decision. Both these projects take some legal statements, at least, to be

purely evaluative as distinct from descriptive: they express either what the speaker prefers—his personal politics—or what he believes is objectively required by the principles of an ideal political morality. Neither of these projects is plausible, because someone who says that a particular untested affirmative action plan is constitutional does mean to describe the law as it is rather than as he wants it to be or thinks that, by the best moral theory, it should be. He might, indeed, say that he regrets that the plan is constitutional and thinks that according to the best moral theory, it ought not to be.

There is a better alternative: propositions of law are not simply descriptive of legal history in a straightforward way, nor are they simply evaluative in some way divorced from legal history. They are interpretive of legal history, which combines elements of both description and evaluation but is different from both. This suggestion will be congenial, at least at first blush, to many lawyers and legal philosophers. They are used to saying that law is a matter of interpretation; but only, perhaps, because they understand interpretation in a certain way. When a statute (or the Constitution) is unclear on some point, because some crucial term is vague or because a sentence is ambiguous, lawyers say that the statute must be interpreted, and they apply what the call "techniques of statutory construction." Most of the literature assumes that interpretation of a particular document is a matter of discovering what its authors (the legislators, or the delegates to the Constitutional Convention) meant to say in using the words they did. But lawyers recognize that on many issues the author had no intention either way and that on others his intention cannot be discovered. Some lawyers take a more skeptical position. They say that whenever judges pretend they are discovering the intention behind some piece of legislation, this is simply a smoke screen behind which the judges impose their own view of what the statute should have been.

Interpretation as a technique of legal analysis is less familiar in the case of the common law, but not unfamiliar. Suppose the Supreme Court of Illinois decided, several years ago, that a negligent driver who ran down a child was liable for the emotional damage suffered by the child's mother, who was standing next to the child on the road. Now an aunt sues another careless driver for emotional damage suffered when she heard, on the telephone many miles from the accident, that her niece had been hit. Does the aunt have a right to recover for that damage? Lawyers often say that this is a matter of interpreting the earlier decision correctly. Does the legal theory on which the earlier judge actually relied, in making his decision about the mother on the road, cover the aunt on the telephone? Once again skeptics point out that it is unlikely that the earlier judge had in mind any theory sufficiently developed so as to decide the aunt's case either way, so that a judge "interpreting" the earlier decision is actually making new law in the way he or she thinks best.

The idea of interpretation cannot serve as a general account of the nature of truth of propositions of law, however, unless it is cut loose from these associations with the speaker's meaning or intention. Otherwise it becomes simply one version of the positivist's thesis that propositions of law describe decisions made by people or institutions in the past. If interpretation is to form the basis of a different and more plausible theory about propositions of law, then we must develop a more inclusive account of what interpretation is. But that means that lawyers must not treat legal interpretation as an activity *sui generis*. We must study interpretation as a general activity, as a mode of knowledge, by attending to other contexts of that activity.

Lawyers would do well to study literary and other forms of artistic interpretation. That might seem bad advice (choosing the fire over the frying pan) because critics themselves are thoroughly divided about what literary interpretation is, and the situation is hardly better in the other arts. But that is exactly why lawyers should study these debates. Not all of the battles within literary criticism are edifying or even comprehensible, but many more theories of

interpretation have been defended in literature than in law, and these include theories that challenge the flat distinction between description and evaluation that has enfeebled legal theory. [pp. 527–30]

III. Law and Literature

A. The Chain of Law

These sketchy remarks about literary interpretation may have suggested too sharp a split between the role of the artist in creating a work of art and that of the critic in interpreting it later. The artist can create nothing without interpreting as he creates; since he intends to produce art, he must have at least a tacit theory of why what he produces is art and why it is a better work of art through this stroke of the pen or the brush or the chisel rather than that. The critic, for his part, creates as he interprets; for though he is bound by the fact of the work, defined in the more formal and academic parts of his theory of art, his more practical artistic sense is engaged by his responsibility to decide which way of seeing or reading or understanding that work shows it as better art. Nevertheless there is a difference between interpreting while creating and creating while interpreting, and therefore a recognizable difference between the artist and the critic.

I want to use literary interpretation as a model for the central method of legal analysis, and I therefore need to show how even this distinction between artist and critic might be eroded in certain circumstances. Suppose that a group of novelists is engaged for a particular project and that they draw lots to determine the order of play. The lowest number writes the opening chapter of a novel which he or she then sends to the next number who adds a chapter, with the understanding that he is adding a chapter to that novel rather than beginning a new one, and then sends the two chapters to the next number, and so on. Now every novelist but the first has the dual responsibilities of interpreting and creating, because each must read all that has gone before in order to establish, in the interpretivist sense, what the novel so far created is. He or she must decide what the characters are "really" like, what motives in fact guide them; what the point or theme of the developing novel is; how far some literary devide or figure, consciously or unconsciously used, contributes to these, and whether it should be extended or refined or trimmed or dropped in order to send the novel further in one direction rather than another. This must be interpretation in a non-intention-bound style because, at least for all novelists after the second, there is no single author whose intentions any interpreter can, by the rules of the project, regard as decisive.

Some novels have in fact been written in his way (including the soft-core pornographic novel *Naked Came the Stranger*[38]), though for a debunking purpose; and certain parlor games for rainy weekends in English country houses have something of the same structure. But in my imaginary exercise the novelists are expected to take their responsibilities seriously and to recognize the duty to create, so far as they can, a single, unified novel rather than, for example, a series of independent short stories with characters bearing the same names. Perhaps this is an impossible assignment; perhaps the project is doomed to produce not simply a bad novel but no novel at all, because the best theory of art requires a single creator or, if more than one, that each have some control over the whole. (But what about legends and jokes?) I need not push that question further because I am interested only in the fact that the assignment makes sense, that each of the novelists in the chain can have some idea of what he or she is asked to do, whatever misgivings each might have about the value or character of what will then be produced.

Deciding hard cases at law is rather like this strange literary exercise. The

similarity is most evident when judges consider and decide "common-law" cases; that is, when no statute figures centrally in the legal issue, and the argument turns on which rules or principles of law "underlie" the related decisions of other judges in the past. Each judge is then like a novelist in the chain. He or she must read through what other judges in the past have written not simply to discover what that judges have said, or their state of mind when they said it, but to reach an opinion about what these judges have collectively *done*, in the way that each of our novelists formed an opinion about the collective novel so far written. Any judge forced to decide a law suit will find, if he looks in the appropriate books, records of many arguably similar cases decided over decades or even centuries past by many other judges of different styles and judicial and political philosophies, in periods of different orthodoxies of procedure and judicial convention. Each judge must regard himself, in deciding the new case before him, as a partner in a complex chain enterprise of which these innumerable decisions, structures, conventions, and practices are the history; it is his job to continue that history into the future through what he does on the day. He *must* interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own. So he must determine, according to his own judgment, what the earlier decisions come to, what the point or theme of the practice so far, taken as a whole, really is.

The judge in the hypothetical case ... about an aunt's emotional shock, must decide what the theme is, not only of the particular precedent of the mother in the road, but of accident cases, including that precedent, as a whole. He might be forced to choose, for example, between these two theories about the "meaning" of the chain of decisions. According to the first, negligent drivers are responsible to those whom their behaviour is likely to cause physical harm, but they are responsible to the people for whatever injury—physical or emotional—they in fact cause. It this is the correct principle, then the decisive difference between that case and the aunt's case is just that the aunt was not within the physical risk, and therefore she cannot recover. On the second theory, however, negligent drivers are responsible for any damage they can reasonably be expected to foresee if they think about their behaviour in advance. If that is the right principle, then the aunt may yet recover. Everything turns on whether it is sufficiently foreseeable that a child will have relatives, beyond his or her immediate parents, who may suffer emotional shock when they learn of the child's injury. The injury trying the aunt's case must decide which of these two principles represents the better "reading" of the chain of decisions he must continue.

Can we say, in some general way, what those who disagree about the best interpretation of legal precedent are disagreeing about? I said that a literary interpretation aims to show how the work in question can be seen as the most valuable work of art, and so must attend to formal features of identity, coherence, and integrity as well as more substantive considerations of artistic value. A plausible interpretation of legal practice must also, in a parallel way, satisfy a test with two dimensions: it must both fit that practice and show its point or value. But point or value here cannot mean artistic value because law, unlike literature, is not an artistic enterprise. Law is a political enterprise, whose general point, if it has one, lies in coordinating social and individual effort, or resolving social and individual disputes, or securing justice between citizens and between them and their government, or some combination of these. (This characterization is itself an interpretation, of course, but allowable now because relatively neutral). So an interpretation of any body or division of law, like the law of accidents, must show the value of that body of law in political terms by demonstrating the best principle or policy it can be taken to serve.

We know from the parallel argument in literature that this general description of interpretation in law is not license for each judge to find in doctrinal history whatever he thinks should have been there. The same distinction holds between

interpretation and ideal. A judge's duty is to interpret the legal history he finds, not to invent a better history. The dimension of fit will provide some boundaries. There is, of course, no algorithm for deciding whether a particular interpretation sufficiently fits that history not to be ruled out. When a statute or constitution or other legal document is part of the doctrinal history, the speaker's meaning will play a role. But the choice of which of several crucially different senses of speaker's or legislator's intention is the appropriate one cannot itself be referred to anyone's intention but must be decided by whoever must make the decision, as a question of political theory[39] in the common-law cases the question of fit is more complex. Any particular hypothesis about the point of a string of decisions ("These decisions establish the principle that no one can recover for emotional damage who did not lie within the area of physical danger himself.") is likely to encounter, if not flat counter-examples in some earlier case, at least language or argument that seems to suggest the contrary. So any useful conception of interpretation must contain a doctrine of mistake—as must any novelist's theory of interpretation for the chain novel. Sometimes a legal argument will explicitly recognize such mistakes: "Insofar as the cases of *A* v. *B* and C v. *D* may have held to the contrary, they were, we believe, wrongly decided and need not be followed here." Sometimes the doctrine of precedent forbids this crude approach and requires something like: "We held, in *E* v. *F*, that such-and-such, but that case raised special issues and must, we think, be confined to its own facts" (which is not quote so disingenuous as it might seem).

This flexibility may seem to erode the difference on which I insist, between interpretation and a fresh, clean-slate decision about what the law ought to be. But there is nevertheless this overriding constraint. Any judge's sense of the point or function of law, on which every aspect of his approach to interpretation will depend, will include or imply some conception of the integrity and coherence of law as an institution, and this conception will both tutor and constrain his working theory of fit—that is, his convictions about how much of the prior law an interpretation must fit, and which of it, and how. (The parallel with literary interpretation holds here as well).

It should be apparent, however, that any particular judge's theory of fit will often fail to produce a unique interpretation. (The distinction between hard and easy cases at law is perhaps just the distinction between cases in which they do and do not.) Just as two readings of a poem may each find sufficient support in the text to show its unity and coherence, so two principles may each find enough support in the various decisions of the past to satisfy any plausible theory of fit. In that case substantive political theory (like substantive considerations of artistic merit) will play a decisive role. Put bluntly, the interpretation of accident law, that a careless driver is liable to those whose damage is both substantial and foreseeable, is probably a better interpretation, if it is, only because it states a sounder principle of justice than any principle that distinguishes between physical and emotional damage or that makes recovery for emotional damage depend on whether the plaintiff was in danger of physical damage. (I should add that this issue, as an issue of political morality, is in fact very complex, and many distinguished judges and lawyers have taken each side.)

We might summarize these points this way. Judges develop a particular approach to legal interpretation by forming and refining a political theory sensitive to those issues on which interpretation in particular cases will depend; they call this their legal philosophy. It will include both structural features, elaborating the general requirement that an interpretation must fit doctrinal history, and substantive claims about social goals and principles of justice. Any judge's opinion about the best interpretation will therefore be the consequence of beliefs

[39] See Dworkin, *The Forum of Principle* in 56 N.Y.U.L. Rev. 469. [See now *A Matter of Principle* (1985), p. 33.]

other judges need not share. If a judge believes that the dominant purpose of a legal system, the main goal it ought to serve, is economic, then he will see in past accident decisions some strategy for reducing the economic costs of accidents overall. Other judges, who find any such picture of the law's function distasteful, will discover no such strategy in history but only, perhaps, an attempt to reinforce conventional morality of fault and responsibility. If we insist on a high order of neutrality in our description of legal interpretation, therefore, we cannot make our description of the nature of legal interpretation much more concrete than I have.

B. Author's Intention in Law

I want instead to consider various objections that might be made not to the detail of my argument but to the main thesis, that interpretation in law is essentially political. I shall not spend further time on the general objection already noted: that this view of law makes it irreducibly and irredeemably subjective, just a matter of what particular judges think best or what they had for breakfast. Of course, for some lawyers and legal scholars this is not an objection at all, but only the beginnings of sceptical wisdom about law. But it is the nerve of my argument that the flat distinction between description and evaluation on which this skepticism relies—the distinction between finding the law just "there" in history and making it up wholesale—is misplaced here because interpretation is something different from both...

There is no obvious reason in the account I gave of legal interpretation to doubt that one interpretation of law can be better than another and that one can be best of all. Whether this is so depends on general issues of philosophy not peculiar to law any more than to literature; and we would do well, in considering these general issues, not to begin with any fixed ideas about the necessary and sufficient conditions of objectivity (for example, that no theory of law can be sound unless it is demonstrably sound, unless it would wring assent from a stone). In the meantime we can sensibly aim to develop various levels of a conception of law for ourselves, to find the interpretation of a complex and dramatically important practice which seems to us at once the right kind of interpretation for law and right as that kind of interpretation.

I shall consider one further, and rather different, objection in more detail: that my political hypothesis about legal interpretation, like the aesthetic hypothesis about artistic interpretation, fails to give an adequate place to author's intention. If fails to see that interpretation in law is simply a matter of discovering what various actors in the legal process—constitutional delegates, members of Congress and state legislatures, judges, and executive officials—intended. Once again it is important to see what is at stake here. The political hypothesis makes room for the author's intention argument as a conception of interpretation, a conception which claims that the best political theory gives the intentions of legislators and past judges a decisive role in interpretation. Seen this way, the author's intention theory does not challenge the political hypothesis but contests for its authority. If the present objection is really an objection to the argument so far, therefore, its claim must be understood differently, as proposing, for example, that the very "meaning" of interpretation in law requires that only these officials' intentions should count or that at least there is a firm consensus among lawyers to that effect. Both of these claims are as silly as the parallel claims about the idea or the practice of interpretation in art.

Suppose, therefore, that we do take the author's intention theory, more sensibly, as a conception rather than an explication of the concept of legal interpretation. The theory seems on firmest ground, as I suggested earlier, when interpretation is interpretation of a canonical legal text, like a clause of the Constitution, or a section of a statute, or a provision of a contract or will. But just

as we noticed that novelist's intention is complex and structured in ways that embarrass any simple author's intention theory in literature, we must now notice that a legislator's intention is complex in similar ways. Suppose a delegate to a constitutional convention votes for a clause guaranteeing equality of treatment without regard to race in matters touching people's fundamental interests; but he thinks that education is not a matter of fundamental interest and so does not believe that the clause makes racially segregated schools unconstitutional. We may sensibly distinguish an abstract and a concrete intention here: the delegate intends to prohibit discrimination in whatever in fact is of fundamental interest and also intends not to prohibit segregated schools. There are not isolated, discrete intentions; our descriptions, we might say, describe the same intention in different ways. But it matters very much which description a theory of legislative intention accepts as canonical. If we accept the first description, then a judge who wishes to follow the delegate's intentions, but who believes that education is a matter of fundamental interest, will hold segregation unconstitutional. If we accept the second, he will not. The choice between the two descriptions cannot be made by any further reflection about what an intention really is. It must be made by deciding that one rather than the other description is more appropriate in virtue of the best theory of representative democracy or on some other openly political ground. (I might add that no compelling argument has yet been produced, so far as I am aware, in favor in deferring to a delegate's more concrete intentions, and that this is of major importance in arguments about whether the "original intention" of the Framers requires, for example, abolishing racial discrimination, or capital punishment.)

When we consider the common-law problems of interpretation, the author's intention theory shows in an even poorer light. The problems are not simply evidentiary. Perhaps we can discover what was "in the mind" of all the judges who decided cases about accidents at one time or another in our legal history. We might also discover (or speculate) about the psychodynamic or economic or social explanations of why each judge thought what he or she did. No doubt the result of all this research (or speculation) would be a mass of psychological data essentially different for each of the past judges included in the study, and order could be brought into the mass, if at all, only through statistical summaries about which proportion of judges in which historical period probably held which opinion and was more or less subject to which influence. But this mass, even tamed by statistical summary, would be of no more help to the judge trying to answer the question of what the prior decisions, taken as a whole, really come to than the parallel information would be to one of our chain novelists trying to decide what novel the novelists earlier in the chain had collectively written. That judgment, in each case, requires a fresh exercise of interpretation which is neither brute historical research nor a clean-slate expression of how things ideally ought to be.

A judge who believed in the importance of discerning an author's intention might try to escape these problems by selecting one particular judge or a small group of judges in the past (say, the judges who decided the most recent case something like his or the case he thinks closest to his) and asking what rule that judge or group intended to lay down for the future. This would treat the particular earlier judges as legislators and so invite all the problems of statutory interpretation including the very serious problem we just noticed. Even so, it would not even escape the special problems of common-law adjudication after all, because the judge who applied this theory of interpretation would have to suppose himself entitled to look only to the intentions of the particular earlier judge or judges he had selected, and he could not suppose this unless he thought that it was the upshot of judicial practice as a whole (and not just the intentions of some *other* selected earlier judge) that this is what judges in his position should do.

IV. Politics in Interpretation

If my claims about the role of politics in legal interpretation are sound, then we should expect to find distinctly liberal or radical or conservative opinions not only about what the Constitution and laws of our nation should be but also about what they are. And this is exactly what we do find. Interpretation of the equal protection clause of the Constitution provides especially vivid examples. There can be no useful interpretation of what that clause means independent of some theory about what political equality is and how far equality is required by justice, and the history of the last half-century of constitutional law is largely an exploration of exactly these issues of political morality. Conservative lawyers argued steadily (though not consistently) in favor of an author's intentions style of interpreting this clause, and they accused others, who used a different style with more egalitarian results, of inventing rather than interpreting law. But this was bluster meant to hide the role their own political convictions played in their choice of interpretive style, and the great legal debates over the equal protection clause would have been more illuminating if it had been more widely recognized that reliance on political theory is not a corruption of interpretation but part of what interpretation means. [pp. 540–549]

RONALD DWORKIN

Law's Empire

(1986)

The Interpretive Attitude

Perhaps this picture of what makes disagreement possible is too crude to capture any disagreement, even one about books. But I shall argue only that it is not exhaustive and, in particular, that it does not hold in an important set of circumstances that includes the oretical argument in law. It does not hold when members of particular communities who share practices and traditions make and dispute claims about the best interpretation of these—when they disagree, that is, about what some tradition or practice actually requires in concrete circumstances. These claims are often controversial, and the disagreement is genuine even though people use different criteria in forming or framing these interpretations; it is genuine because the competing interpretations are directed toward the same object or events of interpretation. I shall try to show how this model helps us to understand legal argument more thoroughly and to see the role of law in the larger culture more clearly. But first it will be useful to see how the model holds for a much simpler institution.

Imagine the following history of an invented community. Its members follow a set of rules, which they call "rules of courtesy", on a certain range of social occasions. They say, "Courtesy requires that peasants take off their hats to nobility," for example, and they urge and accept other propositions of that sort. For a time this practice has the character of taboo: the rules are just there and are neither questioned nor varied. But then, perhaps slowly, all this changes. Everyone develops a complex "interpretive" attitude toward the rules of courtesy, an attitude that has two components. The first is the assumption that the practice of courtesy does not simply exist but has value, that it serves some interest or purpose or enforces some principle—in short, that it has some point—that can be stated independently of just describing the rules that make up the practice. The second is the further assumption that the requirements of courtesy—the behavior it calls for or judgments it warrants—are not necessarily or exclusively what they have always been taken to be but are instead sensitive to its point, so that the

strict rules must be understood or applied or extended or modified or qualified or limited by that point. Once this interpretive attitude takes hold, the institution of courtesy ceases to be mechanical; it is no longer unstudied deference to a runic order. People now try to impose *meaning* on the institution—to see it in its best light—and then to restructure it in the light of that meaning.

The two components of the interpretive attitude are independent of one another; we can take up the first component of the attitude toward some institution without also taking up the second. We do that in the case of games and contests. We appeal to the point of these practices in arguing about how their rules should be changed, but not (except in very limited cases) about what their rules now are; that is fixed by history and convention. Interpretation therefore plays only an external role in games and contests. It is crucial to my story about courtesy, however, that the citizens of courtesy adopt the second component of the attitude as well as the first; for them interpretation decides not only why courtesy exists but also what, properly understood, it now requires. Value and content have become entangled.

How Courtesy Changes

Suppose that before the interpretive attitude takes hold in both its components, everyone assumes that the point of courtesy lies in the opportunity it provides to show respect to social superiors. No question arises whether the traditional forms of respect are really those the practice requires. These just *are* the forms of deference, and the available options are conformity or rebellion. When the full interpretive attitude develops, however, this assumed point acquires critical power, and people begin to demand, under the title of courtesy, forms of deference previously unknown or to spurn or refuse forms previously honored, with no sense of rebellion, claiming that true respect is better served by what they do than by what others did. Interpretation folds back into the practice, altering its shape, and the new shape encourages further reinterpretation, so the practice changes dramatically, though each step in the progress is interpretive of what the last achieved.

People's views about the proper grounds of respect, for example, may change from rank to age or gender or some other property. The main beneficiaries of respect would then be social superiors in one period, older people in another, women in a third, and so forth. Or opinions may change about the nature or quality of respect, from a view that external show constitutes respect to the opposite view, that respect is a matter of feelings only. Or opinions may change along a different dimension, about whether respect has any value when it is directed to groups or for natural properties rather than to individuals for individual achievement. If respect of the former sort no longer seems important, or even seems wrong, then a different interpretation of the practice will become necessary. People will come to see the point of courtesy as almost the converse of its original point, in the value of impersonal forms of social relation that, because of their impersonality, neither require nor deny any greater significance. Courtesy will then occupy a different and diminished place in social life, and the end of the story is in sight: the interpretive attitude will languish, and the practice will lapse back into the static and mechanical state in which it began. [pp. 46–49]

. . . Creative interpretation is not conversational but *constructive*. Interpretation of works of art and social practices, I shall argue, is indeed essentially concerned with purpose not cause. But the purposes in play are not (fundamentally) those of some author but of the interpreter. Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong. It does not follow, even from that rough account, that

or work of art anything he would have wanted it to be, that a citizen of courtesy who is enthralled by equality, for example, can in good faith claim that courtesy actually requires the sharing of wealth. For the history or shape of a practice or object constrains the available interpretations of it, though the character of that constraint needs careful accounting, as we shall see. Creative interpretation, on the constructive view, is a matter of interaction between purpose and object.

A participant interpreting a social practice, according to that view, proposes value for the practice by describing some scheme of interests or goals or principles the practice can be taken to serve or express or exemplify. Very often, perhaps even typically, the raw behavioral data of the practice—what people do in what circumstances—will underdetermine the ascription of value: those data will be consistent, that is, with different and competing ascriptions. One person might see in the practices of courtesy a device for ensuring that respect is paid to those who merit it because of social rank or other status. Another might see, equally vividly, a device for making social exchange more conventional and therefore *less* indicative of differential judgments of respect. If the raw data do not discriminate between these competing interpretations, each interpreter's choice must reflect his view of which interpretation proposes the most value for the practice—which one shows it in the better light, all things considered.

I offer this constructive account as an analysis of creative interpretation only. But we should notice in passing how the constructive account might be elaborated to fit the other two contexts of interpretation I mentioned, and thus show a deep connection among all forms of interpretation. Understanding another person's conversation requires using devices and presumptions, like the so-called principle of charity, that have the effect in normal circumstances of making of what he says the best performance of communication it can be. And the interpretation of data in science makes heavy use of standards of theory construction like simplicity and elegance and verifiability that reflect contestable and changing assumptions about paradigms of explanation, that is, about what features make one form of explanation superior to another. The constructive account of creative interpretation, therefore, could perhaps provide a more general account of interpretation in all its forms. We would then say that all interpretation strives to make an object the best it can be, as an instance of some assumed enterprise, and that inter pretation takes different forms in different contexts only because different enterprises engage different standards of value or success. Artistic interpretation differs from scientific interpretation, we would say, only because we judge success in works of art by standards different from those we use to judge explanations of physical phenomena. [pp. 52–53]

Stages of Interpretation

We must begin to refine constructive interpretation into an instrument fit for the study of law as a social practice. We shall need an analytical distinction among the following three stages of an interpretation, noticing how different degrees of consensus within a community are needed for each stage if the interpretive attitude is to flourish there. First, there must be a "preinterpretive" stage in which the rules and standards taken to provide the tentative content of the practice are identified. (The equivalent stage in literary interpretation is the stage at which discrete novels, plays and so forth are identified textually, that is, the stage at which the text of *Moby Dick* is identified, and distinguished from the text of other novels.) I enclose "preinterpretive" in quotes because some kind of interpretation is necessary even at this stage. Social rules do not carry identifying labels. But a very great degree of consensus is needed—perhaps an interpretive community is usefully defined as requiring consensus at this stage—if the interpretive attitude is to be fruitful, and we may therefore abstract from this stage in our analysis by

presupposing that the classifications it yields are treated as given in day-to-day reflection and argument.

Second, there must be an interpretive stage at which the interpreter settles on some general justification for the main elements of the practice identified at the preinterpretive stage. This will consist of an argument why a practice of that general shape is worth pursuing, if it is. The justification need not fit every aspect or feature of the standing practice, but it must fit enough for the interpreter to be able to see himself as interpreting that practice, not inventing a new one. Finally, there must be a postinterpretive or reforming stage, at which he adjusts his sense of what the practice "really" requires so as better to serve the justification he accepts at the interpretive stage. An interpreter of courtesy, for example, may come to think that a consistent enforcement of the best justification of that practice would require people to tip their caps to soldiers returning from a crucial war as well as to nobles. Or that it calls for a new exception to an established pattern of defence: making returning soldiers exempt from displays of courtesy, for example. Or perhaps even that an entire rule stipulating deference to an entire group or class of persons must be seen as a mistake in the light of that justification.

Actual interpretation in my imaginary society would be much less deliberate and structured than this analytical structure suggests. People's interpretive judgments would be more a matter of "seeing" at once the dimensions of their practice, a purpose or aim in that practice, and the post-interpretive consequence of that purpose. And this "seeing" would ordinarily be no more insightful than just falling in with an interpretation then popular in some group whose point of view the interpreter takes up more or less automatically. Nevertheless there will be inevitable controversy, even among contemporaries, over the exact dimensions of the practice they all interpret, and still more controversy about the best justification of that practice. For we have already identified in our preliminary account of what interpretation is like, a great many ways to disagree.

We can now look back through our analytical account to compose an inventory of the kind of convictions or beliefs or assumptions someone needs to interpret something. He needs assumptions or convictions about what counts as part of the practice in order to define the raw data of his interpretation at the preinterpretive stage; the interpretive attitude cannot survive unless members of the same interpretive community share at least roughly the same assumptions about this. He also needs convictions about how far the justification he proposes at the interpretive stage must fit the standing features of the practice to count as an interpretation of it rather than the invention of something new. Can the best justification of the practices of courtesy, which almost everyone else takes to be mainly about showing deference to social superiors, really be one that would require, at the reforming stage, no distinctions of social rank? Would this be too radical a reform, too ill-fitting a justification to count as an interpretation at all? Once again, there cannot be too great a disparity in different people's convictions about fit; but only history can teach us how much difference is too much. Finally, he will need more substantive convictions about which kinds of justification really would show the practice in the best light, judgments about whether social ranks are desirable or deplorable, for example. These substantive convictions must be independent of the convictions about fit just described, otherwise the latter could not constrain the former, and he could not, after all, distinguish interpretation from invention. But they need not be so much shared within his community, for the interpretive attitude to flourish, as his sense of preinterpretive boundaries or even his convictions about the required degree of fit. [pp. 65–68]

Integrity

Agenda

We have two principles of political integrity: a legislative principle, which asks lawmakers to try to make the total set of laws morally coherent, and an adjudicative principle, which instructs that the law be seen as coherent in that way, so far as possible. Our main concern is with the adjudicative principle, but not yet. In this chapter I argue that the legislative principle is so much part of our political principle that no competent interpretation of that practice can ignore it. We measure that claim on the two dimensions now familiar. We ask whether the assumption, that integrity is a distinct ideal of politics, fits our politics, and then whether it honors our politics. If the legislative principle of integrity is impressive on both these dimensions, then the case for the adjudicative principle, and for the conception of law it supports, will already be well begun.

Does Integrity Fit?

Integrity and Compromise

Integrity would not be needed as a distinct political virtue in a utopian state. Coherence would be guaranteed because officials would always do what was perfectly just and fair. In ordinary politics, however, we must treat integrity as an independent ideal if we accept it at all, because it can conflict with these other ideals. It can require us to support legislation we believe would be inappropriate in the perfectly just and fair society and to recognize rights we do not believe people would have there. We saw an example of this conflict in the last chapter. A judge deciding *McLoughlin* might think it unjust to require compensation for any emotional injury. But if he accepts integrity and knows that some victims of emotional injury have already been give a right to compensation, he will have a reason for deciding in favour of Mrs McLoughlin nevertheless.

Conflicts among ideals are common in politics. Even if we rejected integrity and based our political activity only on fairness, justice and procedural due process, we would find the first two virtues sometimes pulling in opposite directions. Some philosophers deny the possibility of any fundamental conflict between justice and fairness because they believe that one of these virtues in the end derives from the other. Some say that justice has no meaning apart from fairness, that in politics, as in roulette, whatever happens through fair procedures is just. That is the extreme of the idea called justice as fairness. Others think that the only test of fairness in politics is the test of result, that no procedure is fair unless it is likely to produce political decisions that meet some independent test of justice. That is the opposite extreme, of fairness as justice. Most political philosophers—and I think most people—take the intermediate view that fairness and justice are to some degree independent of one another, so that fair institutions sometimes produce unjust decisions and unfair institutions just ones.

If that is so, then in ordinary politics we must sometimes choose between the two virtues in deciding which political programs to support. We might think that majority rule is the fairest workable decision procedure in politics, but we know that the majority will sometimes, perhaps often, make unjust decisions about the rights of individuals. Should we tamper with majority rule by giving special voting strength to one economic group, beyond what its numbers would justify, because we fear that straight majority rule would assign it less than its just share? Should we accept constitutional constraints on democratic power to prevent the majority from limiting freedom of speech or other important liberties? These difficult questions arise because fairness and justice sometimes conflict. If we believe that integrity is a third and independent ideal, at least when people disagree about one of the first two, then we may well think that fairness or justice must sometimes be sacrificed to integrity.

Internal Compromises

I shall try to show that our political practices accept integrity as a distinct virtue, and I begin with what I hope will strike you as a puzzle. Here are my background assumptions. We all believe in political fairness: we accept that each person or group in the community should have a roughly equal share of control over the decisions made by Parliament or Congress or the state legislature. We know that different people hold different views about moral issues that they all treat as of great importance. It would seem to follow from our convictions about fairness that legislation on these moral issues should be a matter not just of enforcing the will of the numerical majority, as if its view were unanimous, but of trades and compromises so that each body of opinion is represented, to a degree that matches its numbers, in the final result. We could achieve this compromise in a Solomonic way. Do the people of North Dakota disagree whether justice requires compensation for product defects that manufacturers could not reasonably have prevented? Then why should their legislature not impose this "strict" liability on manufacturers of automobiles, but not manufacturers of washing machines? Do the people of Alabama disagree about the morality of racial discrimination? Why should their legislature not forbid racial discrimination on buses but permit it in restaurants? Do the British divide on the morality of abortion? Why should Parliament not make abortion criminal for pregnant women who were born in even years but not for those born in odd years? This Solomonic model treats a community's public order as a kind of commodity to be distributed in accordance with distributive justice, a cake to be divided fairly by assigning each group a proper slice.

Most of us, I think, would be dismayed by "checkerboard" laws that treat similar accidents or occasions of racial discrimination or abortion differently on arbitrary grounds. Of course we do accept arbitrary distinctions about some matters: zoning, for example. We accept that shops or factories be forbidden in some zones and not others and that parking be prohibited on alternate sides of the same street on alternate days. But we reject a division between parties of opinion when matters of principle are at stake. We follow a different model: that each point of view must be allowed a voice in the process of deliberation but that the collective decision must nevertheless aim to settle on some coherent principle whose influence then extends to the natural limits of its authority. If there must be compromise because people are divided about justice, then the compromise must be external, not internal; it must be compromise about which scheme of justice to adopt rather than a compromised scheme of justice.

But there lies the puzzle. Why should we turn our back on checkerboard solutions as we do? Why should we not embrace them as a general strategy for legislation whenever the community is divided over some issue of principle? Why is this strategy not fair and reasonable, reflecting political maturity and a finer sense of the political art than other communities have managed to achieve? What is the special defect we find in checkerboard solutions? It cannot be a failure in fairness (in our sense of a fair distribution of political power) because checkerboard laws are by hypothesis fairer than either of the two alternatives. Allowing each of two groups to choose some part of the law of abortion, in proportion to their numbers, is fairer (in our sense) than the winner-take-all scheme our instincts prefer, which denies many people any influence at all over an issue they think desperately important.

outcomes: a political decision causes injustice, however fair the procedures that produced it, when it denies people some resource, liberty, or opportunity that the best theories of justice entitle them to have. Can we oppose the checkerboard strategy on the ground that it would produce more instances of injustice than it would prevent? We must be careful not to confuse two issues here. Of course any single checkerboard solution of an important issue will produce more instances of injustice than one of the alternatives and fewer than the other. The community can unite over that proposition while disagreeing about which alternative would be more and which less just. Someone who believes that abortion is murder will think that the checkerboard abortion statute produces more injustice than outright prohibition and less than outright license; someone who believes women have a right to abortion reverses these judgments. So both have a reason of justice for preferring some other solution to the checkerboard one. Our question is whether we collectively have a reason of justice for not agreeing, in *advance* of these particular disagreements, to the checkerboard strategy for resolving them. We have a reason of fairness, as we just noticed, for that checkerboard strategy, and if we have no reason of justice against it, our present practice needs a justification we have not yet secured.

We are looking for a reason of justice we all share for rejecting the checkerboard strategy in advance even if we would each prefer a checkerboard solution on some occasions to the one that will be imposed if the strategy is rejected. Shall we just say that a checkerboard solution is unjust by definition because it treats different people differently for no good reason, and justice requires treating like cases alike? This suggestion seems in the right neighbourhood, for if checkerboard solutions do have a defect, it must lie in their distinctive feature, that they treat people differently when no principle can justify the distinction. But we cannot explain why this is always objectionable, so long as we remain on the plane of justice as I have defined it. For in the circumstances of ordinary politics the checkerboard strategy will prevent instances of injustice that would otherwise occur, and we cannot say that justice requires not eliminating any injustice unless we can eliminate all.

Suppose we can rescue only some prisoners of tyranny; justice hardly requires rescuing none even when only luck, not any principle, will decide whom we save and whom we leave to torture. Rejecting a checkerboard solution seems perverse in the same way when the alternative will be the general triumph of the principle we oppose. The internal compromise would have rescued some, chosen arbitrarily, from an injustice that others will be left to suffer, but the alternative would have been to rescue none. Someone may now say: nevertheless, though checkerboard solutions may be desirable for that reason on some occasions, we do better to reject their use out of hand in advance, because we have reason to think that in the long run more discrete injustice will be created than avoided through these solutions. But that would be a plausible prediction only for members of a constant and self-conscious majority of opinion, and if such a majority existed so would a self-conscious majority that would have the opposite opinion. So we have no hope of finding here a common reason for rejecting checkerboard solutions.

But perhaps we are looking in the wrong direction. Perhaps our common reason is not any prediction about the number of cases of injustice that the checkerboard strategy would produce or prevent, but our conviction that no one should actively engage in producing what he believes to be injustice. We might say: no checkerboard statute could be enacted unless a majority of the legislators voted for provisions they thought unjust. But this objection begs the main question. If each member of the legislature who votes for a checkerboard compromise does so not because he himself has no principles but because he wants to give the maximum possible effect to the principles he thinks right, then how has anyone behaved irresponsibly? Even if we were to accept that no legislator should

compromise as an *outcome*. For we can easily imagine a legislative structure that would produce compromise statutes mechanically, as a function of the different opinions about strict liability or racial discrimination or abortion among the various legislators, without any legislator being asked or required to vote for the compromise as a package. It might be understood in advance that the proportion of women who would be permitted an abortion would be fixed by the ratio of votes for permitting all abortions to total votes. If we still object, then our objection cannot be based on the principle that no individual should vote against his conscience.

So it seems we have no reason of justice for using the checkerboard strategy in advance, and strong reasons of fairness for endorsing it. Yet our instincts condemn it. Indeed many of us, to different degrees in different situations, would reject the checkerboard solution not only in general and in advance, but even in particular cases if it were available as a possibility. We would prefer either of the alternative solutions to the checkerboard compromise. Even if I thought strict liability for accidents wrong in principle, I would prefer that manufacturers of both washing machines and automobiles be held to that standard than that only one of them be. I would rank the checkerboard solution not intermediate between the other two but third, below both, and so would many other people. In some cases this instinct might be explained as reflecting the unworkability or inefficiency of a particular checkerboard solution. But many of those we can imagine, like the abortion solution, are not particularly inefficient, and in any case our instinct suggests that these compromises are wrong, not merely impractical.

Not everyone would condemn every checkerboard solution. People who believe very strongly that abortion is always murder, for example, may indeed think that the checkerboard abortion statute is better than a wholly permissive law. They think that fewer murders are better than more no matter how incoherent the compromise that produces fewer. If they rank the checkerboard solution last in other circumstances, in the case of strict liability for manufacturers, for example, they nevertheless believe that internal compromise is wrong, though for reasons that yield when the substantive issue is very grave. So they share the instinct that needs explaining. This instinct is likely to be at work, moreover, in other, more complicated rankings they might make. Suppose you think abortion is murder and that it makes no difference whether the pregnancy is the result of rape. Would you not think a statute prohibiting abortion except in the case of rape distinctly better than a statute prohibiting abortion except to women born in one specified decade each century? At least if you had no reason to think either would in fact allow more abortions? You see the first of these statutes as a solution that gives effect to two recognizable principles of justice, ordered in a certain way, even though you reject one of the principles. You cannot treat the second that way; it simply affirms for some people a principle it denies to others. So for many of us, our preferences in particular cases pose the same puzzle as our more comprehensive rejection of the checkerboard solution as a general strategy for resolving differences over principle. We cannot explain our hostility to internal compromise by appeal to principles of either fairness or justice as we have defined those virtues.

Astronomers postulated Neptune before they discovered it. They knew that only another planet, whose orbit lay beyond those already recognized, could explain the behavior of the nearer planets. Our instincts about internal compromise suggest another political ideal standing beside justice and fairness. Integrity is our Neptune. The most natural explanation of why we oppose checkerboard statutes appeals to that idea: we say that a state that adopts these internal compromises is acting in an unprincipled way, even though no single official who voted for or enforces the compromise has done anything which, judging his individual actions by the ordinary standards of personal morality, he ought not to have done. The state lacks integrity because it must endorse

principles to justify part of what it has done that it must reject to justify the rest. That explanation distinguishes integrity from the perverse consistency of someone who refuses to rescue some prisoners because he cannot save all. If he had saved some, selected arbitrarily, he would not have violated any principle he needs to justify other acts. But a state does act that way when it accepts a Solomonic checkerboard solution; it is inconsistency in principle among the acts of the state personified that integrity condemns. [pp. 176–184]

A large view

. . . Law as integrity denies that statements of law are either the backward-looking factual reports of conventionalism or the forward-looking instrumental programs of legal pragmatism. It insists that legal claims are interpretive judgments and therefore combine backward- and forward-looking elements; they interpret contemporary legal practice seen as an unfolding political narrative. So law as integrity rejects as unhelpful the ancient question whether judges find or invent law; we understand legal reasoning, it suggests, only by seeing the sense in which they do both and neither.

Integrity and Interpretation

The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness. We form our third conception of law, our third view of what rights and duties flow from past political decisions, by restating this instruction as a thesis about the grounds of law. According to law as integrity, propositions of 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. Deciding whether the law grants Mrs McLoughlin compensation for her injury, for example, means deciding whether legal practice is seen in a better light if we assume the community has accepted the principle that people in her position are entitled to compensation.

Law as integrity is therefore more relentlessly interpretive than either conventionalism or pragmatism. These latter theories offer themselves *as* interpretations. They are conceptions of law that claim to show our legal practices in the best light these can bear, and they recommend, in their postinterpretive conclusions, distinct styles or programs for adjudication. But the programs they recommend are not themselves programs *of* interpretation: they do not ask judges deciding hard cases to carry out any further, essentially interpretive study of legal doctrine. Conventionalism requires judges to study law reports and parliamentary records to discover what decisions have been made by institutions conventionally recognized to have legislative power. No doubt interpretive issues will arise in that process: for example, it may be necessary to interpret a text to decide what statutes our legal conventions construct from it. But once a judge has accepted conventionalism as his guide, he has no further occasion for interpreting the legal record as a whole in deciding particular cases. Pragmatism requires judges to think instrumentally about the best rules for the future. That exercise may require interpretation of something beyond legal material: a utilitarian pragmatist may need to worry about the best way to understand the idea of community welfare, for example. But once again, a judge who accepts pragmatism is then done with interpreting legal practice as a whole.

Law as integrity is different: it is both the product of and the inspiration for comprehensive interpretation of legal practice. The program it holds out to judges

deciding hard cases is essentially, not just contingently interpretive; law as

integrity asks them to continue interpreting the same material that it claims to have successfully interpreted itself. It offers itself as continuous with—the initial part of—the more detailed interpretations it recommends. [pp. 225–227]

Law: The Question of Emotional Damages

Law as integrity asks a judge deciding a common-law case like *McLoughlin*[40] to think of himself as an author in the chain of common law. He knows that other judges have decided cases that, although not exactly like his case, deal with related problems; he must think of their decisions as part of a long story he must interpret and then continue, according to his own judgment of how to make the developing story as good as it can be. (Of course the best story for him means best from the standpoint of political morality, not aesthetics.) We can make a rough distinction once again between two main dimensions of this interpretive judgment. The judge's decision—his postinterpretive conclusions—must be drawn from an interpretation that both fits and justifies what has gone before, so far as that is possible. But in law as in literature the interplay between fit and justification is complex. Just as interpretation within a chain novel is for each interpreter a delicate balance among different types of literary and artistic attitudes, so in law it is a delicate balance among political convictions of different sorts; in law as in literature these must be sufficiently related yet disjoint to allow an overall judgment that trades off an interpretation's success on one type of standard against its failure on another. I must try to exhibit that complex structure of legal interpretation, and I shall use for that purpose an imaginary judge of superhuman intellectual power and patience who accepts law as integrity.

Call him Hercules. In this and the next several chapters we follow his career by noticing the types of judgments he must make and tensions he must resolve in deciding a variety of cases. But I offer this caution in advance. We must not suppose that his answers to the various questions he encounters *define* law as integrity as a general conception of law. They are the answers I now think best. But law as integrity consists in an approach, in questions rather than answers, and other lawyers and judges who accept it would give different answers from his to the questions it asks. You might think other answers would be better. (So might I, after further thought.) You might, for example, reject Hercules' views about how far people's legal rights depend on the reasons past judges offered for their decisions enforcing these rights, or you might not share his respect for what I shall call "local priority" in common-law decisions. If you reject these discrete views because you think them poor constructive interpretations of legal practice, however, you have not rejected law as integrity but rather have joined its enterprise.

Six Interpretations

Hercules must decide *McLoughlin*. Both sides in that case cited precedents; each argued that a decision in its favor would count as going on as before, as continuing the story begun by the judges who decided those precedent cases. Hercules must form his own view about that issue. Just as a chain novelist must find, if he can, some coherent view of character and theme such that a hypothetical single author with that view could have written at least the bulk of the novel so far, Hercules must find, if he can, some coherent theory about legal rights to compensation for emotional injury such that a single political official with that theory could have reached most of the results the precedents report.

He is a careful judge, a judge of method. He begins by setting out various

candidates for the best interpretation of the precedent cases even before he reads them. Suppose he makes the following short list: (1) No one has a moral right to compensation except for physical injury. (2) People have a moral right to compensation for emotional injury suffered at the scene of an accident against anyone whose carelessness caused the accident but have no right to compensation for emotional injury suffered later. (3) People should recover compensation for emotional injury when a practice of requiring compensation in their circumstances would diminish the overall costs of accidents or otherwise make the community richer in the long run. (4) People have a moral right to compensation for any injury, emotional or physical, that is the direct consequence of careless conduct, no matter how unlikely or foreseeable it is that that conduct would result in that injury. (5) People have a moral right to compensation for emotional or physical injury that is the consequence of careless conduct, but only if that injury was reasonably foreseeable by the person who acted carelessly. (6) People have a moral right to compensation for reasonably foreseeable injury but not in circumstances when recognizing such a right would impose massive and destructive financial burdens on people who have been careless out of proportion to their moral fault.

These are all relatively concrete statements about rights and, allowing for a complexity in (3) we explore just below, they contradict one another. No more than one can figure in a single interpretation of the emotional injury cases. (I postpone the more complex case in which Hercules constructs an interpretation from competitive rather than contradictory principles, that is, from principles that can live together in an overall moral or political theory though they sometimes pull in different directions.) Even so, this is only a partial list of the contradictory interpretations someone might wish to consider; Hercules chooses it as his initial short list because he knows that the principles captured in these interpretations have actually been discussed in the legal literature. It will obviously make a great difference which of these principles he believes provides the best interpretation of the precedents and so the nerve of his postinterpretive judgment. If he settles on (1) or (2), he must decide for Mr O'Brian; if on (4), for Mrs McLoughlin. Each of the others requires further thought, but the line of reasoning each suggests is different. (3) invites an economic calculation. Would it reduce the cost of accidents to extend liability to emotional injury away from the scene? Or is there some reason to think that the most efficient line is drawn just between emotional injuries at and those away from the scene? (5) requires a judgment about foreseeability of injury, which seems to be very different, and (6) a judgment both about foreseeability and the cumulative risk of financial responsibility if certain injuries away from the scene are included.

Hercules begins testing each interpretation on his short list by asking whether a single political official could have given the verdicts of the precedent cases if that official were consciously and coherently enforcing the principles that form the interpretation. He will therefore dismiss interpretation (1) at once. No one who believed that people never have rights to compensation for emotional injury could have reached the results of those past decisions cited in *McLoughlin* that allowed compensation. Hercules will also dismiss interpretation (2), though for a different reason. Unlike (1), (2) fits the past decisions; someone who accepted (2) as a standard would have reached these decisions, because they all allowed recovery for emotional injury at the scene and none allowed recovery for injury away from it. But (2) fails as an interpretation of the required kind because it does not state a principle of justice at all. It draws a line that it leaves arbitrary and unconnected to any more general moral or political consideration.

What about (3)? It might fit the past decisions, but only in the following way. Hercules might discover through economic analysis that someone who accepted the economic theory expressed by (3) and who wished to reduce the community's accident costs would have made just those decisions. But it is far from obvious

that (3) states any principle of justice or fairness. Remember the distinction between principles and policies [. . .] (3) supposes that it is desirable to reduce accident costs overall. Why? Two explanations are possible. The first insists that people have a right to compensation whenever a rule awarding compensation would produce more wealth for the community overall than a rule denying it. This has the form, at least, of a principle because it describes a general right everyone is supposed to have. I shall not ask Hercules to consider (3) understood in that way now, because he will study it very carefully in Chapter 8. The second, quite different, explanation suggests that it is sometimes or even always in the community's general interest to promote overall wealth in this way, but it does not suppose that anyone has any right that social wealth always be increased. It therefore sets out a policy that government might or might not decide to pursue in particular circumstances. It does not state a principle of justice, and so it cannot figure in an interpretation of the sort Hercules now seeks.

Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards. That style of adjudication respects the ambition integrity assumes, the ambition to be a community of principle. But [. . .] integrity does not recommend what would be perverse, that we should all be governed by the same goals and strategies of policy on every occasion. It does not insist that a legislature that enacts one set of rules about compensation today, in order to make the community richer on the whole, is in any way committed to serve that same goal of policy tomorrow. For it might then have other goals to seek, not necessarily in place of wealth but beside it, and integrity does not frown on this diversity. Our account of interpretation, and our consequent elimination of interpretation (3) read as a naked appeal to policy, reflects a discrimination already latent in the ideal of integrity itself.

We reach the same conclusion in the context of *McLoughlin* through a different route, by further reflection on what we have learned about interpretation. An interpretation aims to show what is interpreted in the best light possible, and an interpretation of any part of our law must therefore attend not only to the substance of the decisions made by earlier officials but also to how—by which officials in which circumstances—these decisions were made. A legislature does not need reasons of principle to justify the rules it enacts about driving, including rules about compensation for accidents, even though these rules will create rights and duties for the future that will then be enforced by coercive threat. A legislature may justify its decision to create new rights for the future by showing how these will contribute, as a matter of sound policy, to the overall good of the community as a whole. There are limits to this kind of justification [. . .]. The general good may not be used to justify the death penalty for careless driving. But the legislature need not show that citizens already have a moral right to compensation for injury under particular circumstances in order to justify a statute awarding damages in those circumstances.

Law as integrity assumes, however, that judges are in a very different position from legislators. It does not fit the character of a community of principle that a judge should have authority to hold people liable in damages for acting in a way he concedes they had no legal duty not to act. So when judges construct rules of liability not recognized before, they are not free in the way I just said legislators are. Judges must make their common-law decisions on grounds of principle, not policy; they must deploy arguments why the parties actually had the "novel" legal rights and duties they enforce at the time the parties acted or at some other pertinent time in the past. A legal pragmatist would reject that claim. But Hercules rejects pragmatism. He follows law as integrity and therefore wants an interpretation of what judges did in the earlier emotional damage cases that shows

them acting in the way he approves, not in the way he thinks judges must decline to act. It does not follow that he must dismiss interpretation (3), as supposing that past judges acted to protect a general legal right to compensation when this would make the community richer. For if people actually have such a right, others have a corresponding duty, and judges do not act unjustly in ordering the police to enforce it. The argument disqualifies interpretation (3) only when this is read to deny any such general duty and to rest on grounds of policy alone.

Expanding the Range

Interpretations (4), (5) and (6) do, however, seem to pass these initial tests. The principles of each fit the past emotional injury decisions, at least on first glance, if only because none of these precedents presented facts that would discriminate among them. Hercules must now ask, as the next stage of his investigation, whether any one of the three must be ruled out because it is incompatible with the bulk of legal practice more generally. He must test each interpretation against other past judicial decisions, beyond those involving emotional injury, that might be thought to engage them. Suppose he discovers, for example, that past decisions provide compensation for physical injury caused by careless driving only if the injury was reasonably foreseeable. That would rule out interpretation (4) unless he can find some principled distinction between physical and emotional injury that explains why the conditions for compensation should be more restrictive for the former than the latter, which seems extremely unlikely.

Law as integrity, then, requires a judge to test his interpretation of any part of the great network of political structures and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole. No actual judge could compose anything approaching a full interpretation of all of his community's law at once. That is why we are imagining a Herculean judge of superhuman talents and endless time. But an actual judge can imitate Hercules in a limited way. He can allow the scope of his interpretation to fan out from the cases immediately in point to cases in the same general area or department of law, and then still farther, so far as this seems promising. In practice even this limited process will be largely unconscious: an experienced judge will have a sufficient sense of the terrain surrounding his immediate problem to know instinctively which interpretation of a small set of cases would survive if the range it must fit were expanded. But sometimes the expansion will be deliberate and controversial. Lawyers celebrate dozens of decisions of that character, including several on which the modern law of negligence was built...

Suppose a modest expansion of Hercules' range of inquiry does show that plaintiffs are denied compensation if their physical injury was not reasonably foreseeable at the time the careless defendant acted, thus ruling out interpretation (4). But this does not eliminate either (5) or (6). He must expand his survey further. He must look also to cases involving economic rather than physical or emotional injury, where damages are potentially very great: for example, he must look to cases in which professional advisers like surveyors or accountants are sued for losses others suffer through their negligence. Interpretation (5) suggests that such liability might be unlimited in amount, no matter how ruinous in total, provided that the damage is foreseeable, and (6) suggests, on the contrary, that liability is limited just because of the frightening sums it might otherwise reach. If one interpretation is uniformly contradicted by cases of that sort and finds no support in any other area of doctrine Hercules might later inspect, and the other is confirmed by the expansion, he will regard the former as ineligible, and the latter alone will have survived. But suppose he finds, when he expands his study in this way, a mixed pattern. Past decisions permit extended liability for members of some professions but not for those of others, and this mixed pattern holds for

other areas of doctrine that Hercules, in the exercise of his imaginative skill, finds pertinent.

The contradiction he has discovered, though genuine, is not in itself so deep or pervasive as to justify a skeptical interpretation of legal practice as a whole, for the problem of unlimited damages, while important, is not so fundamental that contradiction within it destroys the integrity of the larger system. So Hercules turns to the second main dimension, but here, as in the chain-novel situation, questions of fit surface again, because an interpretation is *pro tanto* more satisfactory if it shows less damage to integrity than its rival. He will therefore consider whether interpretation (5) fits the expanded legal record better than (6). But this cannot be a merely mechanical decision; he cannot simply count the number of past decisions that must be conceded to be "mistakes" on each interpretation. For these numbers may reflect only accidents like the number of cases that happen to have come to court and not been settled before verdict. He must take into account not only the numbers of decisions counting for each interpretation, but whether the decisions expressing one principle seem more important or fundamental or wide-ranging than the decisions expressing the other. Suppose interpretation (6) fits only those past judicial decisions involving charges of negligence against one particular profession—say, lawyers—and interpretation (5) justifies all other cases, involving all other professions, and also fits other kinds of economic damage cases as well. Interpretation (5) then fits the legal record better on the whole, even if the number of cases involving lawyers if for some reason numerically greater, unless the argument shifts again, as it well might, when the field of study expands even more.

Now suppose a different possibility: that though liability has in many and varied cases actually been limited to an amount less than interpretation (5) would allow, the opinions attached to these cases made no mention of the principle of interpretation (6), which has in fact never before been recognized in official judicial rhetoric. Does that show that interpretation (5) fits the legal record much better, or that interpretation (6) is ineligible after all? Judges in fact divide about this issue of fit. Some would not seriously consider interpretation (6) if no past judicial opinion or legislative statement had ever explicitly mentioned its principle. Others reject this constraint and accept that the best interpretation of some line of cases may lie in a principle that has never been recognized explicitly but that nevertheless offers a brilliant account of the actual decisions, showing them in a better light than ever before. Hercules will confront this issue as a special question of political morality. The political history of the community is *pro tanto* a better history, he thinks, if it shows judges making plain to their public, through their opinions, the path that later judges guided by integrity will follow and if it shows judges making decisions that give voice as well as effect to convictions about morality that are widespread throughout the community. Judicial opinions formally announced in law reports, moreover, are themselves acts of the community personified that, particularly if recent must be taken into the embrace of integrity. These are among his reasons for somewhat preferring an interpretation that is not too novel, not too far divorced from what past judges and other officials said as well as did. But he must set these reasons against his more substantive political convictions about the relative moral value of the two interpretations, and if he believes that interpretation (6) is much superior from that perspective, he will think he makes the legal record better overall by selecting it even at the cost of the more procedural values. Fitting what judges did is more important than fitting what they said.

Now suppose an even more unpatterned record. Hercules finds that unlimited liability has been enforced against a number of professions but has not been enforced against a roughly equal number of others, that no principle can explain the distinction, that judicial rhetoric is as split as the actual decisions, and that this split extends into other kinds of actions for economic damage. He might

expand his field of survey still further, and the picture might change if he does. But let us suppose he is satisfied that it will not. He will then decide that the question of fit can play no more useful role in his deliberations even on the second dimension. He must now emphasize the more plainly substantive aspects of that dimension: he must decide which interpretation shows the legal record to be the best it can be from the standpoint of substantive political morality. He will compose and compare two stories. The first supposes that the community personified has adopted and is enforcing the principle of foreseeability as its test of moral responsibility for damage caused by negligence, that the various decisions it has reached are intended to give effect to that principle, though it has often lapsed and reached decisions that foreseeability would condemn. The second supposes, instead, that the community has adopted and is enforcing the principle of foreseeability limited by some overall ceiling on liability, though it has often lapsed from that principle. Which story shows the community in a better light, all things considered, from the standpoint of political morality?

Hercules' answer will depend on his convictions about the two constituent virtues of political morality we have considered: justice and fairness. It will depend, that is, not only on his beliefs about which of these principles is superior as a matter of abstract justice but also about which should be followed, as a matter of political fairness, in a community whose members have the moral convictions his fellow citizens have. In some cases the two kinds of judgment—the judgment of justice and that of fairness—will come together. If Hercules and the public at large share the view that people are entitled to be compensated fully whenever they are injured by others' carelessness, without regard to how harsh this requirement might turn out to be, then he will think that interpretation (5) is plainly the better of the two in play. But the two judgments will sometimes pull in different directions. He may think that interpretation (6) is better on grounds of abstract justice, but know that this is a radical view not shared by any substantial portion of the public and unknown in the political and moral rhetoric of the times. He might then decide that the story in which the state insists on the view he thinks right, but against the wishes of the people as a whole, is a poorer story, on balance. He would be preferring fairness to justice in these circumstances, and that preference would reflect a higher-order level of his own political convictions, namely his convictions about how a decent government committed to both fairness and justice should adjudicate between the two in this sort of case.

Judges will have different ideas of fairness, about the role each citizen's opinion should ideally play in the state's decision about which principles of justice to enforce through its central police power. They will have different higher-level opinions about the best resolution of conflicts between these two political ideals. No judge is likely to hold the simplistic theory that fairness is automatically to be preferred to justice or vice versa. Most judges will think that the balance between the opinions of the community and the demands of abstract justice must be struck differently in different kinds of cases. Perhaps in ordinary commercial or private law cases, like *McLoughlin*, an interpretation supported in popular morality will be deemed superior to one that is not, provided it is not thought very much inferior as a matter of abstract justice. But many judges will think the interpretive force of popular morality very much weaker in constitutional cases like *Brown*,[41] because they will think the point of the Constitution is in part to protect individuals from what the majority thinks right. [pp. 238–250]

[41] *Brown v. Board of Education* (1954) 347 U.S. 483.

A Provisional Summary

Judges who accept the interpretive ideal 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 structure and legal doctrine of their community. They try to make that complex structure and record the best these can be. It is analytically useful to distinguish different dimensions or aspects of any working theory. It will include convictions about both fit and justification. Convictions about fit will provide a rough threshold requirement that an interpretation of some part of the law must meet if it is to be eligible at all. Any plausible working theory would disqualify an interpretation of our own law that denied legislative competence or supremacy outright or that claimed a general principle of private law requiring the rich to share their wealth with the poor. That threshold will eliminate interpretations that some judges would otherwise prefer, so the brute facts of legal history will in this way limit the role any judge's personal convictions of justice can play in his decisions. Different judges will set this threshold differently. But anyone who accepts law as integrity must accept that the actual political history of his community will sometimes check his other political convictions in his overall interpretive judgment. If he does not—if his threshold of fit is wholly derivative from and adjustable to his convictions of justice, so that the latter automatically provide an eligible interpretation—then he cannot claim in good faith to be interpreting his legal practice at all. Like the chain novelist whose judgments of fit automatically adjusted to his substantive literary opinions, he is acting from bad faith or self-deception.

Hard cases arise, for any judge, when his threshold test does not discriminate between two or more interpretations of some statute or line of cases. Then he must choose between eligible interpretations by asking which shows the community's structure of institutions and decisions—its public standards as a whole—in a better light from the standpoint of political morality. His own moral and political convictions are now directly engaged. But the political judgment he must make is itself complex and will sometimes set one department of his political morality against another: his decision will reflect not only his opinions about justice and fairness but his higher-order convictions about how these ideals should be compromised when they compete. Questions of fit arise at this stage of interpretation as well, because even when an interpretation survives the threshold requirement, any infelicities of fit will count against it, in the ways we noticed, in the general balance of political virtues. Different judges will disagree about each of these issues and will accordingly take different views of what the law of their community, properly understood, really is.

Any judge will develop, in the course of his training and experience, a fairly individualized working conception of law on which he will rely, perhaps unthinkingly, in making these various judgments and decisions, and the judgments will then be, for him, a matter of feel or instinct rather than analysis. Even so, we as critics can impose structure on his working theory by teasing out its rules of thumb about fit—about the relative importance of consistency with past rhetoric and popular opinion, for example—and its more substantive opinions or learnings about justice and fairness. Most judges will be like other people in their community, and fairness and justice will therefore not often compete for them. But judges whose political opinions are more eccentric or radical will find that the two ideals conflict in particular cases, and they will have to decide which resolution of that conflict would show the community's record in the best light. Their working conceptions will accordingly include higher-order principles that have proved necessary to that further decision. A particular judge may think or assume, for example, that political decisions should mainly respect majority opinion, and yet believe that this requirement relaxes and even disappears when serious constitutional rights are in question.

We should now recall two general observations we made in constructing the chain-novel model, because they apply here as well. First, the different aspects or dimensions of a judge's working approach—the dimensions of fit and substance, and of different aspects of substance—are in the last analysis all responsive to his political judgment. His convictions about fit, as these appear either in his working threshold requirement or analytically later in competition with substance, are political not mechanical. They express his commitment to integrity: he believes that an interpretation that falls below his threshold of fit shows the record of the community in an irredeemably bad light, because proposing that interpretation suggests that the community has characteristically dishonored its own principles. When an interpretation meets the threshold, remaining defects of fit may be compensated, in his overall judgment, if the principles of that interpretation are particularly attractive, because then he sets off the community's infrequent lapses in respecting these principles against its virtue in generally observing them. The constraint fit imposes on substance, in any working theory, is therefore the constraint of one type of political conviction on another in the overall judgment which interpretation makes a political record the best it can be overall, everything taken into account. Second, the mode of this constraint is the mode we identified in the chain novel. It is not the constraint of external hard fact or of interpersonal consensus. But rather the structural constraint of different kinds of principle within a system of principle, and it is none the less genuine for that.

No mortal judge can or should try to articulate his instinctive working theory so far, or make that theory so concrete and detailed, that no further thought will be necessary case by case. He must treat any general principles or rules of thumb he has followed in the past as provisional and stand ready to abandon these in favor of more sophisticated and searching analysis when the occasion demands. These will be moments of special difficulty for any judge, calling for fresh political judgments that may be hard to make. It would be absurd to suppose that he will always have at hand the necessary background convictions of political morality for such occasions. Very hard cases will force him to develop his conception of law and his political morality together in a mutually supporting way. But it is nevertheless possible for any judge to confront fresh and challenging issues as a matter of principle, and this is what law as integrity demands of him. He must accept that in finally choosing one interpretation over another of a much contested line of precedents perhaps after demanding thought and shifting conviction, he is developing his working conception of law in one rather than another direction. This must seem to him the right direction as a matter of political principle, not just appealing for the moment because it recommends an attractive decision in the immediate case. There is, in this counsel, much room for deception, including self-deception. But on most occasions it will be possible for judges to recognize when they have submitted an issue to the discipline it describes. And also to recognize when some other judge has not.

Some Familiar Objections

Hercules is Playing Politics

Hercules has completed his labours in *McLoughlin*. He declares that the best interpretation of the emotional damage cases, all things considered, is (5): the law allows compensation for all emotional injury directly caused by careless driving and foreseeable by a reasonably thoughtful motorist. But he concedes that in reaching that conclusion he has relied on his own opinion that this principle is better—fairer and more just—than any other that is eligible on what he takes to be the right criteria of fit. He also concedes that this opinion is controversial: it is not shared by all of his fellow judges, some of whom therefore think that some

other interpretation, for example (6), is superior. What complaints are his arguments likely to attract? The first in the list I propose to consider accuses Hercules of ignoring the actual law of emotional injury and substituting his own views about what the law should be.

How shall we understand this objection? We might take it in two very different ways. It might mean that Hercules was wrong to seek to justify his interpretation by appealing to justice and fairness because it does not even survive the proper threshold test of fit. We cannot assume, without reviewing the cases Hercules consulted, that this argument is mistaken. Perhaps this time Hercules nodded; perhaps if he had expanded the range of his study of precedents further he would have discovered that only one interpretation did survive, and this discovery would then have settled the law, for him, without engaging his opinions about the justice of requiring compensation for accidents. But it is hardly plausible that even the strictest threshold test of fit will always permit only one interpretation, so the objection, understood this way, would not be a general objection to Hercules' methods of adjudication but only a complaint that he had misapplied his own methods in the particular case at hand.

We should therefore consider the second, more interesting reading of the objection: this claims that a judge must never rely on his personal convictions about fairness or justice the way Hercules did in this instance. Suppose the critic says, "The correct interpretation of a line of past decisions can always be discovered by morally neutral means, because the correct interpretation is just a matter of discovering what principles the judges who made these decisions intended to lay down, and that is just a matter of historical fact". Hercules will point out that this critic needs a political reason for his dictum that interpretations must match the intentions of past judges. That is an extreme form of the position we have already considered, that an interpretation is better if it fits what past judges said as well as did, and even that weaker claim depends on the special arguments of political morality I described. The critic supposes that these special reasons are not only strong but commanding; that they are so powerful that a judge always does wrong even to consider an interpretation that does not meet the standard they set, no matter how well that interpretation ties together, explains, and justifies past decisions.

So Hercules' critic, if his argument is to have any power, is not relying on politically neutral interpretive convictions after all. He, too, has engaged his own background convictions of political morality. He thinks the political values that support his interpretive style are of such fundamental importance as to eliminate any competing commands of justice altogether. That may be a plausible position, but it is hardly uncontroversial and is in no sense neutral. His difference with Hercules is not, as he first suggested, about whether political morality is relevant in deciding what the law is, but about which principles of morality are sound and therefore decisive of that issue. So the first, crude objection, that Hercules has substituted his own political convictions for the politically neutral correct interpretation of the past law, is an album of confusions.

Hercules Is a Fraud

The second objection is more sophisticated. Now the critic says, "It is absurd to suppose that there is any single correct interpretation of the emotional injury cases. Since we have discovered two interpretations of these cases, neither of which can be preferred to the other on 'neutral' grounds of fit, no judge would be forced by the adjudicative principle of integrity to accept either. Hercules has chosen one on frankly political grounds; his choice reflects only his own political morality. He has no choice in the circumstances but to legislate in that way. Nevertheless it is fraudulent for him to claim that he has discovered, through his

political choice, what the *law* is. He is only offering his own opinion about what it should be."

This objection will seem powerful to many readers, and we must take care not to weaken it by making it seem to claim more than it does. It does not try to reinstate the idea of conventionalism, that when convention runs out a judge is free to improve the law according to the right legislative standards; still less the idea of pragmatism that he is always free to do this, checked only by considerations of strategy. It acknowledges that judges must choose between interpretations that survive the test of fit. It insists only that there can be no best interpretation when more than one survives that test. It is an objection, as I have framed it, from within the general idea of law as integrity; it tries to protect that idea from corruption by fraud.

Is the objection sound? Why is it fraudulent, or even confusing, for Hercules to offer his judgment as a judgment of law? Once again, two somewhat different answers—two ways of elaborating the objection—are available, and we cannot do credit to the objection unless we distinguish them and consider each. The first elaboration is this: "Hercules" claim is fraudulent because it suggests that there can be a right answer to the question whether interpretation (5) or (6) is fairer or more just; since political morality is subjective there cannot be a single right answer to that question, but only answers." This is the challenge of moral skepticism ... I cannot escape saying something more about it now, but I will use a new critic, with a section of his own, to do so. The second elaboration does not rely on skepticism: "Hercules is a fraud even if morality is objective and even if he is right that the principle of foreseeability he settled on is objectively fairer and more just. He is a fraud because he pretends he has discovered what the law is, but he has only discovered what it should be." That is the form of the objection I shall consider here.

We ask of a conception of law that it provide an account of the grounds of law—the circumstances under which claims about what the law is should be accepted as true or sound—that shows why law licenses coercion. Law as integrity replies that the grounds of law lie in integrity, in the best constructive interpretation of past legal decisions, and that law is therefore sensitive to justice in the way Hercules recognizes. So there is no way Hercules *can* report his conclusion about Mrs McLoughlin's case except to say that the law, as he understands it, is in her favor. If he said what the critic recommends, that she has no legal right to win but has a moral right that he proposes to honor, he would be *misstating* his view of the matter. He would think that a true account of some situations—if he found the law too immoral to enforce, for example—but not of this one. A critic might disagree with Hercules at many levels. He might reject law as integrity in favor of conventionalism or pragmatism or some other conception of law. Or he might accept it but reach different conclusions about Hercules because he holds different ideas about the necessary requirements of fit, or different convictions about fairness or justice or the relation between them. But he can regard Hercules' use of "law" as fraudulent (or grammatically wrong) only if he suffers from the semantic sting, only if he assumes that claims of law are somehow out of order when they are not drawn directly from some set of factual criteria for law every competent lawyer accepts.

One aspect of the present objection, however, might be thought immune from my arguments against the rest. Even if we agree that Hercules' conclusions about Mrs McLoughlin are properly presented as conclusions of law, it might seem extravagant to claim that these conclusions in any way follow from integrity understood as a distinct political ideal. Would it not be more accurate to say that integrity is at work in Hercules' calculations just up to the point at which he has rejected all interpretations that fail the threshold test of fit, but that integrity plays no part in selecting among those that survive that test? Should we not say that his conception of law is really two conceptions: law as integrity supplemented, when

integrity gives out, by some version of natural law theory? This is not a very important objection; it only suggests a different way of reporting the conclusions it no longer challenges. Nevertheless the observation that prompts it is too crude. For it is a mistake to think that the idea of integrity is irrelevant to Hercules' decision once that decision is no longer a matter of his convictions about fit but draws on his sense of fairness or justice as well.

The spirit of integrity, which we located in fraternity, would be outraged if Hercules were to make his decision in any way other than by choosing the interpretation that he believes best from the standpoint of political morality as a whole. We accept integrity as a political ideal because we want to treat our political community as one of principle, and the citizens of a community of principle aim not simply at common principles, as if uniformity were all they wanted, but the best common principles politics can find. Integrity is distinct from justice and fairness, but it is bound to them in that way: integrity makes no sense except among people who want fairness and justice as well. So Hercules' final choice of the interpretation he believes sounder on the whole—fairer and more just in the right relation—flows from his initial commitment to integrity. He makes that choice at the moment and in the way integrity both permits and requires, and it is therefore deeply misleading to say that he has abandoned the ideal at just that point.

Hercules is Arrogant and Anyway a Myth

I shall deal much more briefly with two less important critics who nevertheless must be heard. I have been describing Hercules' methods in what some will call a subjective way, by describing the questions he must answer and judgments he must make for himself. Other judges would answer these differently, and you might agree with one of them rather than Hercules. We shall consider in a moment whether any of this means that neither Hercules nor any other judge or critic can be "really" right about what the law is. But Hercules' opinion will be controversial no matter how we answer that philosophical question, and his new critic seizes just on the fact of controversiality, untainted by any appeal to either external or internal skepticism. "Whether or not there are right answers to the interpretive questions on which Hercules" judgment depends, it is unfair that the answer of one judge (or a bare majority of judges on a panel) be accepted as final when he has no way to *prove*, against those who disagree, that his opinion is better."

We must return, for an answer, to our more general case for law as integrity. We want our officials to treat us as tied together in an association of principle, and we want this for reasons that do not depend on any identity of conviction among these officials, either about fit or about the more substantive principles an interpretation engages. Our reasons endure when judges disagree, at least in detail, about the best interpretation of the community's political order, because each judge still confirms and reinforces the principled character of our association by striving, in spite of the disagreement, to reach his own opinion instead of turning to the usually simpler task of fresh legislation. But even if this were not so, the present objection could not count as an objection to law as integrity distinctly, for it would apply in its full force to pragmatism or to conventionalism, which becomes pragmatism in any case hard enough to come before an appellate court. How can it be fairer for judges to enforce their own views about the best future, unconstrained by any requirement of coherence with the past, than the more complex but no less controversial judgments that law as integrity requires?

Another minor critic appears. His complaint is from a different quarter. "Hercules," he says, "is a myth. No real judge has his powers, and it is absurd to hold him out as a model for others to follow. Real judges [illegible]

more instinctively. They do not construct and test various rival interpretations against a complex matrix of intersecting political and moral principles. Their craft trains them to see structure in facts and doctrine at once; that is what thinking as a lawyer really is. If they decided to imitate Hercules, trying in each case to secure some general theory of law as a whole, they would be paralyzed while their docket choked." This critic misunderstands our exercise. Hercules is useful to us just because he is more reflective and self-conscious than any real judge need be or, given the press of work, could be. No doubt real judges decide most cases in a much less methodical way. But Hercules shows us the hidden structure of their judgments and so lays these open to study and criticism. We must be careful to distinguish, moreover, two senses in which he might be said to have more powers than any actual judge could. He works so much more quickly (and has so much more time available) that he can explore avenues and ideas they cannot; he can pursue, not just one or two evident lines in expanding the range of cases he studies but all the lines there are. That is the sense in which he can aim at more than they: he can aim at a comprehensive theory, while theirs must be partial. But he has no vision into transcendental mysteries opaque to them. His judgments of fit and political morality are made on the same material and have the same character as theirs. He does what they would do if they had a career to devote to a single decision; they need, not a different conception of law from his, but skills of craft husbandry and efficiency he has never had to cultivate.

Now this critic trims his sails. "In any case Hercules has too much theory for easy cases. Good judges just know that the plain meaning of a plain statute, or a crisp rule always applied and never doubted in precedent, is law, and that is all there is to it. It would be preposterous, not just time-consuming, to subject these undoubted truths to interpretive tests on each occasion. So law as integrity, with its elaborate and top-heavy structure, is at best a conception for hard cases alone. Something much more like conventionalism is a better interpretation of what judges do in the easy ones." The distinction between easy and hard cases at law is neither so clear nor so important as this critic assumes, ... but Hercules does not need that point now. Law as integrity explains and justifies easy cases as well as hard ones; it also shows why they are easy. It is obvious that the speed limit in California is 55 because it is obvious that any competent interpretation of California traffic law must yield that conclusion. So easy cases are, for law as integrity, only special cases of hard ones, and the critic's complaint is then only what Hercules himself would be happy to concede: that we need not ask questions when we already know the answer. [pp. 255–266].

of what Parliament has enacted and what English judges have decided in the past. But why do these particular institutions (rather than, for example, an assembly of the presidents of major universities) have the power to make propositions of law true? Lawyers often claim, moreover, that some proposition of law is true—for instance, that Mrs. Sorenson is legally entitled to a share of damages from each of the drug companies—when no legislature or past judges have so declared or ruled. What else, beside these institutional sources, can make a claim of law true? Lawyers often disagree about whether some claim of law, including that one, is true, even when they know all the facts about what institutions have decided in the past. What in the world are they then disagreeing about? We want, moreover, to answer these questions not just for a particular legal system, like English law, but for law in general, whether in Alabama or Afghanistan, or anywhere else. Can we say anything, in general, about what makes a claim of law true wherever it is true? Can there be true claims of law in places with very different kinds of political institutions from those we have? Or no recognizable political institutions at all? Is there a difference, in England or anyplace else, between the claim that the law requires someone to perform contracts he signed and a prediction that officials will punish him if he does not? Or between that claim and the apparently different claim that he is morally obligated to perform his contracts? If a claim of law is different from both a prediction of consequences and a statement of moral obligation, how, exactly, is it different?

Hart set out to answer these ancient questions in *The Concept of Law*. ... Hart thought that in every community in which claims of law are made the great bulk of the officials of the community all accept, as a kind of convention, some master rule of recognition that identifies which historical or other facts or events make claims of law true. These conventions might be very different from one legal system to another: in one place the master convention might identify legislatures and past judicial decisions as the source of true legal claims, while in another the convention might identify custom or even moral soundness as the source. What form the convention takes, in any particular community, is a matter of social fact: everything turns on what the bulk of the officials in that community happen to have agreed on as the master test. But it is part of the very concept of law that in every community some master convention exists and picks out what counts as law for that community.

Hart's sources thesis is controversial: my own view of what makes claims of law true when they are true is very different. What is now important, however, is not the adequacy of Hart's theory but its character. Ordinary, first-order legal practice may consist in competing value judgments: it will do so, Hart says in his Postscript, if the community's master rule of recognition uses moral standards as part of the test for valid claims of law. But his own theory, he insists, which describes ordinary legal argument, is not a normative or evaluative theory—it is not a value judgment of any kind. It is rather an empirical or descriptive theory that elucidates the concepts that that ordinary legal argument deploys. Hart's position is a special case of the standard Archimedean view that there is a logical divide between the ordinary use of political concepts and the philosophical elucidation of them.

His position is therefore open to the same objections we reviewed against Archimedeanism in general. First, it is impossible to distinguish the two kinds of claims—to distinguish the first-order claims of lawyers in legal practice from second-order philosophers' claims about how first-order claims are to be identified and tested—sufficiently to assign them to different logical categories. Hart's sources thesis is very far from neutral between the parties in Mrs. Sorenson's case, for example. No "source" of the kind Hart had in mind had provided that people in Mrs. Sorenson's position are entitled to recover damages on a market-share basis, or stipulated a moral standard that might have that upshot or consequence. So if Hart is right Mrs. Sorenson cannot claim that law is on her side. Indeed, the