

# THE VALUE OF COMMUNITY, OR HOW BURKE COMPROMISES DWORKIN\*

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## I. THE LOGIC OF EMPIRE

The import and intentions of Ronald Dworkin's work are fairly grand. Dworkin does not propose a plain theory of law. Indeed, his theory of law is one part of a grand architectonic that also encompasses a theory of liberal equality and an important discussion of community. Though it is the last component that this essay is most interested in, it is impossible to consider one part in isolation from the others. Dworkin believes that community can serve as a go-between for authority and autonomy; or, to use a different rubric, community can explain and justify obligation. The authority must present a legal system that is true to the value of integrity. If a legal system displays integrity, the political community becomes amenable to personification. Personification of the community allows for the formation of feelings of veneration and attachment towards it. These feelings are critical to the well-being of the individual. Hence if authority abides by the demands of community, it deserves allegiance from the individual. The tension between authority and autonomy is in this manner resolved.

In attempting to explain this movement in more detail, I will bring some passages from Dworkin up against some passages from Edmund Burke. This will be done not solely in the spirit of the intellectual magpie or, indeed, the academic peacock. However, this is not intellectual history either. There is no suggestion that Dworkin is writing under the influence of Burke. Indeed, virtually the only reference Dworkin makes to Burke is a derogatory one.<sup>1</sup> Though that fact of itself may well be evidence of a complicated anxiety of influence, this essay will restrict itself, through the discussion of Burke, to the pious objective of developing a better feeling for ideas such as integrity and the community personified. It will also be contended, however, that a reading of Burke helps to bring out what may be the two most pervasive problems in Dworkin's theory of community: the interaction between the

1. He refers to the "curious philosophy of Edmund Burke": R. Dworkin, *TAKING RIGHTS SERIOUSLY* x (1978) (hereinafter "*TRS*").

liberal theory of justice and the ideal of community, and the interaction between the political community and what Burke would call the “little platoons.” Upon consideration of these two issues, we will discover how indeed Burke compromises Dworkin.

## II. REFLECTIONS ON THE EVOLUTION IN LAW

Ronald Dworkin’s theory of law is the theory of law as integrity. Although it is rarely easy to find a single best statement of a theory, the position in the adjudicative context is well captured in the following passage:

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.<sup>2</sup>

Integrity is not, however, to be only an adjudicative ideal; it is also the legislative ideal. In particular, this ideal rules out checkerboard statutes. And if integrity achieves this dual presence, Dworkin explains that citizens come to:

accept that their fates are linked in the following strong way: they accept that they are governed by common principles, not just by rules hammered out in political compromise. Politics has a different character for such people. It is a theater of debate about which principles the community should adopt as a system, which view it should take of justice, fairness, and due process, not the different story, appropriate to the other models, in which each person tries to plant the flag of his convictions over as large a domain of power or rules as possible.<sup>3</sup>

These passages, however, seem to be lacking something. We do not necessarily need to have at all a strong notion of community to believe that it would be a good thing, “so far as this is possible,” for law to be “structured by a coherent set of principles about justice and fairness and procedural due process.” This is desirable quite simply for the sake of clarity, predictability, and coordination. Similarly, we may believe that politics needs to be “a theater of debate about which principles the community should adopt as a system” because we consider the existence of this mode to be instrumentally valuable in the pursuit of justice and we believe that debate and singular settlements (one principle fits all, but there may be principled exceptions)

2. R. Dworkin, *LAW’S EMPIRE* 243 (1986) (hereinafter “*LE*”).

3. *LE* at 211.

help to bring out justice. If it is assumed from the beginning that a plurality of settlements is possible, that if you dig your heels in deep enough, you can walk away with the settlement you want and others can still get the settlement or settlements they want, there will be far less reason to engage with others' views as to the justice of the various possible settlements.

Similarly, we may hesitate before trying to plant the flag of our convictions about justice "over as large a domain of power or rules as possible" because we hold that if everyone adopts this orientation, politics will become an extremely antagonistic affair. It will also come to be understood as simply a play-off between special interests. The project of pursuing justice through the law will suffer. We hence participate in the debate, but if our convictions are being sidelined, we do not demand a special settlement for ourselves. We believe that it is more important for there to be one settlement than for our own convictions to be included amongst a series of settlements.<sup>4</sup>

The most substantial aim of this essay is to set up justice in contrast to community, and the suggestion in the remarks directly above is that we may have justice-based reasons rather than community-based reasons for propounding some sort of ideal of integrity. We for instance reject checkerboard statutes not because they threaten to throw the Neptune of our political morality—integrity—out of orbit<sup>5</sup> but because they threaten the project of pursuing justice through law. Consider one of Dworkin's examples of a statute that he maintains we would reject:

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.<sup>6</sup>

To give this example a fuller context, let us also suppose that the specified decade is the seventies and that decade has been specified because women born in the seventies are very powerful in politics. I suggest that we would prefer the statute with the rape exception not because it helps us to appear as

4. This of course is the statement of an ideal. In contemporary political systems, it seems that checkerboard solutions over issues such as environmental protection are highly available. Logging companies and oil companies, or rather their firms of lobbyists, are not all that willing to put aside their convictions in order to allow a singular settlement.

5. "Astronomers postulated Neptune before they discovered it. They knew that only another planet, whose orbit lay beyond those already recognized, could explain the behaviour of the nearer planets. Our instincts about internal compromise suggest another political ideal standing beside justice and fairness. Integrity is our Neptune." *LE* at 183.

6. *LE* at 183. Footnote omitted.

a community but primarily and exactly because it can be seen as giving effect to two recognizable principles of justice. That statute fits with our objective of maintaining a legal system in which justice is pursued. Accepting such a statute may mean that in the immediate context, the principle of justice that I oppose will prevail, but there is nevertheless a justice-based reason to prefer that loss to the partial success of a checkerboard. Accepting checkerboards threatens the general project of pursuing justice. It threatens the idea of a legal system based on principle rather than relative bargaining power. The statute with the exception for women born in the seventies cannot fit the image we have (or want to have) of our system. That statute suggests a legal system in which bargains are struck simply on the most salient terms.

To fill out this line of attack, we need to think of an example of a checkerboard statute against which no justice-based reasons can be posed. We should have no reason to reject that statute. If, however, our instincts still recoil from it, we might well have to accept that there is a Neptune which is producing these gravitational effects. Another Dworkinian example:

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. . . . 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.<sup>7</sup>

Clearly we would want to start by rescuing the prisoners according to some principle. Perhaps we would want the weak and infirm first, or the children, or the healthiest adults. But say the regime that is holding them prisoner resists all principled proposals and insists that if we want to rescue anyone, we agree to a scheme whereby every prisoner will roll two dice and we will be able to take away everyone who rolls a seven or an eleven. Accepting this checkerboard solution may not have any effects within our polity, such as providing legitimation for future checkerboard solutions. Alternatively, the imperative of rescuing as many people as we can outweighs any such justice-based reasons for rejecting the checkerboard solution. Would we go along with the scheme? Absolutely we would. This suggests that there is no non-justice-based reason for accepting integrity as a value.

Dworkin, however, is equally likely to take a different tact. Dworkin need not argue that law as integrity provides the only “fit” or the more sociologically accurate “fit” for these intuitions and instincts about compromises and continuity. Instead he may argue that law as integrity provides a morally more attractive justification of these intuitions and instincts than this variety of justice-pragmatism. How does this argument go? Dworkin himself

7. *LE* at 181. I deliberately omitted the sentence: “Rejecting a checkerboard solution seems perverse in the same way when the alternative will be the general triumph of the principle we oppose.” I believe this is dealt with by the previous argument. There may be a deeper justice-based reason for rejecting checkerboards, and so the rejection is not perverse.

spends barely a page setting out the “moral and expressive” consequences of integrity.<sup>8</sup> It is at this point that Burke may begin to prove useful.

Here is Burke reflecting upon the plight of the queen during the Revolution in France:

I thought ten thousand swords must have leaped from their scabbards to avenge even a look that threatened her with insult. —But the age of chivalry is gone. —That of sophisters, oeconomists, and calculators, has succeeded; and the glory of Europe is extinguished for ever. Never, never more, shall we behold that generous loyalty to rank and sex, that proud submission, that dignified obedience, that subordination of the heart, which kept alive, even in servitude itself, the spirit of an exalted freedom. The unbought grace of life, the cheap defence of nations, the nurse of manly sentiment and heroic enterprize is gone! It is gone, that sensibility of principle, that chastity of honour, which felt a stain like a wound, which inspired courage whilst it mitigated ferocity, which ennobled whatever it touched, and under which vice itself lost half its evil, by losing all its grossness.<sup>9</sup>

Of course—the postmodern reader of Burke declares with a flourish—it would be a shame to interpret Burke here as referring too directly to the queen herself or to the personage of a monarch. The queen is the personification of the political community. And Dworkin too is seeking to personify the political community. Law as integrity is the device by which this personification is to be achieved. As Dworkin explains, if:

we insist on treating internally compromised statutes as the acts of a single distinct moral agent, then we can condemn them as unprincipled, and we then have a reason for arguing that no official should contribute to his state’s unprincipled acts. In order to defend the legislative principle of integrity, therefore, we must defend the general style of argument that takes the community itself as a moral agent.<sup>10</sup>

Just as Burke fears the sophisters, who through calculating and hence failing correctly to appreciate the value of loyalty have extinguished the glory of Europe for ever, Dworkin fears the pragmatist, who looks at law in instrumental terms and in doing so cuts off the route to the glory of law as integrity.

For the defence of law as integrity, Dworkin marshals, ironically enough, a political ideal from French revolutionary rhetoric: “we should look for our defense of integrity in the neighbourhood of fraternity or, to use its more fashionable name, community.”<sup>11</sup> Burke complains of the Revolution,

8. *LE* at 189–190.

9. E. Burke, *REFLECTIONS ON THE REVOLUTION IN FRANCE 170* (1986) (hereinafter “*RRF*”).

10. *LE* at 187.

11. *LE* at 188. In a gracious footnote to the term “fraternity,” Dworkin adds: “The word is unfortunate because it is etymologically masculine. I mean sorority as well, or the idea common to these latinate terms.”

however, that it seemed to have forgotten its own ideal of fraternity. Hence the two do not necessarily diverge upon their approbation or disapprobation of the Revolution in France. Indeed, Dworkin would find succor in Burke's insistent indictments of the sophisters and economists.

On the scheme of this barbarous philosophy, which is the offspring of cold hearts and muddy understandings, and which is void of solid wisdom, as it is destitute of all taste and elegance, laws are to be supported only by their own terrors, and by the concern, which each individual may find in them, from his own private speculations, or can spare to them from his own private interests. In the groves of *their* academy, at the end of every vista, you see nothing but the gallows. Nothing is left which engages the affections on the part of the commonwealth. On the principles of this mechanic philosophy, our institutions can never be embodied, if I may use the expression, in persons; so as to create in us love, veneration, admiration, or attachment. But that sort of reason which banishes the affections is incapable of filling their place. These public affections, combined with manners, are required sometimes as supplements, sometimes as correctives, always as aids to law.<sup>12</sup>

Dworkin does make practical arguments for law as integrity.<sup>13</sup> He contends for instance that this conception provides protection against favoritism and vindictiveness. Certainly, if integrity is to be cast aside and checkerboard statutes are to be permitted, this is an active concern. Similarly, Dworkin argues that integrity contributes to the efficiency of law. If citizens come to understand that the legal system includes not only the rules from explicit political decisions but also the principles that underlie those decisions, citizens will be able to work out the demands of the law in novel situations, and the need for legislation and adjudication will be reduced. This benefit is very much incumbent on there being, in the novel situations, general agreement amongst the citizens as to what is the best interpretation of the currently existing laws. The deeper problem, though, with these practical arguments is that they are equally available to the justice-based position. Indeed they seem to strengthen the case for saying that law as integrity is not the only defence for the ideal of integrity, but that the justice-pragmatist has good reasons for accepting integrity as an ideal too.

The burden of the argument for law as integrity hence certainly falls on the fraternal and expressive consequences of adopting the conception of law as integrity and disadopting the pragmatist's conception. As Burke explains in the passage quoted above, the pragmatic perspective has no room for feelings of "veneration, admiration or attachment." Why are these feelings important? One accusation is that the calculator is left only with the gallows at the end of every vista. The law comes to be supported solely by its terrors. That seems somewhat harsh though. Even the extreme pragmatist

12. *RRF* at 172; emphasis in original.

13. *LE* at 188.

may emerge from her game-theoretical grids, her prisoners' dilemmas and coordination problems, with some feelings of veneration or attachment. The trouble is that these feelings may be altogether too reasonable. There does seem to be some form of loss in the move from "I love her" to "I love her because . . ."; just that conjunction between the realm of desire and the realm of reason. As soon as the connection is made, there seems no way to stop the former from becoming responsive to the latter. Hence perhaps there is some expressive loss when the citizen and the political community are cut apart and the dictates of reason are offered instead as the ties. Although they might still bind, perhaps they are more slender, more fragile.

For Burke, the connection is of the moral imagination. We have a natural interest in great things. We begin with "our naked shivering nature," an almost pathetic presence. We have to imbue it with some sort of glory, "raise it to dignity in our own estimation"<sup>14</sup>; it must be given a garb, else we will not be able to face it.

Grand, swelling sentiments of liberty, I am sure I do not despise. They warm the heart; they enlarge and liberalise our minds; they animate our courage in a time of conflict.<sup>15</sup>

The trouble with pragmatist understandings is that they return to our own interests, and our own interests—our own naked shivering nature—are exactly what we are trying to obscure. Integrity should not be understood then as the best means for the realization of a set of utilitarian interests. Integrity represents the fulfillment of a moral vision. Integrity disciplines the community towards an internal coherence. If there were no internal coherence, the notion of the personification of the community and the notion that this moral agent is pursuing a moral vision would be impossible to establish. And if we do not think of community as a moral agent pursuing a moral vision, its grip over our hearts and minds will soon loosen.

The errors and defects of old establishments are visible and palpable. It calls for little ability to point them out; and where absolute power is given, it requires but a word wholly to abolish the vice and the establishment together.<sup>16</sup>

The play of political and legal argument, it seems, must brim over with forgetfulness. We have to interpret away the defects. Almost without acknowledging them, we have to remove them. We have to slip in under "all the pleasing illusions"<sup>17</sup>—but slowly, carefully, lest they flare up in our own minds.

14. *RRF* at 171.

15. *RRF* at 373.

16. *RRF* at 280.

17. *RRF* at 171.

It is one of the excellencies of a method in which time is amongst the assistants, that its operation is slow, and in some cases almost imperceptible.<sup>18</sup>

As Burke explains to the young addressee of the *Reflections*, “You began ill, because you began by despising everything that belonged to you.” The thought is not only that casting off “the decent drapery of life”<sup>19</sup> threatens the hold of the imagination; there is the deeper notion that without the things that belong to you, there will be nothing left to think with. There is no abstract reason or human nature as such. Or if there is, it responds only to the gallows. Without the drapery, everything will seem fine. Because anything, any sort of cover will be welcome. Everything will seem commendable:

No difficulties occur in what has never been tried. Criticism is almost baffled in discovering the defects of what has not existed; and eager enthusiasm, and cheating hope, have all the wide field of imagination in which they may expiate with little or no opposition.<sup>20</sup>

The danger is that we will adopt schemes that will turn out to be monstrous and our own histories and moral sensibilities will soon find them repulsive. Burke certainly wants to resist the noble dream which insists that everything can be made anew.<sup>21</sup> Burke contends that the correct, the politic, the sagacious means to proceed is to offer the best interpretation of the past and project it into the future. This may seem a little perplexing. At first, the idea is that we need to establish a certain primacy for the personified political community. But if we then also stipulate that this political community has to be constantly bettered, are we not then shifting our allegiance from the political community itself to the ideal, the system of reason by which we wish to offer better and better interpretations of the community? Burke contends that the correct, the politic, the sagacious means to proceed is to offer the best interpretation of the past and project it into the future. This may seem a little perplexing. At first, the idea is that we need to establish a certain primacy for the personified political community. But if we then also stipulate that this political community has to be constantly bettered, are we not then shifting our allegiance from the political community itself to the ideal, the system of reason by which we wish to offer better and better interpretations of the community?

On the other hand, say I have a friend and I love this friend but I am concerned about the extent of his generosity. He sometimes gives money to beggars. He never sends money to aid appeals though. He never volunteers

18. *RRF* at 280.

19. *RRF* at 171.

20. *RRF* at 280.

21. Cf. D. Bromwich, *Burke, Wordsworth and the Defense of History*, in *A CHOICE OF INHERITANCE: SELF AND COMMUNITY FROM EDMUND BURKE TO ROBERT FROST* (1989); B.J. SMITH, *POLITICS AND REMEMBRANCE: REPUBLICAN THEMES IN MACHIAVELLI, BURKE, AND TOCQUEVILLE* (1985).



to buy lunch. In subtle ways, I press him to expand his spirit of generosity. If he does become a more generous person, I may well love him more. If he does not become a more generous person though, it need not be the case that I will love him less. Perhaps the key is that the criticism or idealism be articulated in terms of ideals that are internal, that is, already a part of the moral outlook of the person or the structure of the social practice. It is only if external ideals are invoked that the feelings of veneration and attachment are threatened. Burke clarifies this:

At once to preserve and to reform is quite another thing. When the useful parts of an old establishment are kept, and what is superadded is to be fitted to what is retained, a vigorous mind, steady persevering attention, various powers of comparison and combination, and the resources of an understanding fruitful in expedients are to be exercised. . . . Where the great interests of mankind are concerned through a long succession of generations, that succession ought to be admitted into some share in the councils which are so deeply to affect them. If justice requires this, the work itself requires the aid of more minds than one age can furnish. It is from this view of things that the best legislators have been often satisfied with the establishment of some sure, solid, and ruling principle in government; a power like that which some of the philosophers have called a plastic nature; and having fixed the principle, they have left it afterwards to its own operation.<sup>22</sup>

Burke can be forced then to illustrate the existential and moral backdrop not only of Dworkin's conception of law as integrity but of his methodology for arriving at law as integrity. The best interpretation of social practices is the interpretation that ought to be given. The best interpretation must be given because only those objects that are morally attractive and that are capable of having their moral attractiveness enhanced can captivate our minds and actions. The best interpretation of our intuitions and instincts about integrity is the conception of law as integrity. It may be possible to fit a justice-based interpretation of integrity onto our understandings, but as only law as integrity can provide for the crucial element of personification, law as integrity is the best interpretation. One of the main aims of the remainder of this essay is to establish that a justice-based understanding can also provide for personification. Community hence provides us with no argument to go against justice.

### III. THE CIRCUMSTANCES OF COMMUNITY

Dworkin's notion of community has not yet been fully explicated. Integrity may be sufficient for the personification of the political community and that personification may create an opportunity for feelings of veneration

22. *RRF* at 280–282.

and attachment, but those feelings fill out and the political community sustains fraternal obligations, according to Dworkin, only if a further four conditions are met.

The citizens must regard the obligations which exist within the group as *special*, as distinctive to the group. They must experience the obligations as *personal*, as linking each member to each other member, not as linking each member merely to the center. The responsibilities must be seen not in an individuated way but as flowing from a more general responsibility each member has of *concern* for the well-being of the others. The members must also believe that the group's practices embody an *equal concern* for all the members of the group. Community is hence, in Dworkin's phrase, "conceptually egalitarian." It need not be structurally egalitarian, it may even be hierarchical, but the hierarchy must be built on the essential assumption which is that the "roles and rules are equally in the interests of all, that no one's life is more important than anyone else's."<sup>23</sup>

It is important to realize that these conditions do go beyond the requirements of integrity. Integrity merely demands for instance that there not be unprincipled distinctions between persons. It may be possible to explain in a principled way why one person's life is more important than another's. For instance, it may be possible to explain in a principled way why the king's life is more important than the peasant's or why the artist's life is more important than the mechanic's. Or in either case, vice versa. The fourth condition of *equal concern*, however, stipulates that any community in which such explanations are current is merely a "bare" community and not a "true" community. Similarly, a community based on universalist or humanist principles would fail the very first condition despite possessing oodles of integrity. The members would not regard their obligations to each other as *special*; they would hold that they have the same obligations to everyone else.

This game of giving counterexamples can be extended in the other direction too. A community could fulfill all four conditions but not embody the ideal of integrity. The condition such a community would have trouble with would be the fourth condition. Could this community manifest *equal concern*? Say this community is considering its position on abortion rights. It decides to adopt a checkerboard solution whereby women born before 1963 do not have abortion rights and women born after 1963, the year sexual intercourse began, do have abortion rights, and yet it decides to adopt this solution exactly because women born before 1963 do not want abortion rights and women born after 1963 do. The rules are then equally in the interests of all, are they not?

Notwithstanding the equivocal nature of the above discussion, the four additional conditions for community do seem something akin to a theory of justice. They are at the very least further conditions, beyond the condition

23. *LE* at 199–200.

of integrity. And yet integrity and the whole project of personification, as we saw from Burke, eschew the idea of external ideals. The practice can be interpreted in the light of internal ideals, ideals, that is, that “fit” the practice. That adds to the feelings of veneration and attachment. The introduction and use of external ideals may, however, threaten the connection. To return to my tightfisted friend. Suppose he has no spirit of generosity whatsoever and I consider generosity to be a very important quality indeed. It may then be that I would never become friends with this person. If, however, circumstances throw us together and a bond develops, his lack of generosity will continue to be a problem for me. It will continue to destabilize my feelings of veneration or attachment. If I begin to press him about developing a spirit of generosity and he is amenable, my love for him will increase. If he is resistant, my love for him will begin to diminish. What is more, all else being equal, I will prefer those of my friends who do have a grander spirit of generosity and I may have less and less time for this friend and may be less and less inclined to put myself out on his behalf.

The perception that Dworkin may also be relying on a theory of justice is furthered when you encounter, well, his theory of justice. Dworkin is interested, quite explicitly and at quite some length, in a liberal theory of justice premised on the ideal of equal resources. As he explains:

Can we turn our backs on equality? No government is legitimate that does not show equal concern for the fate of all those citizens over whom it claims dominion and from whom it claims allegiance. Equal concern is the sovereign virtue of political community—without it government is only tyranny—and when a nation’s wealth is very unequally distributed, as the wealth of even very prosperous countries now is, then its equal concern is suspect. . . . This book argues that equal concern requires that government aim at a form of material equality that I have called equality of resources, though other names might be equally appropriate.<sup>24</sup>

One possible means of reconciling this apparent invocation of an external ideal and the personification project is already hinted at in this passage. Equality of resources is a version of equal concern. And note how Dworkin states that “equal concern is the sovereign virtue of political community.” It is not a virtue of some political communities. It is the sovereign virtue. And it is the sovereign virtue of political community per se. It may be that equal concern and so equal resources are actually internal ideals, that they are simply part of the concept of political community. Before we get to that argument though, or even to the other alternatives for reconciling Dworkinian community and Dworkinian justice, there is one more discussion of community

24. R. Dworkin, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 1–3 (2000) (hereinafter “SV”).

to take account of.

Citizens identify with their political community when they recognize that the community has a communal life, and that the success or failure of their own lives is ethically dependent on the success or failure of that communal life.<sup>25</sup>

This idea, that there is a relationship between the collective good and individual well-being and that community consists in the mutual dependence and mutual reconciliation of the two, constitutes Dworkin's concept of community. The notion of personification is apparent in the first prong of the quotation given above. The second prong expresses the ideal of attachment. The particular conception of community that Dworkin wants to pursue is labeled "liberal community." Different conceptions differ as to how they define the nature and extent of the communal life. According to liberal community, the communal life consists of no more and no less than the official political acts of the political community.<sup>26</sup> In one way, this is a somewhat underwhelming conception. The invocation of community does not expand the scope of the citizen's obligations. The invocation of community does not expand the scope of collective concern. Questions as to what official political acts are appropriate, questions as to what the limits on the scope of official political acts should be, remain the same questions of justice, fairness, and due process, with the invocation of community as without.<sup>27</sup> What significance, then, has the notion of integration, that is, the existence of community? As Dworkin explains:

A community of people who accept integration in this sense will always have one important advantage over communities whose citizens deny integration. An integrated citizen accepts that the value of his own life depends on the success of his community in treating everyone with equal concern. Suppose this sense is public and transparent: everyone understands that everyone else shares that attitude. Then the community will have an important source of stability and legitimacy even though its members disagree greatly about what justice is. They will share an understanding that politics is a joint venture in a particularly strong sense: that everyone, of every conviction and economic level, has a personal stake—a strong personal stake for someone with a lively sense of his critical interests—in justice not only for himself but for everyone else as well. That understanding provides a powerful bond underlying even the most heated argument over particular policies and principles.<sup>28</sup>

25. SVat 231.

26. The case for this shared responsibility for political decisions is made at greater length in R. Dworkin, *The Partnership Conception of Democracy* 86 CALIFORNIA LAW REVIEW 453 (1998).

27. For complaints that Dworkin's notion of communal life is too thin or question-begging, see respectively, P. Selznick, *Dworkin's Unfinished Task* 77 CALIFORNIA LAW REVIEW 505 (1989); and B. Williams, *Dworkin on Community and Critical Interests* 77 CALIFORNIA LAW REVIEW 515 (1989).

28. SVat 233.

The intensity of the engagement could, however, have as much of a centrifugal effect rather than the centripetal effect described by Dworkin. If the community begins to be tugged towards a conception of justice that is different from the one that I hold, this not only affects me as a political loss but diminishes my critical well-being, for I experience it as a failure of the communal life. On Dworkin's description, my incentives for having my conception of justice embedded in the law are in fact doubled. This may mean that I am more vituperative and more rigid in arguments over policies and principles. When I lose out, my allegiance to the political community is doubly threatened. I may form a desire to deintegrate myself from the political community and instead seek integration in some other community, a community in which the success of my conception of justice is assured.

This essay is interested in the interaction between community and justice. We will now ask whether the demands of community and justice ever conflict. Two strategies are suggested below for modeling the relationship between them. Dworkin also asserts that when the law is able to ground a notion of community, many benefits are gained. One issue mentioned earlier was the relationship of authority to autonomy. Certainly Dworkin believes that one of the benefits gained through invocation of the idea of community is the reconciliation of the two. This reconciliation was explained earlier in terms of personification and attachment. It is the argument of this essay that justice can account for this reconciliation equally well. Indeed, this essay will argue that the benefits of personification as well as the other supposed benefits of community can all be secured through using justice in the place of integrity. The ideal of integrity in its two manifestations, legislative and adjudicative, is the means by which Dworkin believes personification is made possible. I have already briefly argued that the features of the legislative ideal can be accounted for in terms of justice-based reasons. Under the heading of Strategy 3, I will argue either that the ideal of integrity does not have the features and benefits that Dworkin attributes to it or that the features and benefits of the ideal as a whole can be accounted for in terms of justice-based reasons.

**Strategy 1: Individual well-being and the collective good can only be reconciled through the liberal theory of justice premised on equal resources**

This is certainly the most ambitious or most single-minded of the available strategies. If it can be made to work, the consequence is that there can never be a conflict between community and the liberal theory of justice. Community, in the sense Dworkin stipulates, that is, the reconciliation of individual well-being and the collective good, is achieved only if the liberal theory of justice is satisfied. There is some textual evidence which suggests that this is the exit Dworkin has planned for himself. In one discussion, he explains that there seems to be a contradiction between two ethical ideals most of us embrace. On the one hand, we believe that we have special responsibilities

towards ourselves, our family and friends, plus perhaps neighbors and colleagues. On the other hand, in political matters, we work and vote for policies and programs that treat every citizen as equal:

A competent overall ethics must reconcile these two ideals. They can be reconciled adequately, however, only when politics actually succeeds in distributing resources in the way justice requires. If a just distribution has been secured, then the resources people control are morally as well as legally theirs; using them as they wish, and as special attachments and projects require, in no way derogates from their recognizing that all citizens are entitled to a just share. But when injustice is substantial, people who are drawn to both ideals—of personal projects and attachments on the one hand and equality of political concern on the other—are placed in a kind of ethical dilemma. They must compromise one of the ideals, and each direction of compromise impairs the critical success of their lives.<sup>29</sup>

The premises of this may be disputed. Do many of us not adhere to an opposite ethical ideal which urges that we proffer a certain primacy to the interests of our (another Burkean phrase) “subordinate partialities,” even in political matters? This question intrudes on a later discussion. For now, let us leave Dworkin’s premises undisturbed. The argument is a simple one. If the theory of justice is not substantiated, critical well-being is impaired. This is either because I do not have sufficient resources to fulfill my special responsibilities or else I have sufficient resources, but others do not have their just share. This argument does not, however, establish the case for equal resources of itself. If I hold a different theory of justice to be true, my critical well-being will not be impaired by what others may diagnose as widespread injustice in terms of equal resources. I may believe that I deserve more resources than my neighbor and that the collective good is more likely to be realized if the distribution of resources takes account of such differences in desert. I hence believe that I am entitled to these resources both legally and morally. I may use them as I wish. I may use them to fulfill my special responsibilities, and this will in no way derogate from my recognizing that all citizens are entitled to a just share. I will be faced only with the compromise between the two ideals, and my well-being will be impaired only if there is manifest injustice in terms of my conception of desert. If other citizens do not have their just shares in terms of justice as desert, then I may have to expend some of my own resources in bringing about a more just distribution. But there is no need to quibble with this extension. It proves simply that an alternative conception of justice can fit Dworkin’s schema equally well.

Alternatively, or in addition, I may believe that I am entitled to inherit from my grandfather, who was an aristocrat, and to retain my grandfather’s resources so long as those resources were obtained without force or fraud

29. *SV* at 236.

and the amount is not so obscene as to violate the Lockean proviso.<sup>30</sup> I may moreover believe that society will go better as a whole, there will be more incentives to produce, more social and economic stability, true freedom, if such historical differences are on the whole allowed to count regardless of what view the theory of equal resources takes on this. Again, as long as everyone else has their just Nozickian shares, I will feel fully entitled to my resources, morally and legally. I will feel free to use them in order to fulfill my special responsibilities, and this will not conflict with my other ethical ideal that all citizens are entitled to a just share.

Dworkin has to make one of two arguments to salvage Strategy 1. He could argue that the theory of equal resources is in some sense the most efficient theory of justice and that a society which manifests this theory will be the only kind of society in which it is even possible for the two ethical ideals to be brought into harmony—basically, that this will be the only kind of society in which everyone will have sufficient resources to fulfill all their special responsibilities. That seems a very difficult sort of argument to make, if for no other reason than because the range and scope of these responsibilities will presumably vary from one society to another. They will vary because views as to the significance of affinity will vary. They will vary because understandings of consanguinity will vary. It is probable that in order to get this argument started, Dworkin will first have to provide an objective list of special responsibilities. Dworkin offers no hints that he is intending to embark on this project. And it is difficult to imagine any such project being successful.

The other argument Dworkin could make to salvage this strategy would center on the claim that if I do not adopt the theory of equal resources, although I may appear to achieve critical well-being, I in fact get it wrong. Dworkin does not, though, seem overly interested in this argument either. He writes, for instance:

Someone lives well when he responds appropriately to his circumstances. The ethical question is not how human beings should live, but how someone in my position should live. A great deal turns, therefore, on how my position is to be defined, and it seems compelling that justice should figure in the description.<sup>31</sup>

There seems to be some relativization of the notion of justice in this passage. Part of the detail of the position I am in is “justice.” Dworkin does not appear to be insisting that in answering the ethical question, we must assume the theory of justice premised on equal resources. More relevant to the position I am in is the theory of justice prevalent in my culture, the theory of justice that provides the best interpretation of the legal system.

30. The allusion is to Robert Nozick's theory of justice, cf. *Anarchy, State, Utopia* (1978).

31. *SV* at 235.

In the most substantive discussion of an actual conflict between community and justice to be found in Dworkin's work, though the relativization is absent, Dworkin suggests his disinterest in this second argument in a different way. Dworkin writes of a culture in which parents have the power to choose spouses for their daughters but not for their sons.<sup>32</sup> He contends that we first have to make a set of interpretive findings as to whether the community meets the four conditions that mark the difference between a bare and a true community. The snag is going to be *equal concern*. Does the culture in good faith maintain that the parental power is in the daughters' interest? Before answering this question, though, Dworkin quite plainly states that we are disposed to regard this paternalism as unjust. He does not even attempt to argue for instance that the daughters in this culture have other resources, in the form of say opportunities, available to them which sons do not have and these compensate for the inequality of opportunity to choose one's own marital partner. Dworkin does not urge that there is equality of resources here. And that presumably is the theory of justice he is using in saying that the practice is unjust. There is, then, a direct conflict between community and justice as equal resources, and yet Dworkin says that as long as the community meets the condition of equal concern, community prevails. There is an obligation on the daughter to obey her father. There is here a reconciliation between individual well-being and the collective good, and it is not in terms of equal resources.

Returning to the question between community and equal concern, Dworkin suggests that the community may well be manifesting equal concern even here, and so the authority of the community stands. Community creates obligations only when it satisfies equal concern. And equal concern, recall, is the requirement that the community act in the interests of all.

It is much more plausible, then, to conclude that community is possible, that is, individual well-being and the collective good can be reconciled, only if equal concern is satisfied. Equal concern is the necessary quality, not equal resources. Equal concern, moreover, seems much more likely to be capable of being made consistent with alternative conceptions of justice based on desert or history.<sup>33</sup> Even if Dworkin wishes to permit some relativization of the theory of justice, even if he wishes to concede that individual well-being and the collective good can be reconciled through theories of justice that are not premised on equal resources, he can continue to maintain that equal concern is nevertheless a condition. However, it also appears that this involves conceding that there will be conflicts between community and the theory of justice as equal resources and that community will succeed in many of these conflicts.

32. *LE* at 204–205.

33. Though as suggested above, the four conditions for being a “true” community may not be met by certain other communities which do strike us as communities nevertheless. A community manifesting universalist principles was one example. A community in which artists are considered more important than mechanics may be another.



It may be that Dworkin's theory of justice will have to be understood in some different way. The role of equal concern also remains to be clarified. Is it a theory of justice in itself? Yet Dworkin just stated that a community manifesting equal concern was nevertheless unjust. Perhaps equal concern is a theory of justice in an inchoate form, a theory of justice that other more sophisticated theories incorporate and extend?

**Strategy 2: Equal resources are simply the best interpretation of equal concern. By definition, a true community always manifests equal concern. Hence community is always premised on justice.**

As Dworkin explains:

*Equal concern* requires that government aim at a form of material equality that I have called equality of resources, though other names might be equally appropriate.<sup>34</sup>

He also writes:

The responsibilities a true community deploys are special and individualized and display a pervasive mutual concern that fits a plausible conception of equal concern.<sup>35</sup>

Equal concern marks the difference between bare communities and true communities. A community has normative authority only when it manifests equal concern. Equal concern has this critical function because equal concern expresses the concept of justice. Even equal resources, which Dworkin regards as the ideal theory of justice, are stated to be required by equal concern. Equal concern, it would appear, is the *concept* of justice, and then there are perhaps innumerable possible and plausible *conceptions* of equal concern. Equal concern after all requires only that roles and rules are in the interests of all and that no one's life is considered more important than anyone else's. A Nozickian can be just as comfortable with this notion as a Rawlsian. Both Jewish and Islamic jurisprudence might be said to embody this concept of justice. Dworkin's position may be that, indeed, all these conceptions of justice are conceptions of equal concern, but the best conception of equal concern is the theory of justice premised on equal resources.

The beauty of this argument is that it means that equal resources are always an internal ideal. Every political community that counts as a true community, and those are the ones that we are interested in, manifests equal concern. And equal resources are the best conception of equal concern.

The fact that it is always possible to make an argument toward the ideal theory of justice does not, however, mean that this argument always has to

34. *SV* at 3; emphasis added.

35. *LE* at 201.

succeed. The tension between the *concepts* of community and justice may be resolved on this view, but practical conflicts may well continue. To take again Dworkin's example of the community in which parents have the right to choose spouses for their daughters but not for their sons, Dworkin dubbed that rule unjust. The rule does not satisfy equal resources. The rule does nevertheless have authority. It does create some sort of obligation. And this is because the community manifests equal concern, and the rule is integral in defining rights and roles in the community. It is not only, then, the best conception of equal concern that counts. Conceptions of equal concern along the line toward the best conception can count too.

Why is there this movement towards the best conception? Why does a community not just stop once it has a conception of equal concern and its citizens are satisfied with this conception? Perhaps this is because, as Burke argues, we need something sublime and beautiful to animate our souls. Hence we always yearn for the next best conception of equal concern. Dworkin writes of: "law's ambitions for itself, the purer form of law within and beyond the law we have."<sup>36</sup> We are never, then, profoundly satisfied with the current conception of justice. We ache for a purer conception. We try to elucidate this purer conception ourselves. Furthermore, our feelings of veneration and attachment towards the political community are sustained only if the political community continues to move up through the conceptions of equal concern.

If this is true, however—if this interpretation of Dworkin holds—it is puzzling why Dworkin insists that community can contravene justice and still possess authority. He clearly states in the dutiful daughter example that the practices of the community are unjust. That is, though they manifest a conception of equal concern, they are condemned in light of a better conception of justice. Why, then, does he nevertheless claim that they may possess authority and create obligation? Why does the next best conception of equal concern not always have normative priority over the current conception of equal concern? This is effectively the dispute between community and justice revisited. This is the form in which the dispute appears when it is translated into Dworkinian terms. The stage is now set to consider whether community ever gives us a reason for preferring integrity, that is, for preferring the current conception of equal concern over the next best conception of equal concern. I will argue that some of the reasons that Dworkin gives for preferring integrity-community to justice are unsound. I will also, however, concede that there are some sound reasons for preferring the current conception of equal concern. The problem for Dworkin is that all of these reasons can be explained in justice-based terms.

**Strategy 3: There are good reasons to prefer integrity over justice, that is, there are good reasons to prefer the current conception of equal concern over the next best conception of equal concern.**

36. *LE* at 407.

Why might we think that integrity is a value? Why pursue continuity with the past and the practices of the community when that past and those practices fail to manifest the best conception of justice available?

#### A. The Practical Reasons

There may be a number of practical reasons. Hence on account of the value of certainty, predictability, and the protection of settled expectations, it may be better to exhibit continuity with the past rather than disjuncture. Law as integrity makes room for these considerations in its two-pronged test for how interpretation of the law should proceed. The test consists of “fit” and “justification.” Thus there is the objective of making the practices appear the best they can be made to appear, but it is very much the current practices that have to be interpreted. The interpretation offered must pass a certain threshold of “fit.” Is it the case, however, on the justice-based account, that if the current practices do not at all manifest the next best conception of justice, the current practices can just be abandoned? All that matters is “justification.” “Fit” is immaterial.

I do not imagine, though, that a justice-based account of law will find much difficulty in incorporating these practical interests, that is, in accepting a level of conventionalism. Expectations and courses of conduct based on poor conceptions of justice may not deserve respect. But even law as integrity countenances that. Some fit may be compromised in order to achieve better justification. However, expectations and courses of conduct based on the previous best conception of justice may well deserve some respect. There would be, for instance, far less incentive to build up a course of conduct based on the best conception of justice if it were known that every time there was adjudication on a pertinent issue, the course of conduct was going to be unsettled by an attempt to reach the next best conception of justice. If that is going to happen, I may as well adopt courses of conduct that manifest the best conception of my self-interest. There is, then, a clear justice-based reason for sometimes preferring integrity.

Similarly, it may be argued that part of what citizens expect from their legal system is indeed these practical benefits of certainty and predictability. If the legal system fails to deliver these benefits, feelings of attachment will suffer. If the legal system wishes to achieve the next best conception of justice, there is no point unless it takes its citizens along with it. The justice-based account hence should recognize another practical reason for sometimes preferring continuity, that is, integrity.

#### B. The Moral-Expressive Reasons

The following passage is taken from a discussion in which Dworkin is trying to set out the moral-expressive case for accepting law as integrity:

Integrity expands and deepens the role individual citizens can play in developing the public standards of their community because it requires them to

treat relations among themselves as characteristically, not just spasmodically, governed by these standards. If people understood formal legislation as only a matter of negotiated solutions to discrete problems, with no underlying commitment to any more fundamental conception of justice, they would draw a sharp distinction between two kinds of encounters with fellow citizens: those that fall within and those that fall outside the scope of some past political decision. Integrity, in contrast, insists that each citizen must accept demands made on him, and may make demands on others, that share and extend the moral dimension of any explicit political decisions. Integrity therefore fuses citizens' moral and political lives: it asks the good citizen, deciding how to treat his neighbour when their interests conflict, to interpret the common scheme of justice to which they are both committed just in virtue of citizenship.<sup>37</sup>

This passage does not set up all that sharp a contrast between law as integrity and a justice-based account. On the justice-based account too, citizens will be required "to treat relations among themselves as characteristically, not just spasmodically, governed by [public] standards." That moral-expressive feature remains. Perhaps more can be made of the argument on gap-filling. I will use this argument as a base upon which to discuss both the Dworkinian and the Burkean moral-expressive reasons for integrity. I use the "gap" idea because Dworkin brings it up. I suspect the same points could be made regarding what Dworkin wants to call "hard" cases. Again it would be preferable to use justice rather than integrity-community. It would be preferable because the moral-expressive case for integrity, as I am about to argue, fails and because in this vacuum, quite straightforwardly, justice should be preferred because it is justice. Similarly, the same points could be made in all the cases where the justice-based reasons for following conventions were outweighed.

A citizen who disregarded integrity would presumably fill the gaps between explicit political decisions (deal with hard cases/deal with cases where the justice-based reasons for following conventions are outweighed) with reference to the theory of justice or self-interest. The temptation to refer to self-interest and the argument against referring to self-interest are consistent between both the argument from integrity and the argument from justice. So to establish the primacy of integrity, Dworkin has to argue that it is better for the individual citizen to display integrity and so refer to the common scheme of justice, which is less good, rather than refer to the next best conception of justice.

In our immediate context, the argument is mistaken. Because the political life is premised on a not-as-good theory of justice, it might be a bad thing if the citizen's moral life was to become more like it. In order to establish the claim that Dworkin needs to establish, the argument has to be that there is enough of an increase in the collective good from each individual citizen utilizing the common scheme of justice in her moral and political

37. *LE* at 190.

lives so that it outweighs the loss that the individual suffers in not acting on the better scheme of justice in at least her moral life, that is, in the gaps between explicit political decisions.

What if, though, the theory of justice premised on equal resources or a theory that was more like it than the theory embodied in the law was the resource for gap-filling. In addition, it was understood that citizens would refer to this theory in the gaps and not the law's theory. In this case, there may be no loss to the collective good in justice being favored over integrity. There need be no damage to effective coordination or to the protection of expectations. The argument from integrity in this regard seems to have a self-fulfilling quality. If integrity is accepted as a value and as a norm in a particular community, of course coordination and expectations will be better protected if there is the fusion that Dworkin adverts to. However, if the theory of justice is to be used and it is generally known that fellow citizens will fill the gaps by reference to the theory of justice, clearly coordination and expectations will not be better protected through integrity, they will be better protected through use of the theory of justice. Certainly, individuals will do better in their moral lives if they follow the better conception of justice.

This argument can be reproduced to a discussion of judging. If it is well known that the judiciary utilizes the theory of justice in its decision-making in gap cases (hard cases/cases where the justice-based reasons for following conventions were outweighed) and not the ideal of integrity, again, coordination and the protection of expectations need not be affected. It is only if it is well known that the judges utilize integrity that there is likely to be that sort of damage from their utilizing the theory of justice instead.

As we remarked earlier, Dworkin does not have much to say about the moral-expressive case for integrity. The Burkean thought, though, was that the political community must be venerated and that it must be interpreted rather than overhauled. The danger of the justice-based account may be that we will lose the feelings of veneration and attachment. And we need these feelings because without them we are spiritually and morally adrift. But not only this, for without these feelings, we are also without an important means for reconciling authority and autonomy. The danger exists, it may be argued, because the next best conception of justice is an external ideal and this threatens the notion of personification, the basis for the feelings of veneration and attachment.

What of the personification project? The central idea of the personification project is that it must be possible to see the political community as a moral agent. This central idea is, however, undisturbed by the justice-based account. The political community can still be understood as a moral agent pursuing the moral vision inherent in the next best conception of justice. It was argued that the ideal of integrity was closely related to the personification project. But what we are trying to do here is understand integrity in a different way. We are reducing the scope of integrity and giving a

justice-based account of what is left. Integrity is going to be derogated from but it is going to be derogated from for reasons of justice. Hence the political community can still be understood in terms of a single moral vision: the pursuit of justice.

We are, though, quite directly invoking this notion of the pursuit of justice. And the conception of justice that we are pursuing is the next best conception of justice. This is not a conception of justice that fits the current practices of the political community. Does this invocation of an external ideal destroy the feelings of veneration and attachment that I need to have?

The explicit political decisions embody one theory of justice. I believe that theory of justice to be incorrect. We are assuming, though, that the political community expects at least the gaps between the explicit political decisions to be filled by reference to the best conception of justice. I am then using an external ideal but I am using it on the terms that the political community permits me to use it. Moreover, all conceptions of justice are conceptions of equal concern. There is this internal relation between them. In some sense, the next best conception of equal concern, though it is not embodied in the practices of the political community, is not an external ideal. The community already manifests equal concern. And here is simply a better conception of that equal concern. There is a disanalogy between this case and the case of my friend who did not manifest an ideal of generosity. In that case, generosity was an external ideal. In this case, justice is not an external ideal. All theories of justice are conceptions of equal concern, and because equal concern is the essential precondition of a true community, justice vis-à-vis community is always an internal ideal.

There is perhaps an additional movement in this argument. I hold a theory of justice that is not embodied in the law. I am getting some opportunity to use it in these mysterious “gaps” between the explicit political decisions. But I do believe that the political community would do better still if its explicit political decisions were based on this theory of justice. Will I not venerate the community less, will my sense of attachment not weaken, because I do believe that there is an alternative, better scheme of justice possible? My critical well-being will be affected if I believe that I am living in an unjust system. Dworkin himself argues this. It seems, in this scenario, that my well-being is in danger whichever way I turn. If I begin to work for and argue for my theory of justice and I am unsuccessful, my feelings of veneration and attachment will suffer. There is the possibility, however, that I will succeed, and my feelings of veneration and attachment will hence not only be saved but potentially enhanced. If I do not become an activist for my theory of justice, though, because it matters to my own well-being that my political community embody the best possible theory of justice, my feelings of veneration and attachment will certainly suffer.

It seems that my best course of action is to pursue the better theory of justice as far as I can—that is, to use my theory of justice, which I believe to be the next best conception of justice, to fill the “gaps” and also to think of

the worth of integrity in terms of justice, so that wherever integrity loses the justice-based reasons for its foundation, integrity can be rejected entirely. Furthermore, I must strive in the public sphere to bring the next best conception of justice to bear in legislation. This is the optimal solution in terms of both justice and my own critical well-being. I am suggesting that this is also the way to maintain feelings of veneration or attachment. Indeed these feelings may well be enhanced exactly because I do feel able to utilize the better conception of justice at times.<sup>38</sup>

It follows then once again that whatever weight there is in the reasons for integrity can be accounted for in terms of justice, rather than in terms of community. And that wherever the justice-based reasons for integrity run out, the argument from justice directly ought to prevail.

### C. The Argument from Disagreement

It is important to realize that there may be limit-conditions on the above proposals. What if there is general disagreement about the next best conception of justice? When it comes then to filling a gap or dealing with a hard case, what should a citizen or a judge do, especially when his decision is going to have an impact on other people who may well reject the conception of justice that the citizen or judge is proposing to use? Is it upon consideration of these circumstances that the value of integrity properly emerges—and emerges indeed in community-based terms?

Waldron contends that the circumstances of integrity are something like the following: (1) there is substantial disagreement as to the correct theory of justice within the political community; (2) it is nevertheless possible to produce a patchwork of the political decisions of the community.<sup>39</sup> There are two ways to understand the argument Waldron makes. Either he is saying that the range of possible patchworks is narrower than the range of theories of justice that are being propounded amongst the judges or citizens. Alternatively, or in addition, the idea is that, given the circumstances, it is in some sense better to stitch together these patchworks than use theories of justice directly. Before we can get to considering the argument from disagreement, however, we need to clarify Dworkin's theory of interpretation.

The problem for Dworkin in relying on this sort of an argument from disagreement may be that he espouses a "protestant" theory of interpretation.

38. Nordahl suggests that the moral force of law is ultimately, in Dworkin's work, connected to authorship, the allocation of a role to the citizen in the theater of debate. Law as integrity does proffer this role. However, Dworkin does not pay very much attention to it. The role of judges seems much more important. I am thus skeptical of Nordahl's claim but I believe that this altered conception of law, involving justice in the place of integrity, allows for authorship in at least the same way: R. Nordahl, *The Place of Community in Dworkin's Jurisprudence* 12 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 263 (1992); Nordahl, *Rousseau in Dworkin* 3 LEGAL THEORY 317 (1997).

39. J. Waldron, *The Circumstances of Integrity*, in LAW AND DISAGREEMENT (1999). Hereinafter referred to as *CI*. Waldron does state more "circumstances," but these are the two which are relevant to the discussion which follows.

To use law as integrity requires interpreting with reference to two tests: the test of “fit” and the test of “justification.” Dworkin states that different interpreters may disagree as to the proper threshold of fit. It is also perfectly legitimate to lower the threshold of fit in order to make gains in terms of justification. Conceivably, this could mean that two interpreters nominally interpreting the same object could actually be working from two quite different sets of data. Furthermore, the test of justification requires that each interpreter attempt to place the morally best interpretation possible upon the interpreted object. And the determination of morally best is not to be made with reference to some societal morality or the intentions of the creator of the interpreted object but with reference to the interpreter’s own moral convictions. The interpreter is not looking for the most salient interpretation of the object. The interpreter is not looking for the interpretation that would have the best chance of being accepted by other interpreters. Centrally, the interpreter is required to find the interpretation that is morally the best in the terms of his own moral convictions. Law as integrity appears, then, to be a peculiar response to the problem of disagreement. It would seem that in the process of interpretation, the disagreements that are characteristic of the political community are simply going to recur.<sup>40</sup>

Dworkin does not write very much about this issue, but there is one illuminating discussion which is focused on interpretive divergence amongst judges using law as integrity.<sup>41</sup> He concedes the existence of this phenomenon:

Each judge’s interpretive theories are grounded in his own convictions about the “point”—the justifying purpose or goal or principle—of legal practice as a whole, and these convictions will inevitably be different, at least in detail, from those of other judges. Nevertheless, a variety of forces tempers these differences and conspires toward convergence.<sup>42</sup>

The forces he has in mind are the shared, general, intellectual environment and the conservatism of legal education. He explains that there is likely to be a shared sense of the danger that pertains to too much divergence. Informed by that sense, judges may well on occasion put aside their own moral

40. The argument here is similar to the argument made by Ken Kress. Law as integrity seems to be threatened by the same sorts of uncertainty and indeterminacy problems as natural law—perhaps I should be using the term “natural law” myself for the alternative set up against law as integrity—and yet it is not even incurring those risks for the sake of moral correctness: K. Kress, *Why No Judge Should Be a Dworkinian Coherentist* 77 *TEX. L. REV.* 1375 (1999).

41. Many commentators contend that Dworkin does not give due regard to system-maintaining forces and that his protestant theory of interpretation, whereby each judge must interpret under the illumination of his own moral lights, slights the social forces that are at work in giving rise to and maintaining the systematizing and regularizing phenomenon we know as law. See, e.g., R.H. Fallon, Jr., *Reflections on Dworkin and the Two Faces of Law* 67 *NOTRE DAME L. REV.* 553 (1992); N. Simmonds, *Between Positivism and Idealism* 50 *CAMBRIDGE L.J.* 308 (1991).

42. *LE* at 87–88.



convictions and indeed pursue the interpretation that is likely to be most acceptable to their brethren or the citizens. Dworkin also points out that the popularity of moral convictions waxes and wanes. Certain positions become paradigmatic; no one thinks of challenging them. Certain other ways just get pushed so far beyond the pale that they are temporarily unavailable in practice. In these ways, it happens to be the case that law does not very often founder on account of excessive divergence.

These sociological observations, however, are likely to be just as valid in a legal system where justice was chosen over integrity. There would be the same constant danger of excessive divergence. There would be this same variety of forces that would conspire towards convergence.

This is where we return to Waldron. Does he give us any reason to believe that law as integrity is more likely to hold a political community together than a more thoroughgoing justice-based theory? The notion that the range of possible patchworks that may be recommended by integrity is going to be narrower than the range of possible solutions that may be recommended by justice seems impossible to prove or disprove. The tests of fit and justification involved in law as integrity do seem very accommodating of disagreement, however. It is probable that in the abstract the two ranges are pretty much parallel and pretty much infinite and that they will both be narrowed by exactly the same societal forces, some of which are identified by Dworkin—forces that conspire towards convergence.

There may be more to the contention that in a political community which is characterized by political disagreement, arguments with a basis in integrity-community are more acceptable to other citizens and in some sense fairer than arguments based baldly on justice. As Waldron explains, sticking strictly to one's own theory of justice:

may seem blinkered, self-centered, and obtuse when one is acting in the name of the whole society. . . . Exercises of social power must claim legitimacy in relation to the community as a whole; they must claim also the allegiance and obligation of every member of the community. They will be hard put to do this if their legitimacy is based solely upon conceptions of justice which some members of society reject.<sup>43</sup>

In contrast, if we manifest integrity, the exercises of social power, the interpretations we address to each other, will not be based solely upon conceptions of justice that the addressees reject but will be interpretations of shared social practices. A great deal of the legitimacy of such an interpretation will, however, continue to rest on the test of justification, that is, on the moral convictions, which some members of the society reject, by which the interpretation has been concluded. I suspect there are already grounds for being suspicious of this argument.

43. *CI* at 205.

Even if we accept the basic premise of the argument, however, there are clear limits to its scope. It must be the case that disagreement and mutual suspicion in this political community have not advanced to the extent that arguments which claim to have a purchase in the shared social practices will simply be read as manipulations of the shared social practices. Especially with a protestant theory of interpretation, this is an active danger. If this is our explanation for the value of integrity, it is also clear that we have no reason to use integrity when the addressees of our interpretations or actions will accept our conceptions of justice. So on issues upon which there is political-moral agreement and particularly with regard to citizens' gap-filling, when those who will be affected share my convictions about justice, it is still possible and entirely legitimate to rely directly on justice. There is also presumably a threshold of disagreement that needs to be reached before this argument comes into force. It cannot be that we can rely on a theory of justice only when absolutely everyone in the political community accepts it as true.

Perhaps the central problem with this argument, though, as far as Dworkin is concerned, is that the best interpretation of this argument is as a justice-based argument. This may be because the decision procedure that is being stipulated looks suspiciously like a theory of justice in itself. Is Waldron reading law as integrity as an argument for liberal neutrality? Is the connection between integrity and community being severed in favor of a connection between integrity and a theory of justice, which incidentally is quite different to Dworkin's own theory of justice? Alternatively, this argument ends up creating a connection between integrity and justice more generally. Why am I being prohibited from pursuing the best conception of justice? Because, in the context of political disagreement, that conception will not be able to acquire any broad legitimacy. It is also inappropriate to force that conception of justice upon those who reject it. What am I to do instead? I am to interpret the shared social practices by the light of my own convictions about justice. Those interpretations are more likely to be accepted as legitimate. They are also more appropriate. This may mean that I am compromising on my theory of justice, but I am compromising in order to maintain the political community as the sort of place where justice can be pursued.

If I continue to espouse my theory of justice in a strict way, and everyone else does so too, there is the danger of the political community spinning apart or of it becoming a forum for purely antagonistic political disputes, perhaps the kind of place where purely the most powerful social bloc wins or perhaps the sort of place where people begin to withdraw from public life and pursue justice only in their subcommunities. It is for this reason that I accept integrity. And this is a justice-based reason. To state this in a slightly different form, it is critically important to ensure that arguments based on justice remain legitimate. If relying on justice in a strict way is going to reduce the legitimacy of justice-based arguments generally, I have a justice-based reason to temper my arguments and utilize only those justice-based arguments that will not reduce the legitimacy of justice-based arguments,

that is, according to Waldron, to use only those arguments that have a basis in the practices of the community.

#### D. Burkean Reasons

This essay has concentrated so far on drawing out what perhaps are two very narrow strands of Burke's thought: the importance of feelings of veneration and attachment in relation to the political community, and the concomitant notion of personification. It may be said that what is much more central to Burke's thought is the normative force of tradition or community morality. Indeed, it is this idea which is picked out by Dworkin in his passing references to Burke:

Many other critics of the ruling theory, on the other hand, are associated with the political right. They follow the curious philosophy of Edmund Burke, who has become newly popular in American political theory, and believe that the true law of the community is not simply the deliberate decisions that legal positivism takes to be exclusive, but also the diffuse community morality that exercises a great influence on these decisions. . . . They argue, with Burke, that the rules best suited to promote the welfare of a community will emerge only from the experience of that community, so that more trust must be put in established social culture than in the social engineering of utilitarians who suppose that they know better than history.<sup>44</sup>

Burke does place great moral weight on tradition, or the experience of the community. I do not wish to engage in a long discussion of the position here, but it will suffice to say that for Burke, justice comes out of tradition. There is no independent theory of justice. Dworkin hence will find no succor in this reading of Burke. Clearly this Burkean position can be used to support an ideal of integrity, but this position provides justice-based reasons for integrity. For Burke, justice and the best interpretation of the tradition are the same thing. Hence it is not quite the value of community that recommends integrity, it is justice.

The other sort of Burkean reason that may be excavated for use in support of integrity is less dependent on a full theoretical framework. Burke always advocates gradualism. It is always better to begin with what we already have and to improve it in stages rather than to pursue an ideal, hitherto abstract scheme of justice immediately and in its entirety. To recycle a quotation from earlier in this chapter:

No difficulties occur in what has never been tried. Criticism is almost baffled in discovering the defects of what has not existed; and eager enthusiasm, and cheating hope, have all the wide field of imagination in which they may expiate with little or no opposition.<sup>45</sup>

44. *TRS* at x.

45. *RRF* at 280.

Through going slowly, we can carefully consider the social changes and contingencies that occur. This doctrine of gradualism may be detachable from the bigger Burkean structure. Even if we are pursuing an ideal theory of justice, it will be a good thing if we pursue it gently for we will be able to refine it as we go along. When justice is in opposition to community morality or community practices, we should not immediately tear up the communal artifacts. If we go slowly, we may realize that the problem is with the theory of justice instead. Here, then, is an argument for integrity<sup>46</sup>—an argument for integrity that is compatible with the simultaneous espousal of an ideal theory of justice. However, it is a justice-based argument. The reason for integrity, on this understanding, is that integrity, valued for the sake of gradualism, aids in the pursuit of justice. Integrity, in the guise of gradualism, helps us to get justice right. We see therefore that the Burkean reasons for integrity in fact betray Dworkin's project. This is the first of the two ways in which Burke compromises Dworkin.

I hope in this section to have first of all clarified the relationship between community and justice. Each true community manifests a conception of equal concern. Dworkin's theory of justice presents the best conception of equal concern. Of course, once we get to that best conception, perhaps a better conception still will come into view. Perhaps justice is just always in the quest. Moreover, the ideal of justice is internal to the concept of community. Community is the reconciliation of individual well-being and the collective good. Justice figures in the working out of the collective good and, because of the notion of integration, justice also figures in individual well-being. Given all this, it is strange that Dworkin should believe that community can have any normative force separate from the normative force of the best available conception of justice. In view of this strangeness, I have argued either that community in the guise of integrity is not valuable or that when integrity is valuable, it is valuable for justice-based reasons.

We must recall at this stage why integrity was ever held to be important. The importance to Dworkin, I suggested, was that integrity allows for personification of the political and legal system, and that this personification, according to Burke, is the precondition for feelings of veneration and attachment. These feelings of veneration and attachment, this complex of community, integrity, and personification, suggest a means of reconciling authority and autonomy. However, as it turns out, this reconciliation can be considered entirely in terms of justice. Justice can provide the arguments for integrity. In the process, justice can also allow for the personification of the political and legal system. The pursuit of justice does not destroy feelings of veneration and attachment. If the political and legal system does not reflect the demands of justice, critical well-being suffers. The reconciliation

46. Dworkin seems to be invoking a similar notion of gradualism when he approvingly refers to "Otto Neurath's happy image," the boat at sea which must be repaired one plank at a time: *LE* at 111, 139.

of individual well-being and the collective good is possible only in terms of justice. These latter two ideas are stated by Dworkin himself. The first few have been developed over the course of this essay. Justice hence is capable of reconciling authority and autonomy.

Perhaps we should have known this throughout. If authority only asks what it is entitled to ask, according to justice, autonomy should not be able to provide an argument against authority. Authority merely aids the individual in acting as he ought to. They are already reconciled. However, what the argument in this essay does achieve is that it takes the Burkean and Dworkinian arguments for an alternative model of reconciliation, that of community, and establishes that these arguments are available to the justice-based account in addition to the arguments that it already had. In the process of answering a potentially powerful counterargument, the justice-based account not only defuses the force of that argument, it appropriates much of the force for itself.

#### IV. EXPLODING THE COMMUNITY

It is often argued that by speaking only of political community, Dworkin is enforcing a strange and unjustifiable limitation on the notion of community. He is attempting to enforce a stipulation, whereas he should be asking and answering an interpretive question. It was suggested above that Dworkin's concept of community involved the idea of a reconciliation between individual well-being and the collective good. The trouble with this concept may be that political community is not its only conception. There may be other collectives and other collective goods with which the individual is keen to seek a reconciliation. And the terms of the reconciliation with a more discrete subcommunity may conflict with the terms of the reconciliation with the political community.<sup>47</sup> Note too that achieving justice in the subcommunity may be critical to my well-being. And note, moreover, that if justice for the subcommunity is not achieved, my veneration for and attachment to the political community will suffer. Even if justice is achieved in the political community, my individual well-being may not have been reconciled to the collective good, and this because my more discrete collective good may not have been attained.

At first glance, Burke reinforces the existence of this problem:

To be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections.<sup>48</sup>

47. See, e.g., D. Newman, *Individual, Subnational and International Identity: A Critique of Dworkin's Conception of Community* 17 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 86 (1999); E. Lagerspetz, *Ronald Dworkin on Communities and Obligations: A Critical Comment* 12 RATIO JURIS 108 (1999); E. Christodoulidis, *The Suspect Intimacy between Law and Political Community* 80 ARCHIV FÜR RECHTS UND SOZIALPHILOSOPHIE 1 (1994).

48. *RRF* at 135.

He seems to hold the primacy of the little platoon to be true both as a descriptive principle of social psychology and as a normative principle of how affections ought properly to be arranged. The little platoon does not, however, exhaust our affective feelings. Indeed:

It is the first link in the series by which we proceed towards a love to our country and to mankind.<sup>49</sup>

As he explains in more detail:

We begin our public affections in our families. No cold relation is a zealous citizen. We pass on to our neighbourhoods, and our habitual provincial connections. These are inns and resting-places. Such divisions of our country as have been formed by habit, and not by a sudden jerk of authority, were so many little images of the great country in which the heart found something which it could fill. The love to the whole is not extinguished by this subordinate partiality. Perhaps it is a sort of elemental training to those higher and more large regards.<sup>50</sup>

This might be the sort of argument Dworkin has to incorporate. He has to demonstrate to those who want to stop at the subordinate partiality that their critical well-being depends on justice being achieved throughout the political community. Burke is confident in urging us on from the inns and resting-places of our families and neighborhoods because he believes these to be “so many little images of the great country.” Our sentiments cannot immediately aspire to encompassing the entire political community. Hence they begin by taking in smaller, more direct particularities. These particularities are subordinate, however, and as this realization develops, some of our sentiment moves on towards the next level of partiality. Through a series of these movements, we proceed to a love of our country.

It is already significant that Burke uses the term “country.” This is not the term we have met in Dworkin’s work. There we have to talk instead of the “political community.” It is already a less inspiring notion. The problem more precisely is that in the kinds of liberal societies that Dworkin is writing about, it is harder to see the subordinate particularities as “so many little images of the great [political community].” In what way is my subversive art collective a little image of the liberal polity? My synagogue is not immediately akin to the secular political community. The norms and practices of my hard-core, traditionalist Sri Lankan family or the norms and practices of my hard-core, traditionalist RPG (role-playing game) society are not very much like the norms and practices of the community writ large. What if the subordinate particularities pull the sentiments in different directions? And that opening question again: What if justice in the subordinate particularity

49. *RRF* at 135.

50. *RRF* at 315.

makes demands that conflict with the demands of justice in the political community?

One sort of answer would explain that though there may be a great diversity of subcommunities within a political community, it may nevertheless be the case that there are certain communal norms that stretch across the entirety. In so far as this is the case, the problem described above is eliminated. And the remainder? It may be argued that the kind of ordering that is required can be achieved through liberalism itself. In order to establish the series of links, we do not compromise the liberal values of the political community, we enforce them conscientiously, though carefully. The subordinate particularities hence come to be transformed until they embody the liberal norms of the larger political community. On the Dworkinian variant, this would require that the Sri Lankan family, the RPG club, the synagogue, the art collective all come to embody the liberal theory of justice premised on equal resources. This policy may not deliver up a neat ordering of sentiments, however. Because it will require more or less substantial internal upheaval, it may produce only resentment and bitterness. It may further weaken affinity to the political community. It may also, through the internal reorderings and reinterpretations it will require, alter all the little platoons to the point whereby they become indistinguishable from each other or to the point, at least, where they lose a great deal of what made them distinctive and what attracted partiality in the first place.

Recall, however, that in the example of the community where daughters have to marry as their parents say, Dworkin was willing to proffer that community some authority, notwithstanding his belief that it was unjust. The condition was that it at least manifest equal concern. Perhaps equal concern is once again the key. The little platoons will all lead up in a series of links to the political community because the little platoons will embody a conception of equal concern and, in this regard at least, they will be like so many little images of the political community. There will be an arrangement of so many different conceptions of equal concern. I will begin, then, with the conception of equal concern in my family. My sentiments will want to expand, though. My understanding of equal concern will want to develop. And so I will explore a different subordinate partiality. The two different conceptions of equal concern might clash at times. But I will act according to the one that is morally the best. I will progress to considering a further platoon. And so on, until ultimately I will be maintaining myself in a chain of communities, including in this chain, the political community, and balancing off the conflicts between the demands of different ones in terms of the best interpretation of equal concern.

What of the demands of, for instance, my subversive art collective? To maintain those demands, I will have to believe that the conception of equal concern that we profess in the collective is better than the conception of equal concern that is manifest in the political community. I suspect that through this understanding of equal concern and through highlighting this

kind of harmonization of partialities, Dworkin is able to repel the charge that his theory does not take into account any community other than the political community.

The other significant consequence, though, is that on this understanding, the political community will be entitled to primacy only if it has the best conception of equal concern. Otherwise, I am at least morally justified in giving primacy to the demands of a subcommunity that embodies a better conception of equal concern than the political community. Once again, the value of community has been made subordinate to the value of justice. Burke has, for the second time, succeeded in compromising Dworkin.