



Oxford, It Ain't

The death of Ronald Dworkin last week was not merely an event for legal philosophers, but really for anyone concerning with the law, for Dworkin might have been the pre-eminent legal theorist of the last century. The legacy of his ideas is too broad and deep for a blog post, but his notion of law-as-integrity has always seemed to me particularly vital for anyone concerned with legal development. Cass Sunstein [sums it up nicely](#):

Dworkin introduced an arresting metaphor. Suppose that you are a participant in writing a chain novel. Others have written earlier chapters. Now it's your turn. How shall you proceed?

Dworkin's answer is that you have to engage in an act of interpretation. You can't disregard what has come before. If your predecessors have started to write a romance, you can't suddenly turn it into a work of science fiction without doing violence to what they have done. You owe a duty of fidelity to their work.

But your task is not mechanical. You have to fit the existing materials, and you have to justify them, by writing a new chapter that makes the emerging novel, taken as a whole, the best it can be.

Dworkin thinks that judging is a lot like that. Precedents are like the existing chapters, and a new case is an opportunity to produce a fresh one. Judges can't just make the law up. But at least in hard cases, they can't merely "follow the law," because there isn't anything to "follow." What they have to do is produce a principle that both fits and justifies the existing legal materials. This is Dworkin's conception of law as integrity.

I find this concept enormously attractive, because it combines the freedom of interpretation with constraint. But I'm wondering how much work it really does. Which brings me to *Dallas*, the late 70's/early 80's prime time blockbuster.

A few years into the show, Patrick Duffy, the actor who played Bobby Ewing (one of the show's protagonists), wanted more money. The producers refused to give it to him. So he quit. So they killed off his character in the show. But then ratings went down, and Duffy didn't get the other roles he thought he would. So then he reappeared the following season, where it was disclosed that his death was "just a dream" of his wife.

There it is! A chain novel, with different episodes being written, all internally coherent. But it also shows that you can sneak a hell of a lot of stuff under the blanket of integrity. If a previous author can kill off a character in a novel, and then you can bring him back arguing that “it was just a dream,” then what exactly does judging-as-integrity do for you?

No doubt, Dworkin would argue that the *Dallas* scenario does not qualify as judging-as-integrity, because it is not the “best” reading of the novel up until that point. Following Dworkin, Sunstein defines “best” as meaning that “it fits with the fabric of existing law and makes good sense out of it.”

I’m not really sure that that gets us very far, particularly when we are dealing with deeply and sincerely contested issues of law. As far as millions of *Dallas* fans were concerned, presenting the death of Bobby Ewing as a “dream” was an extremely good fit with the existing story and made very good sense out of it. And I have chosen the *Dallas* scenario with malice aforethought, precisely because it is far more ridiculous than virtually all major legal controversies. If you can make it with *Dallas*, you can make it anywhere.

I know that there must be an obvious answer to my objection, but I don’t know what it is. [Brian Leiter argues](#) that the way out of it for Dworkin was the “radical” step of saying that certain previous practices were simply not the law, and so there was only one best answer for hard legal questions. I confess that that answer seems to me to be a circular argument.

Sunstein concludes his tribute with this passage from Dworkin:

We have an institution that calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become questions of justice. I do not call that religion or prophesy. I call it law.

One need not call it religion or prophesy. One can, and should, call it law. But people — good people, sincere people, smart people — have different concepts of justice. And I am skeptical as to whether any amount of theorizing can get past such a very stubborn fact.