HERCULES, HERMES AND SENATOR SMITH
THE SYMBOLIC STRUCTURE OF LAW'S EMPIRE

by

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Introduction

Professor Dworkin's theory of the nature of law and the structure of adjudication has sparked widespread debate throughout the common law world. In his most recent work, Law's Empire, he extends and develops his account of the nature and structure of adjudication through the personae of his ideal judge, Hercules, and two new and lesser characters, Hermes, an exponent of the speaker's meaning theory of statutory interpretation, and Senator Smith. His exposition of the structure of adjudication is remarkable for its symbolic content and for its social and political implications. While the heroic figure of Hercules is well known to readers of Dworkin's earlier works, the introduction of the boy messenger Hermes and the feminine, and imperfectly rational Senator Smith completes Dworkin's heroic vision. Through these symbolic figures, Dworkin develops his theory of statutory interpretation and illustrates the application of his theory to a particular statute, the Endangered Species Act, in a particular case, the Snail Darter case. These characters also serve to highlight Dworkin's vision of liberal community and the role of the courts within it.

In Law's Empire, Dworkin continues both his explicit and brilliantly argued account of the structure of law and adjudication, and his implicit account of the judge as moral hero. His continuing saga of the ideal judge, Hercules, symbolizes the structure, the promise, and the limits of the vision of legal liberalism. Hercules not only provides the vehicle for Dworkin's account of the moral obligations of the judge, but, far more significantly, embodies the modern liberal ideal of dispassionate and rational decision making. Ultimately, as he says, the judge

must rely on his own judgment in answering these questions, ...not because he thinks his opinions are automatically right, but because no one can properly answer any question except by relying at the deepest level on what he himself believes.

To understand why the beliefs of the judge have such overweening importance and their role in Dworkin's vision of liberal community as a community created, united, and bound by its laws, it is essential to examine the symbolism implicitly incorporated through the trope of Hercules.

Hercules and the Heroic Ideal

In Greek and Roman mythology Hercules represented the ultimate realization of the heroic ideal. Driven mad by a jealous and vengeful Hera, Hercules burned his house to the ground, thereby killing his wife and children, an act symbolizing both the force of the darker,

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2 R. Dworkin, op. cit.

passionate side of human nature and Hercules' estrangement from the simple pleasures of social life. When he recovered his sanity, he sought the advice of the oracle at Delphi. As penance, he was directed to spend twelve years in the service of Eurystheus, King of Argos. Through his labors, Hercules atoned for his destruction of human community and attained both heroic stature and immortality. His labors symbolized the triumph of humanity and reason over the dark and demonic forces of nature. Both the nature of the tasks and the structure of the heroic vision amplify and expand Dworkin's vision of adjudication. Whether in destroying the Hydra or in taming rivers to cleanse the stables of King Augeus, the labors of Hercules epitomize the triumph of man's reason over nature and emphasize the total commitment of the hero to his assigned task. Equally, of course, the heroic vision symbolizes the separation of the hero from the ordinary encounters and relationships of communal life. The hero's dedication is to the task before him, and not to the ordinary incidents of social life. Through his successful completion of his labors he attains his proper reward. In this way, the task itself attains a transcendent importance. To the hero, laboring in isolation, the successful accomplishment of each new task, while maintaining his estrangement from community and human connection, provides renewed proof of his capacity for absolute commitment to a particular vision and reaffirms the worth of his own existence. To the community, his willingness to step beyond the bounds of ordinary life and to perform his labors in isolation and in their service, both provides a bulwark against the dangers that threaten communal life and a reaffirmation of its importance.

As judge and as symbol Hercules is the concrete embodiment of the heroic vision. Whereas the mythic hero relied upon superhuman strength, aggression and violence to honor the bidding of the oracle, embodying the masculinist ideal of power and estrangement, Dworkin's mythic judge relies, as he says, upon "superhuman skill, patience, learning, and acumen". Hercules is reason incarnate, pure intellect. Ultimately, he symbolizes the masculine faith in the power of rights, principles and rules to resolve conflict and permit social life to continue. The judge as hero realizes his quest through his embodiment of the modernist ideal of pure and untainted rationality, through his perfection of detachment from mere sentiment and ordinary human passions. Because he embodies perfectly the liberal humanist vision of the power of reason as mankind's only bulwark against the natural forces of prejudice and ideology, a specifically modernist version of the monsters and natural forces tamed by the mythic hero, the judge is the obvious modern hero. As Dworkin conceives the project of adjudication, the interpretive quest of the judge offers to the community the possibility of the perfection of law as the vehicle for our collective dreams of social justice and enlightenment. While the mythic Hercules symbolized man's capacity to tame the violent and irrational impulses of his animal nature and to transcend his human nature through selfless service to a community in which he had neither family nor home, as judge, Hercules fulfills the ultimate dream of post-modern society, that reason has the capacity to liberate man from his animal nature. His struggles are struggles of the mind, struggles for liberation from the temptations represented by his needs and his natural impulses, and by the frequently irrational prejudices and attachments to which ordinary people are prey. Reason, embodied by the search of Hercules for the integrity and consistency implicit in the laws and institutions of the community, enables the judge to distance himself from the pull of competing desires and impulses sufficiently to complete the task Dworkin believes our culture has assigned him, that of the re-creation and re-imagination of the structure of society through its laws and institutions. As the heroes of the past guarded the fragile physical structure of society from the dangers which threatened from without, the judge defends the deepest convictions of our society from the potentially subversive effect of the quarrels and

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betrayals of daily life. He endeavors to bring society into consonance with its highest self. He stands guard against destruction from within, against the forces unleashed by human prejudice and emotion.

Dworkin's account of the law as embodying and transforming the virtues of justice, of fairness, and of integrity emphasizes the connection between his conception of the judge as the moral hero of today and the liberal, and quintessentially American view of the law as the agent of empowerment and moral reunification and change. His account contrasts the contingent and transitory episodes of daily life, the attachments, struggles, dialogues and encounters which mark the limits of vision of ordinary people, with the truly Herculean vision of the role of law in realizing an internally consistent and creative moral vision out of the imperfectly realized strands of conviction in our ordinary social and political lives. Essentially, the judge as hero enables human communities to reaffirm and recreate the vision of liberal society, a society created through the instrument of law and united by it.

Dworkin's image of liberal community highlights the tension between the image of the ideal community which can only be realized through law and reason and the non-ideal affective communities within which ordinary men and women labor and love. The heroic character of the vision emphasizes the hegemony of law itself. Because the task of the judge demands that he divorce his vision and his work from all the attachments and attitudes which reflect the contingent nature of all present forms of social life, the judge is an essentially solitary figure, a figure who considers the dialogues which come before him but whose role demands that he remain other to all within the present community. Only in this way can he fulfill his task. In the heroic vision, it is the law itself which represents both the promise and the potential of community and the judge who performs the task for which no other is fitted, that of justifying one present vision of community through the heritage and traditions of the past.

When we realize that for Dworkin the judge is indeed the Prince guarding the gates of law's empire, the basic metaphor which structures law as integrity attains full resonance. The law itself symbolizes the victory of human reason over passion and prejudice. For Dworkin, the institution of law represents our collective promise and commitment to safeguard the rights of the individual, our belief that each individual is endowed with independent worth. It is the heroic task of the judge to mount a solitary and lonely guard over this promise. The symbolic structure of Dworkin's account is reinforced by two further metaphors, that of a second judge, Hermes, whom Dworkin characterizes as almost as clever as Hercules and just as patient, and Hermes' nemesis, Senator Smith. Hermes is introduced as a vehicle for the speaker's meaning theory of statutory interpretation, the belief that legislative enactments ought to be interpreted in accord with the intent of the body enacting them, and to demonstrate what Dworkin considers to be its fatal flaw. Thus, Hermes represents the conventional belief that a judge, in embarking upon statutory interpretation, ought to defer to the collective intention of the legislature. While the speaker's meaning theory finds a home in many different versions of liberal political theory, and has its roots in the belief that the acts of the legislature embody the will of the people, Dworkin also commits Hermes to the moral vision of law as integrity, the belief that we, as a political community, are intuitively committed to the ideal of our community as a community of principle. For Dworkin, liberal community is constituted, not by contract, not by the social accidents of common origins or racial or ethnic unity, but by our imperfectly understood and inchoate allegiance to the ideal of political community as a community of equals.

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8 R. Dworkin, Law's Empire, op.cit., p.407. As Dworkin says, "The courts are the capitals of law's empire and judges are its princes, but not its seers or its prophets."

9 R. Dworkin, Taking Rights Seriously, op.cit., pp.204-205.

Hermes and the Judge as Messenger

Again, the deep structure of Dworkin’s political and moral vision is evoked through its mythic components. Hermes, unlike Hercules, is not a heroic figure. Whereas Hercules performed his solitary tasks upon the edges of conventional society, Hermes, traditionally represented as a boy on the verge of manhood, is the messenger of the gods, a quasi-divine errand boy known for his wit, his speed, and his trickery. As befits a messenger, he is incompletely independent. He has failed to complete the essential task of maturity, that of freeing himself from dependence upon the ideas and attitudes of others. He is essentially androgynous, having the potential either to realize the masculine ideal of independence, or, if he fails in this task, to be unable to extricate himself from the relationships and intrigues surrounding him. His potential for failure in the task of realizing the ideal of heroic independence is symbolized by the fate of Hermaphrodite, his son, who, transformed through bathing in the pool of a nymph, was doomed to live his life as truly androgynous. As judge, engaging in statutory interpretation, Hermes confronts a daunting task. He believes that in order to perform his task faithfully and well he must discover and apply "the communicative will of the legislators".11 As he sets about conveying the message the legislature intended, he realizes that the voice of the legislature is comprised of the individual voices of all who played a role in the enactment of any statute. Even the silence of those who failed to amend or repeal the statute in question has a role to play. He must not only relay the messages it is his task to transmit faithfully and as their authors would have wished, the messages themselves must be ferreted out of their statutory context. If he is to perform his task faithfully, he must decode the meaning of the statute under consideration and assure himself that the meaning he discovers represents the intention of the legislature. Even if, as Dworkin suggests, he resolves these questions by consulting only the intentions of those who are on record as having voted for the statute under consideration, and concludes further that all their intentions ought to count equally, he must somehow ascertain and combine the intentions of many different people.12 Indeed, even if Hermes takes a further and dramatic step and resolves the enigma through an intuitive belief that the intentions of one legislator are representative of the intentions of all, an unlikely proposition at best, his difficulties have only begun. As the introduction of Senator Smith emphasizes, it is unlikely that any actual individual’s intentions are fully crystallized and clear cut. As Dworkin says,

Smith’s mental life is complex; which of her beliefs, attitudes or other mental states constitutes her intention?13

Indeed, even the interpretation of the concept of intention itself is open to question and to challenge. The speaker’s meaning theory, however, ties intention conceptually to intended communication and the question becomes what Senator Smith intended the enactment to communicate.

11 R. Dworkin, law’s Empire, op.cit., p.337.
The World of Senator Smith

Senator Smith, the final figure in Dworkin's trilogy of characters, is remarkable both for her explicit symbolic function and for the implications surrounding the choice of name and of gender. Senator Smith represents the multiplicity of competing motivations, assumptions and intentions of ordinary people. Sometimes she speaks and acts independently. Perhaps she drafted the Endangered Species Act and the words of the enactment represent her best effort to make herself understood, to communicate the meaning she intended. This is, however, not necessarily the case. The ultimate form of the enactment is far more likely to represent a compromise or a committee project. She may hope the finished law will be understood in one way, but expect it to be understood in another. Hermes must decide whether it is her hopes or her expectations he is bound to respect and enforce. Yet, as Dworkin observes, our hopes and expectations often do us little credit. They are often self-serving, sometimes cynical. If Hermes is to act to enforce her hopes or her expectations, he may well defeat the promptings of her more rational, less venial nature. Senator Smith is truly every woman. She represents natural sentimental humanity, humanity pulled this way and that by ties to others, by old debts, and promises of future gain. Senator Smith at once is the perfect representative of the faceless, voiceless and unnoticed people of which ordinary human communities are composed, and pulled this way and that by her own ambitions and weaknesses. By turns altruistic and self-serving, she acts both from an implicit and incompletely realized core of moral principle and from more ordinary preferences and ambitions. As with most people, her motivations and intentions are usually mixed and often unclear. The choice of Senator Smith as the symbol for all the diverse representatives of the people in a political democracy emphasizes the primacy of law in Dworkin's moral vision and the need to ensure that the law is above the veniality and self-serving character of the petty compromises and unconscious motivations of ordinary life.

These features are emphasized by the commonality of the name Smith. Smith is everyone of us, in modern terms simply columns in a telephone directory. Not only is the name Smith wholly ordinary, its traditional origins emphasize that the smith was the servant of those who create and defend empires. The smith provided both the hardware of empire and the tools which enabled man to wrest his living from the reluctant earth. In modern terms, Senator Smith is one of the many who craft the laws and policies required if the nation is to implement the democratic vision of the common good. Thus, Senator Smith provides a dramatic contrast both to the heroic figure of Hercules and the quasi-divine Hermes. The smith subdues and makes use of nature in the service of others, achieves both purpose and fulfillment through labor, through acting on the physical world. Crucially, the smith is bound to the community and part of it. The naturalness and ordinariness of the vision is sharpened and focused by the fact that Senator Smith is the first woman allowed a role in Dworkin's heroic vision. She symbolizes the ordinary social ties and relationships which emphasize humanity's connection to the natural world, the human needs and impulses and desires it is the task of reason to surmount and vanquish.

The relationship between the image of the smith at the forge and the conventional image of woman as imperfectly rational and ruled by intuition and nature is by no means accidental. The smith works with metal and fire and his own body, not with reason. Similarly, Senator Smith works with the often contradictory desires of her constituency and of special interest groups within it as well as with her own beliefs and inchoate convictions. These are the raw materials no politician can ignore in crafting laws and policies. She can neither advance too far beyond the expressed desires of her constituency nor fall too far behind its present vision. She is the master of compromise and of forging a temporary and fragile consensus out of competing aims. Her task is to do the best she can to advance the interests of the community with the resources at her disposal and with a weather eye to public opinion. Both as woman and as legislator, Senator Smith is prey to competing and conflicting attitudes and needs. She responds to the shifting pressures and images of ordinary people in ordinary communities. While, intuitively, she may have deep convictions and firmly held beliefs, these are unlikely to be completely reasoned and

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even more unlikely to form a structured and unified body of principle. These images structure the vision offered. While the people choose their representatives, voice interests which reflect their private needs and visions, these reflect the values and the ambitions of the multitude of competing groups in any modern pluralist community. Their representatives, representatives as imperfectly rational as the people they serve, are as likely to act from their own preferences as from a coherent vision of the common weal. Their dependence upon the shifting pressures and demands of various interest groups emphasizes their inability to consistently comply with the demands of principle. They are not heroes, they are too completely of the communities they serve, have failed to realize the independence which is the ultimate destiny of man. Their capacity to realize the just society is limited by their passions and their ambitions. They lack the breadth of vision demanded, the detachment and rationality needed for the single-minded pursuit of either justice or truth.

As Hermes learns when he attempts to understand Senator Smith's intentions in voting for the Endangered Species Act, her concrete political act may well have reflected many different motivations. These are likely to encompass the full spectrum from a deep and intuitive belief that all rare plant and animal species ought to be protected, to a politically motivated compliance with the desires of some of the special interest groups within her constituency. Equally, her vote may have been secured as part of a political package deal. She may have voted for the legislation, not out of conviction at all, but simply to purchase the support of others for projects which she or her constituency favored. The conflicting web of attitudes and motivations thus revealed offer scant assistance to Hermes. He must determine if a nearly finished federal power project ought to be abandoned merely because its completion will eradicate the only known population of snail darters. In metaphorical terms, Hermes must decide if passage of the Endangered Species Act ought to be allowed to frustrate the completion of a major federal project, one nearly completed at great public cost, simply because one ecologically unimportant fish happened to have its only beds within the catchment. The locus of the conflict is remarkable because it emphasizes the perceived conflict between reason and nature. For the judge, as for the politician, it is easy to deem a particular species uninteresting and insignificant. To the ecologist, no one species in an ecosystem can possibly be insignificant. The elimination of any species alters the balance of the system, and ultimately, the ecosystem itself. Behind the question posed by Dworkin, of course, lies a second issue. Should man's conquest of nature in the service of the community be frustrated by what may well be no more than a sentimental policy decision advanced by politically noisy but numerically small pressure groups? Could this have been what Congress intended to eventuate? Even if a much simpler question is counterfactually put to Senator Smith, the question of whether in voting for the legislation she intended that the Secretary should have the power to order the abandonment of a nearly completed project to protect an insignificant and scientifically uninteresting species, by implication a species we can have no rational reason to protect, it is unlikely that her concrete intentions will have any direct bearing upon the issue before him.

Hermes' Transformation

Instead, Dworkin argues, even a judge who is determined to defer to the collective intention of the legislature in enacting legislation will realize that, in a community of principle, that intention must be treated as a matter of general political convictions rather than of the more venial motivations, beliefs and attitudes he first sought to investigate. Only through this approach can he remain true to the community's conception of itself as a community bound


16 R. Dworkin, Law's Empire, op.cit., p.313, where Dworkin describes the central issue in the "Snail Darter" case as whether "the Endangered Species Act gives the secretary of the interior power to halt a vast, almost finished federal power project to save a small and ecologically uninteresting fish."

together by a structure of principle. Although Senator Smith's convictions may appear to be, and may well be, inconsistent, even though different attitudes appear in her approach to different issues, these enhance the difficulty of Hermes new task, but do not alter it. His task, if he is to treat the political community as a community of principle, is to "lay over them the single, coherent justifying structure integrity demands." He must ask which reading of the statute would best serve all her convictions taken together, as a structured system of ideas, made coherent so far as this is possible.

Once Hermes has reached this conclusion, of course, he is no longer merely a messenger. He has taken the first step to realizing his rational and moral independence and to his transformation into a second Hercules. He will recognize that it is his task to determine the relevance and consistency of isolated intuitions and convictions, and his task to decide which are consistent with the general structure of principle he is attempting to realize and to isolate and which must be abandoned as inconsistent or incoherent. Once he has apprehended this, a second difficulty, that of the appropriate method of combining the intentions of the different legislators voting for the bill, will no longer seem relevant. Just as his initial task was to determine which reading of the statute would best serve Senator Smith's beliefs and convictions rendered as a structured and unified body of principle, so the same method will enable him to create a structured fabric out of the abstract political convictions of the legislature as a political institution. Once his fundamental task is viewed as constructing and realizing the implicit structure of rough and unformed and perhaps contradictory beliefs and ideals, it is no more difficult to realize the structure of conviction mirrored in the history of the acts of an institution than it is to realize the structure of conviction supporting the conduct of an individual. The process and the method are identical. It is important to recognize that his quest is not for the best substantive result. If that were his quest, he would simply be seeking to impose his beliefs and his values upon others. Rather, his task is to show a piece of social history - the story of a democratically elected legislature enacting a particular text in particular circumstances - in the best light overall, and this means his account must justify the story as a whole, not just its ending.

Hermes, the messenger of the gods, has been transformed into the heroic figure of Hercules.

Conclusion

As a political community, Dworkin believes, our allegiance is to the law itself, to our moral vision of ourselves as a community of principle. "We live in and by the law", he insists.

It makes us what we are: citizens and employees and doctors and spouses and people who own things. It is sword, shield and menace: we insist on our wage, or refuse to pay our rent, or are forced to forfeit penalties, or are closed up in jail, all

21 See R. Dworkin, Law's Empire, op.cit., pp.333-337 on the gradual evolution of Hermes into Hercules and on the theory that the convictions of a political institution are open to the same sorts of interpretive judgment as those of an individual.
in the name of what our abstract and ethereal sovereign, the law, has decreed. . . .
We are subjects of law's empire, liegemen to its methods and ideals, bound in
spirit while we debate what we must therefore do. 23

The image of a community constituted in, by and through the law, a legal (and, Dworkin
would insist, moral) community of principle completes the mythic structure. Liberal community
is not the people within it, not their small private triumphs and defeats. It is not the earlier and
still compelling vision of republican democracy, the ideal of individual men (and perhaps, today,
women) meeting to debate and strive to attain the common good. It is not even the more
modern and tenuous vision of representative democracy, whether the representatives sought, as
did those of Rousseau, to realize the general will, or whether, as in the United States, the
common good is best thought to be realized through the jostling and scrambling for position of
numerous fragmentary special interests. Rather, political community is a community of law, a
community whose ideals are realized and transformed through its judges. Judges, in Dworkin's
vision, serve no powers but the law itself, have no special interests. As Hercules was merely the
vehicle for the bidding of Eurystheus, and performed his labors upon the fringes of community,
so the judge is the vehicle for the spirit of the law, and devotes his labors to realizing its spirit in
its most perfect form. The judge is reason incarnate, reason bound to the service of the ideal of
law as a coherent body of principle.

Dworkin offers us a compelling and powerful justification for the political role of the judge
and for the modern liberal faith in the transformative power of law. Just as Hercules as hero
vanquished the dangers threatening real physical communities at the bidding of Eurystheus and
thereby gained immortality, Hercules the judge vanquishes the petty jealousies and interests of
the Smiths of this world. Through his role in the ongoing story of the law, he as well is assured a
kind of immortality, the immortality due one of the links in the chain of law. Our preferences,
our prejudices, our needs, and even our humanity threaten the integrity of the community of law.
Reason defends us against the particularity and limitations of our ordinary attachments and
circumstances, ensures us that these will not prevail forever over the integrity and coherence of
political community as a community of principle.

Despite the awesome power and coherence of Dworkin's vision, many of its images and
allusions are profoundly disquieting. The heroic vision of the law, law itself as the Holy Grail of
liberal community, emphasizes its detachment from the ordinary conditions of individual and
social empowerment. Within the community of law, our judges and lawyers bestow
empowerment upon us. We do not craft it for ourselves, lack both the vision and the skills to do
so. At best, we act through agents and neither apprehend nor seize the vision on our own behalf.
In Dworkin's vision, the old image of adjudication as conflict resolution is transformed into the
image of law as liberation. Whatever the human fates of the individuals before the courts, these
are ultimately less important than the progress of the law as a whole towards the realization of
the ideals of liberal community. Dworkin's liberal community is not a community of ordinary
men and women struggling to take charge of their collective lives and meeting and deliberating
with others, face to face, as equals. Rather, it is a legal community, a collection of individuals
who have recourse to legal weapons in order to enhance their capability to realize their individual
preferences and ambitions. The dramas daily enacted in our courts of law are public dramas, like
in that way to the tragedies and comedies of ancient Greece. The judge assumes the role of deus
ex machina, superimposes a rational and coherent structure upon the accidents and struggles of
social life, the more fragmentary and transitory associations of sense and affect. While Dworkin
asserts that the vision of legal liberalism is our Holy Grail as well, that ultimately we author the
inchoate vision the judge is bound to realize and to transfigure, we are what the law makes us.
The ultimate ideal of legal liberalism is the belief that social and political justice can be realized
through law, that ordinary relationships and institutions can be transformed and reconstituted
through legal means. Yet, in law as elsewhere, we work through the signs and symbols of our
culture. The ideal offered us, that of the judge as hero, emphasizes disengagement, detachment,
distance from the ordinary attachments, risks and disappointments of social life. The judge

attains pure and undiluted rationality through his devotion to the ideal of law, an ideal in whose creation he is engaged. To realize his task, he must, in Dworkin's vision, transform the messily haphazard and historically determined materials with which he works into a unified and coherent fabric, a seamless web.\(^{24}\) In order to do so he must maintain his disengagement from the more ordinary relationships and attachments which threaten to limit and distort his vision. He must constantly struggle to remain free from the dangers of dependence upon the beliefs, the attitudes and the approval of others. As seeker after truth, he necessarily seeks alone. Equally, of course, his only substantive proof of the value and the validity of his labors depends upon recognition of their necessity and their worth by the community he is bound to serve.\(^{25}\)

To the extent that ordinary judges strive to realize the Herculean ideal they must be prepared to treat all ordinary social and political roles including their own as contingent. If they fail in this, they confer unwarranted permanence and stability upon one possible vision of social and communal life, and fail to ask the questions needed if it is to be transformed. Once the contingency of all present relationships and encounters is accepted, the judge has lost his anchorhold in present reality and his obvious recourse is to increasing levels of abstraction and increased dependence upon the rational manipulation of symbols in an attempt to realize the ideal he believes to be implicit in the law itself. In order to maintain his distance and detachment, the judge moves closer to the margins of social and communal life, addresses the formal symbols of social life rather than its present reality. Ultimately, the community served by the judge is a community of legal persons, roles which embody the legal forms of community current in liberal democracies. The virtues of detachment and impartiality become the vices of impersonal and rational manipulation in the service of an ideal only the judge is fitted to envision and to realize. The more fully he accepts and lives the wholly rational character of his task, the greater the danger that he will lose touch with the reality of the men and women he serves, come to view them as symbols, not real and human individuals. To the extent that this existential project fails, to the extent that the judge fully accepts and commits himself to the role in which he finds himself, he has conferred validity upon one realization of the role of the judge. In accepting the present socially and politically determined role of the judge as his anchor to reality, he betrays his continued attachment to present forms of social life and social organization. He accepts the history and traditions of his community as authoritative and confers a value and permanence upon them which is unwarranted. Once he accepts the authoritative status of socially assigned roles and forms of relationship, he has lost the perspective from which to question these. He moves closer to acceptance of the small injustices, the inequalities, inherent in all present social roles and forms of communal life. The tension between these competing realizations of the ideal form of adjudication marks the limits of the promise of legal liberalism.

Should he succeed in his quest for the ideal of pure reason, the judge risks the sacrifice of the real human individuals and relationships of the present to his ideal vision of the law. Any given decision can at once be both the most consistent and principled exegesis possible as part of the story of the law, and appallingly unjust in the particular case before the court. A case directly in point is a decision taken by the United States Supreme Court during the 1880s. In Elk v Wilkins\(^{26}\), the Court held that a Native American who had disaffiliated himself from his tribe and taken up residence in Omaha, Nebraska was not, in the legal sense, a citizen of the United States. As a piece of abstract law, the decision affirmed the territorial integrity and limited sovereignty of


\(^{25}\) R. Unger, op.cit. See especially 55-56 where the limits of the heroic vision are explored. According to Unger, to the extent that the hero remains unaware of the contingent and haphazard nature of his task, or blocks this recognition from his mind, he remains gripped by a delusion and assigns transcendent value to a particular historic task. To the extent that he becomes, as Hercules must be, aware of its limitations, realizes that the ideal he serves is both fragile and transitory, his independence from the community he serves is fatally compromised and he remains bound to one particular set of historically created relationships and roles.

\(^{26}\) 112 U.S. 94 (1884), 102.
the Indian Nations and specifically accorded them the same status as was accorded nations outside the territorial bounds of the United States. As a part of the constitutional jurisprudence of the day, the decision was both consistent with the law as a whole and highly principled. Indeed, the status of the plaintiff was explicitly compared to the status of the children of foreign nationals and of foreign diplomats. As a particular decision, the outcome was profoundly unjust. The plaintiff had lived and worked in Omaha for some years, had assimilated into the dominant community. For all practical purposes, and particularly in terms of the human relationships involved, he was American. It is important to recognize that, had the Supreme Court elected to disregard precedent and accord the plaintiff the status he sought, the Court would have led the way in championing the destruction of the political existence of the Indian Nations. The integrity of the law was preserved, at least for the time, but, like all transcendent ideals, it demanded and received its sacrifice\textsuperscript{27}. Obviously, it is also possible to argue that the same decision was prejudiced and wholly incompatible with the Herculean ideal. If one elects to view the plaintiff as a member of the wider American community, which was the status he sought, the court denied his equality before the law. This alternative argument is strengthened by the fact that the Fourteenth Amendment to the United States Constitution had been ratified only a short time before, an amendment which specifically affirmed the right to vote of all men regardless of race, color or previous condition of servitude. The decision of the Court turned upon the fact that the Indian Nations were legally identified as dependent domestic nations, not states, and were regarded as independent political units. This status was both passionately defended by the Native Americans themselves and one which was increasingly coming under attack from those eager to seize Native American lands. This alternative, as well as being incompatible with the legal and political traditions of the United States at that time, would have imposed an extra-ordinarily heavy price upon the Native American people. Such a decision would have destroyed the internal sovereignty and integrity of the American Indian nations. Given the intense political pressures of the time, pressures aimed at destroying altogether the integrity and the sovereignty of the Indian Nations and fostering both assimilation and the allotment of tribal lands to white prospectors and settlers, the stance taken by the Supreme Court was heroic, if profoundly flawed. One final alternative remained. Conceivably the Court could have crafted a limited decision, one specifically declared to apply only to detribalized Native Americans. Such a decision would, given the status accorded the Indian Nations both by judicial decisions and by treaties (which, in the United States, are incorporated into municipal law), have clearly and explicitly been making law rather than interpreting the law. The Court was trapped by its own culture and traditions. Equally, such a decision, one based upon the relationships of the present and limited in both scope and effect, could not be reconciled with the heroic vision. It would have stood simply as a particular decision in a particular case, a decision which responded to the relationships involved and not to abstract standards.

A choice such as that before the Supreme Court both epitomizes Dworkin's heroic vision of adjudication and provides a tragic and pointed warning of its limits and its perils. The court reached, in Dworkin's terms, the right answer (by which I take him to mean the only legally and morally acceptable answer) on the facts before it, despite the injustice wrought. In Dworkin's language, justice and fairness pulled in opposite directions. Historically, that decision and its predecessors were wholly out of step with the vision of America held by the bulk of its people. The decision commanded no moral suasion, and in the end, lost all gravitational force. Congress, the people, and the Supreme Court united to systematically erode the independence and the political sovereignty of Native Americans. The early decisions are paid lip service as their due, but no more. Ultimately, the heroic vision of adjudication depends upon the consonance of the vision of the judges and the understandings and relationships within the wider community. If the duty of the judge is to realize the law as a structure of principle, those principles must reflect

\textsuperscript{27} Shortly thereafter, as a matter of political history, the Congress of the United States took matters into its own hands and systematically set about destroying the sovereignty the Supreme Court had upheld. Unfortunately, while the Native Americans lost practical sovereignty over many aspects of their lives, they were not universally accorded citizenship until some 40 years later.
those of the community itself. Elk v Wilkins28 left little room for a more uncertain and equivocal understanding of the role of adjudication, an understanding which accepts the limits of the heroic vision while acknowledging the Court's responsibility to do justice in the particular case in a way which avoids the dilemmas which inevitably attend any wider vision. Both our justice and our perceptions are often flawed and incomplete. The present ought not be sacrificed either to the future or to the past. The transformative power of the law is limited. For the law to transform the values and structures of the community, the seeds of the transformation must already have taken root within the soil of the community itself.

If law is truly the modern empire, and ordinary men and women but lieges bound to its service and its traditions, we ought to take Dworkin's ruling metaphors very seriously indeed. As with the priestly kingdoms of old, it is an empire whose commands are made manifest only through the words and deeds of its princes and their acolytes. Despite the limitations upon judicial powers, Dworkin's vision of the heroic nature of the project of adjudication is like in many ways to the Platonic vision of the role of the Guardians. The question is whether, as ordinary men and women, we share his vision. Are we ready to accept the judges of our communities as philosopher kings in judicial robes? The empire of law is one of words and ideals whose commands bind its liegemen and women. Ultimately, the liberating role of law is possible only if and to the extent that the people themselves accept and understand the vision offered and make it their own. The judge can succeed only if he makes our own visions present to us, if we believe his role to be consonant with our vision of political community. The judge must be, not simply a hero, but our hero, one of us. He must lead us from within, not save us from without. We must share his vision and participate in his quest. Unless this possibility can be realized, the vision of legal liberalism, that of law as liberation, cannot succeed.

28 112 U.S 94 (1884).