made. But he did not accept Earl's principle about the *way* in which congressional intention is relevant. He refused to consider the counterfactual test that Earl's analysis made decisive. "It is not for us," he said, "to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated."[16]

Instead he adopted what I called, in discussing Earl's opinion, the excessively weak version of the idea that judges constructing a statute must respect the legislature's intentions. That version comes to this: if the acontextual meaning of the words in the text is clear—if the words "carry out" would normally include continuing as well as beginning a project—then the Court must assign those words that meaning unless it can be shown that the legislature actually intended the opposite result. The legislative history leading up to the enactment of the Endangered Species Act did not warrant that conclusion, he said, because Congress plainly wanted to give endangered species a high order of protection even at great cost to other social goals, and it is certainly possible, even if not probable, that legislators with that general aim would want the snail darter saved even at the amazing expense of a wasted dam. He rejected the evidence of the later committee reports and the actions of Congress in approving funding for the continuation of the dam, which might have been thought to indicate an actual intention not to sacrifice the dam to this particular species. The committees that had reported in favor of the dam were not the same as the committees that had sponsored the act in the first place, he said, and congressmen often vote on appropriations without fully considering whether the proposed expenditures are legal under past congressional decisions.

Justice Lewis Powell wrote a dissent for himself and one other justice. He said that the majority's decision constructed an absurd real statute from the text of the Endangered Species Act. "It is not our province," he said, "to rectify policy or political judgments by the Legislative Branch, however egregiously they may disserve the public interest. But where the statutory and legislative history, as in this case, need not be construed to reach such a result, I view it as the duty of this Court to adopt a permissible construction that accords with some modicum of common sense and the public weal."[17] This states yet another theory of legislation, another theory of how the legislature's intentions affect the statute behind the text, and it is very different from Burger's theory. Burger said that the acontextual meaning of the text should be enforced, no matter how odd or absurd the consequences, unless the court discovered strong evidence that Congress actually intended the opposite. Powell said that the courts should accept an absurd result only if they find compelling evidence that *it* was intended. Burger's theory is Gray's, though in a less rigid form that gives some role to legislative intention. Powell's theory is like Earl's, though in this case it substitutes common sense for the principles of justice found elsewhere in the law.

Once again, if we take the opinions of these two justices at face value, they did not disagree about any historical matters of fact. They did not disagree about the state of mind of the various congressmen who joined in enacting the Endangered Species Act. Both justices assumed that most congressmen had never considered whether the act might be used to halt an expensive dam almost completed. Nor did they disagree over the question of fidelity. Both accepted that the Court should follow the law. They disagreed about the question of law; they disagreed about how judges should decide what law is made by a particular text enacted by Congress when the congressmen had the kinds of beliefs and intentions both justices agreed they had in this instance.

McLoughlin

Elmer's case and the snail darter case both arose under a statute. The decision in each case depended upon the best construction of a real statute from a particular legislative text. In many lawsuits, however, the plaintiff appeals not to

any statute but to earlier decisions by courts. He argues that the judge in his case should follow the rules laid down in these earlier cases, which he claims require a verdict for him. *McLoughlin* was of this sort.[18]

Mrs. McLoughlin's husband and four children were injured in an automobile accident in England at about 4 P.M. on October 19, 1973. She heard about the accident at home from a neighbor at about 6 P.M. and went immediately to the hospital, where she learned that her daughter was dead and saw the serious condition of her husband and other children. She suffered nervous shock and later sued the defendant driver, whose negligence had caused the accident, as well as other parties who were in different ways involved, for compensation for her emotional injuries. Her lawyer pointed to several earlier decisions of English courts awarding compensation to people who had suffered emotional injury on seeing serious injury to a close relative. But in all these cases the plaintiff had either been at the scene of the accident or had arrived within minutes. In a 1972 case, for example, a wife recovered—won compensation—for emotional injury; she had come upon the body of her husband immediately after his fatal accident.[19] In 1967 a man who was not related to any of the victims of a train crash worked for hours trying to rescue victims and suffered nervous shock from the experience. He was allowed to recover.[20] Mrs. McLoughlin's lawyer relied on these cases as precedents, decisions which had made it part of the law that people in her position are entitled to compensation.

British and American lawyers speak of the doctrine of precedent; they mean the doctrine that decisions of earlier cases sufficiently like a new case should be repeated in the new case. They distinguish, however, between what we might call a strict and a relaxed doctrine of precedent. The strict doctrine *obliges* judges to follow the earlier decisions of certain other courts (generally courts above them but sometimes at the same level in the hierarchy of courts in their jurisdiction), even if they believe those decisions to have

been wrong. The exact form of the strict doctrine varies from place to place; it is different in the United States and Britain, and it differs from state to state within the United States. According to most lawyers' view of the strict doctrine in Britain, the Court of Appeal, which is just below the House of Lords in authority, has no choice but to follow its own past decisions, but American lawyers deny that the comparable courts in their hierarchy are constrained in this way. Lawyers within a particular jurisdiction sometimes disagree about the details, at least, of the strict doctrine as it applies to them: most American lawyers think that the lower federal courts are absolutely bound to follow past decisions of the Supreme Court, but that view is challenged by some.[21]

The relaxed doctrine of precedent, on the other hand, demands only that a judge give some weight to past decisions on the same issue, that he must follow these unless he thinks them sufficiently wrong to outweigh the initial presumption in their favor. This relaxed doctrine may embrace the past decisions not only of courts above him or at the same level in his jurisdiction but of courts in other states or countries. Obviously, much depends on how strong the initial presumption is taken to be. Once again, opinion varies among lawyers from jurisdiction to jurisdiction, but it is also likely to vary within a jurisdiction to a greater extent than opinion about the dimensions of the strict doctrine. Any judge is likely to give more weight to past decisions of higher than of lower courts in his own jurisdiction, however, and to past decisions of all these courts than to courts of other jurisdictions. He may well give more weight to recent decisions of any court than to earlier ones, more weight to decisions written by powerful or famous judges than to those written by mediocre judges, and so forth. Two decades ago the House of Lords declared that the strict doctrine of precedent does not require it to follow its own past decisions[22]—before that declaration British lawyers had assumed that the strict doctrine did require this—but the House nevertheless gives

great weight to its own past decisions, more than it gives to past decisions of courts lower in the British hierarchy, and much more than it gives to decisions of American courts.

Differences of opinion about the character of the strict doctrine and the force of the relaxed doctrine explain why some lawsuits are controversial. Different judges in the same case disagree about whether they are obliged to follow some past decision on exactly the question of law they now face. That was not, however, the nerve of controversy in *McLoughlin.* Whatever view lawyers take of the character and force of precedent, the doctrine applies only to past decisions sufficiently like the present case to be, as lawyers say, "in point." Sometimes one side argues that certain past decisions are very much in point, but the other side replies that these decisions are "distinguishable," meaning they are different from the present case in some way that exempts them from the doctrine. The judge before whom Mrs. McLoughlin first brought her suit, the trial judge, decided that the precedents her lawyer cited, about others who had recovered compensation for emotional injury suffered when they saw accident victims, were distinguishable because in all those cases the shock had occurred at the scene of the accident while she was shocked some two hours later and in a different place. Of course not every difference in the facts of two cases makes the earlier one distinguishable: no one could think it mattered if Mrs. McLoughlin was younger than the plaintiffs in the earlier cases.

The trial judge thought that suffering injury away from the scene was an important difference because it meant that Mrs. McLoughlin's injury was not "foreseeable" in the way that the injury to the other plaintiffs had been. Judges in both Britain and America follow the common law principle that people who act carelessly are liable only for reasonably foreseeable injuries to others, injuries a reasonable person would anticipate if he reflected on the matter. The trial judge was bound by the doctrine of precedent to recognize that emotional injury to close relatives at the scene of an accident is reasonably foreseeable, but he said that injury to a mother who saw the results of the accident later is not. So he thought he could distinguish the putative precedents in that way and decided against Mrs. McLoughlin's claim.

She appealed his decision to the next highest court in the British hierarchy, the Court of Appeal.[23] That court affirmed the trial judge's decision—it refused her appeal and let his decision stand—but not on the argument he had used. The Court of Appeal said it *was* reasonably foreseeable that a mother would rush to the hospital to see her injured family and that she would suffer emotional shock from seeing them in the condition Mrs. McLoughlin found. That court distinguished the precedents not on that ground but for the very different reason that what it called "policy" justified a distinction. The precedents had established liability for emotional injury in certain restricted circumstances, but the Court of Appeal said that recognizing a larger area of liability, embracing injuries to relatives not at the scene, would have a variety of adverse consequences for the community as a whole. It would encourage many more lawsuits for emotional injuries, and this would exacerbate the problem of congestion in the courts. It would open new opportunities for fraudulent claims by people who had not really suffered serious emotional damage but could find doctors to testify that they had. It would increase the cost of liability insurance, making it more expensive to drive and perhaps preventing some poor people from driving at all. The claims of those who had suffered genuine emotional injury away from the scene would be harder to prove, and the uncertainties of litigation might complicate their condition and delay their recovery.

Mrs. McLoughlin appealed the decision once more, to the House of Lords, which reversed the Court of Appeal and ordered a new trial.[24] The decision was unanimous, but their lordships disagreed about what they called the true state of the law. Several of them said that policy reasons, of the sort described by the Court of Appeal, might in some circum-

stances be sufficient to distinguish a line of precedents and so justify a judge's refusal to extend the principle of those cases to a larger area of liability. But they did not think these policy reasons were of sufficient plausibility or merit in Mrs. McLoughlin's case. They did not believe that the risk of a "flood" of litigation was sufficiently grave, and they said the courts should be able to distinguish genuine from fraudulent claims even among those whose putative injury was suffered several hours after the accident. They did not undertake to say when good policy arguments might be available to limit recovery for emotional injury; they left it an open question, for example, whether Mrs. McLoughlin's sister in Australia (if she had one) could recover for the shock she might have in reading about the accident weeks or months later in a letter.

Two of their lordships took a very different view of the law. They said it would be wrong for courts to deny recovery to an otherwise meritorious plaintiff for the *kinds* of reasons the Court of Appeal had mentioned and which the other law lords had said might be sufficient in some circumstances. The precedents should be regarded as distinguishable, they said, only if the moral *principles* assumed in the earlier cases for some reason did not apply to the plaintiff in the same way. And once it is conceded that the damage to a mother in the hospital hours after an accident is reasonably foreseeable to a careless driver, then no difference in moral principle can be found between the two cases. Congestion in the courts or a rise in the price of automobile liability insurance, they said, however inconvenient these might be to the community as a whole, cannot justify refusing to enforce individual rights and duties that have been recognized and enforced before. They said these were the wrong sorts of arguments to make to judges as arguments of law, however cogent they might be if addressed to legislators as arguments for a change in the law. (Lord Scarman's opinion was particularly clear and strong on this point.) The argument among their

lordships revealed an important difference of opinion about the proper role of considerations of policy in deciding what result parties to a lawsuit are entitled to have.

Brown

After the American Civil War the victorious North amended the Constitution to end slavery and many of its incidents and consequences. One of these amendments, the Fourteenth, declared that no state might deny any person the "equal protection of the laws." After Reconstruction the southern states, once more in control of their own politics, segregated many public facilities by race. Blacks had to ride in the back of the bus and were allowed to attend only segregated schools with other blacks. In the famous case of *Plessy v. Ferguson*[25] the defendant argued, ultimately before the Supreme Court, that these practices of segregation automatically violated the equal protection clause. The Court rejected their claim; it said that the demands of that clause were satisfied if the states provided separate but equal facilities and that the fact of segregation alone did not make facilities automatically unequal.

In 1954 a group of black schoolchildren in Topeka, Kansas, raised the question again.[26] A great deal had happened to the United States in the meantime—a great many blacks had died for that country in a recent war, for example—and segregation seemed more deeply wrong to more people than it had when *Plessy* was decided. Nevertheless, the states that practiced segregation resisted integration fiercely, particularly in the schools. Their lawyers argued that since *Plessy* was a decision by the Supreme Court, that precedent had to be respected. This time the Court decided for the black plaintiffs. Its decision was unexpectedly unanimous, though the unanimity was purchased by an opinion, written by Chief Justice Earl Warren, that was in many ways a compromise. He did not reject the "separate but equal" formula

tant outside legislation as well. Consider prosecutor's discretion and other policy decisions in the criminal process. Consistency might be thought to argue that if some people who commit a particular crime have been and will be punished, all such people should be, and that punishments should be uniform, given an equal level of culpability. Integrity is more discriminating. If a prosecutor's reason for not prosecuting one person lies in policy—if the prosecution would be too expensive, for example, or would for some reason not contribute effectively to deterrence—integrity offers no reason why someone else should not be prosecuted when these reasons of policy are absent or reversed. But if the reasons that argue against prosecution in one case are reasons of principle—that the criminal statute did not give adequate notice, for example—then integrity demands that these reasons be respected for everyone else. Obviously integrity would also condemn prosecutors' decisions that discriminate, even for reasons of ostensible policy, on grounds that violate rights otherwise recognized, as if our prosecutors saved expense by prosecuting only blacks for a kind of crime that was particularly prevalent in mainly black communities.[32]

SEVEN

INTEGRITY IN LAW

A LARGE VIEW

In this chapter we construct the third conception of law I introduced in Chapter 3. Law as integrity denies that statements of law are either the backward-looking factual reports of conventionalism or the forward-looking instrumental programs of legal pragmatism. It insists that legal claims are interpretive judgments and therefore combine backward- and forward-looking elements; they interpret contemporary legal practice seen as an unfolding political narrative. So law as integrity rejects as unhelpful the ancient question whether judges find or invent law; we understand legal reasoning, it suggests, only by seeing the sense in which they do both and neither.

Integrity and Interpretation

The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness. We form our third conception of law, our third view of what rights and duties flow from past political decisions, by restating this instruction as a thesis about the grounds of law. According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice. Deciding whether the law grants Mrs.

McLoughlin compensation for her injury, for example, means deciding whether legal practice is seen in a better light if we assume the community has accepted the principle that people in her position are entitled to compensation.

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

Law as integrity is different: it is both the product of and the inspiration for comprehensive interpretation of legal practice. The program it holds out to judges deciding hard cases is essentially, not just contingently, interpretive; law as integrity asks them to continue interpreting the same material that it claims to have successfully interpreted itself. It offers itself as continuous with—the initial part of—the more

detailed interpretations it recommends. We must therefore now return to the general study of interpretation we began in Chapter 2. We must continue the account given there of what interpretation is and when it is done well, but in more detail and directed more to the special interpretive challenge put to judges and others who must say what the law is.

Integrity and History

History matters in law as integrity: very much but only in a certain way. Integrity does not require consistency in principle over all historical stages of a community's law; it does not require that judges try to understand the law they enforce as continuous in principle with the abandoned law of a previous century or even a previous generation. It commands a horizontal rather than vertical consistency of principle across the range of the legal standards the community now enforces. It insists that the law—the rights and duties that flow from past collective decisions and for that reason license or require coercion—contains not only the narrow explicit content of these decisions but also, more broadly, the scheme of principles necessary to justify them. History matters because that scheme of principle must justify the standing as well as the content of these past decisions. Our justification for treating the Endangered Species Act as law, unless and until it is repealed, crucially includes the fact that Congress enacted it, and any justification we supply for treating that fact as crucial must itself accommodate the way we treat other events in our political past.

Law as integrity, then, begins in the present and pursues the past only so far as and in the way its contemporary focus dictates. It does not aim to recapture, even for present law, the ideals or practical purposes of the politicians who first created it. It aims rather to justify what they did (sometimes including, as we shall see, what they said) in an overall story worth telling now, a story with a complex claim: that present practice can be organized by and justified in principles suffi-

ciently attractive to provide an honorable future. Law as integrity deplores the mechanism of the older "law is law" view as well as the cynicism of the newer "realism." It sees both views as rooted in the same false dichotomy of finding and inventing law. When a judge declares that a particular principle is instinct in law, he reports not a simple-minded claim about the motives of past statesmen, a claim a wise cynic can easily refute, but an interpretive proposal: that the principle both fits and justifies some complex part of legal practice, that it provides an attractive way to see, in the structure of that practice, the consistency of principle integrity requires. Law's optimism is in that way conceptual; claims of law are endemically constructive, just in virtue of the kind of claims they are. This optimism may be misplaced: legal practice may in the end yield to nothing but a deeply skeptical interpretation. But that is not inevitable just because a community's history is one of great change and conflict. An imaginative interpretation can be constructed on morally complicated, even ambiguous terrain.

THE CHAIN OF LAW

The Chain Novel

I argued in Chapter 2 that creative interpretation takes its formal structure from the idea of intention, not (at least not necessarily) because it aims to discover the purposes of any particular historical person or group but because it aims to impose purpose over the text or data or tradition being interpreted. Since all creative interpretation shares this feature, and therefore has a normative aspect or component, we profit from comparing law with other forms or occasions of interpretation. We can usefully compare the judge deciding what the law is on some issue not only with the citizens of courtesy deciding what that tradition requires, but with the literary critic teasing out the various dimensions of value in a complex play or poem.

Judges, however, are authors as well as critics. A judge deciding *McLoughlin* or *Brown* adds to the tradition he interprets; future judges confront a new tradition that includes what he has done. Of course literary criticism contributes to the traditions of art in which authors work; the character and importance of that contribution are themselves issues in critical theory. But the contribution of judges is more direct, and the distinction between author and interpreter more a matter of different aspects of the same process. We can find an even more fruitful comparison between literature and law, therefore, by constructing an artificial genre of literature that we might call the chain novel.

In this enterprise a group of novelists writes a novel *seriatim;* each novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on. Each has the job of writing his chapter so as to make the novel being constructed the best it can be, and the complexity of this task models the complexity of deciding a hard case under law as integrity. The imaginary literary enterprise is fantastic but not unrecognizable. Some novels have actually been written in this way, though mainly for a debunking purpose, and certain parlor games for rainy weekends in English country houses have something of the same structure. Television soap operas span decades with the same characters and some minimal continuity of personality and plot, though they are written by different teams of authors even in different weeks. In our example, however, the novelists are expected to take their responsibilities of continuity more seriously; they aim jointly to create, so far as they can, a single unified novel that is the best it can be.[1]

Each novelist aims to make a single novel of the material he has been given, what he adds to it, and (so far as he can control this) what his successors will want or be able to add. He must try to make this the best novel it can be construed as the work of a single author rather than, as is the fact, the product of many different hands. That calls for an overall

judgment on his part, or a series of overall judgments as he writes and rewrites. He must take up some view about the novel in progress, some working theory about its characters, plot, genre, theme, and point, in order to decide what counts as continuing it and not as beginning anew. If he is a good critic, his view of these matters will be complicated and multifaceted, because the value of a decent novel cannot be captured from a single perspective. He will aim to find layers and currents of meaning rather than a single, exhaustive theme. We can, however, in our now familiar way give some structure to any interpretation he adopts, by distinguishing two dimensions on which it must be tested. The first is what we have been calling the dimension of fit. He cannot adopt any interpretation, however complex, if he believes that no single author who set out to write a novel with the various readings of character, plot, theme, and point that interpretation describes could have written substantially the text he has been given. That does not mean his interpretation must fit every bit of the text. It is not disqualified simply because he claims that some lines or tropes are accidental, or even that some events of plot are mistakes because they work against the literary ambitions the interpretation states. But the interpretation he takes up must nevertheless flow throughout the text; it must have general explanatory power, and it is flawed if it leaves unexplained some major structural aspect of the text, a subplot treated as having great dramatic importance or a dominant and repeated metaphor. If no interpretation can be found that is not flawed in that way, then the chain novelist will not be able fully to meet his assignment; he will have to settle for an interpretation that captures most of the text, conceding that it is not wholly successful. Perhaps even that partial success is unavailable; perhaps every interpretation he considers is inconsistent with the bulk of the material supplied to him. In that case he must abandon the enterprise, for the consequence of taking the interpretive attitude toward the text in question is then a piece of internal skepticism: that nothing

can count as continuing the novel rather than beginning anew.

He may find, not that no single interpretation fits the bulk of the text, but that more than one does. The second dimension of interpretation then requires him to judge which of these eligible readings makes the work in progress best, all things considered. At this point his more substantive aesthetic judgments, about the importance or insight or realism or beauty of different ideas the novel might be taken to express, come into play. But the formal and structural considerations that dominate on the first dimension figure on the second as well, for even when neither of two interpretations is disqualified out of hand as explaining too little, one may show the text in a better light because it fits more of the text or provides a more interesting integration of style and content. So the distinction between the two dimensions is less crucial or profound than it might seem. It is a useful analytical device that helps us give structure to any interpreter's working theory or style. He will form a sense of when an interpretation fits so poorly that it is unnecessary to consider its substantive appeal, because he knows that this cannot outweigh its embarrassments of fit in deciding whether it makes the novel better, everything taken into account, than its rivals. This sense will define the first dimension for him. But he need not reduce his intuitive sense to any precise formula; he would rarely need to decide whether some interpretation barely survives or barely fails, because a bare survivor, no matter how ambitious or interesting it claimed the text to be, would almost certainly fail in the overall comparison with other interpretations whose fit was evident.

We can now appreciate the range of different kinds of judgments that are blended in this overall comparison. Judgments about textual coherence and integrity, reflecting different formal literary values, are interwoven with more substantive aesthetic judgments that themselves assume different literary aims. Yet these various kinds of judgments, of each general kind, remain distinct enough to check one an-

other in an overall assessment, and it is that possibility of contest, particularly between textual and substantive judgments, that distinguishes a chain novelist's assignment from more independent creative writing. Nor can we draw any flat distinction between the stage at which a chain novelist interprets the text he has been given and the stage at which he adds his own chapter, guided by the interpretation he has settled on. When he begins to write he might discover in what he has written a different, perhaps radically different, interpretation. Or he might find it impossible to write in the tone or theme he first took up, and that will lead him to reconsider other interpretations he first rejected. In either case he returns to the text to reconsider the lines it makes eligible.

Scrooge

We can expand this abstract description of the chain novelist's judgment through an example. Suppose you are a novelist well down the chain. Suppose Dickens never wrote *A Christmas Carol,* and the text you are furnished, though written by several people, happens to be the first part of that short novel. You consider these two interpretations of the central character: Scrooge is inherently and irredeemably evil, an embodiment of the untarnished wickedness of human nature freed from the disguises of convention he rejects; or Scrooge is inherently good but progressively corrupted by the false values and perverse demands of high capitalist society. Obviously it will make an enormous difference to the way you continue the story which of these interpretations you adopt. If you have been given almost all of *A Christmas Carol* with only the very end to be written—Scrooge has already had his dreams, repented, and sent his turkey—it is too late for you to make him irredeemably wicked, assuming you think, as most interpreters would, that the text will not bear that interpretation without too much strain. I do not mean that no interpreter could possibly think Scrooge inherently evil after his supposed redemption.

Someone might take that putative redemption to be a final act of hypocrisy, though only at the cost of taking much else in the text not at face value. This would be a poor interpretation, not because no one could think it a good one, but because it is in fact, on all the criteria so far described, a poor one.[2]

But now suppose you have been given only the first few sections of *A Christmas Carol.* You find that neither of the two interpretations you are considering is decisively ruled out by anything in the text so far; perhaps one would better explain some minor incidents of plot that must be left unconnected on the other, but each interpretation can be seen generally to flow through the abbreviated text as a whole. A competent novelist who set out to write a novel along either of the lines suggested could well have written what you find on the pages. In that case you have a further decision to make. Your assignment is to make of the text the best it can be, and you will therefore choose the interpretation you believe makes the work more significant or otherwise better. That decision will probably (though not inevitably) depend on whether you think that real people somewhat like Scrooge are born bad or are corrupted by capitalism. But it will depend on much else as well, because your aesthetic convictions are not so simple as to make only this aspect of a novel relevant to its overall success. Suppose you think that one interpretation integrates not only plot but image and setting as well; the social interpretation accounts, for example, for the sharp contrast between the individualistic fittings and partitions of Scrooge's countinghouse and the communitarian formlessness of Bob Cratchit's household. Now your aesthetic judgment—about which reading makes the continuing novel better as a novel—is itself more complex because it must identify and trade off different dimensions of value in a novel. Suppose you believe that the original sin reading is much the more accurate depiction of human nature, but that the sociorealist reading provides a deeper and more interesting formal structure for the novel. You must then ask

yourself which interpretation makes the work of art better on the whole. You may never have reflected on that sort of question before—perhaps the tradition of criticism in which you have been trained takes it for granted that one or the other of these dimensions is the more important—but that is no reason why you may not do so now. Once you make up your mind you will believe that the correct interpretation of Scrooge's character is the interpretation that makes the novel better on the whole, so judged.

This contrived example is complex enough to provoke the following apparently important question. Is your judgment about the best way to interpret and continue the sections you have been given of *A Christmas Carol* a free or a constrained judgment? Are you free to give effect to your own assumptions and attitudes about what novels should be like? Or are you bound to ignore these because you are enslaved by a text you cannot alter? The answer is plain enough: neither of these two crude descriptions—of total creative freedom or mechanical textual constraint—captures your situation, because each must in some way be qualified by the other. You will sense creative freedom when you compare your task with some relatively more mechanical one, like direct translation of a text into a foreign language. But you will sense constraint when you compare it with some relatively less guided one, like beginning a new novel of your own.

It is important not only to notice this contrast between elements of artistic freedom and textual constraint but also not to misunderstand its character. It is *not* a contrast between those aspects of interpretation that are dependent on and those that are independent of the interpreter's aesthetic convictions. And it is not a contrast between those aspects that may be and those that cannot be controversial. For the constraints that you sense as limits to your freedom to read *A Christmas Carol* so as to make Scrooge irredeemably evil are as much matters of judgment and conviction, about which different chain novelists might disagree, as the convictions and

attitudes you call on in deciding whether the novel would have been better if he had been irredeemably evil. If the latter convictions are "subjective" (I use the language of external skepticism, reluctantly, because some readers will find it helpful here) then so are the former. Both major types of convictions any interpreter has—about which readings fit the text better or worse and about which of two readings makes the novel substantively better—are internal to his overall scheme of beliefs and attitudes; neither type is independent of that scheme in some way that the other is not.

That observation invites the following objection. "If an interpreter must in the end rely on what seems right to him, as much in deciding whether some interpretation fits as in deciding whether it makes the novel more attractive, then he is actually subject to no genuine constraint at all, because no one's judgment can be constrained except by external, hard facts that everyone must agree about." The objection is misconceived because it rests on a piece of dogmatism. It is a familiar part of our cognitive experience that some of our beliefs and convictions operate as checks in deciding how far we can or should accept or give effect to others, and the check is effective even when the constraining beliefs and attitudes are controversial. If one scientist accepts stricter standards for research procedure than another, he will believe less of what he would like to believe. If one politician has scruples that another politician in good faith rejects, the first will be constrained when the second is not. There is no harm, once again, in using the language of subjectivity the external skeptic favors. We might say that in these examples the constraint is "internal" or "subjective." It is nevertheless phenomenologically genuine, and that is what is important here. We are trying to see what interpretation is like from the point of view of the interpreter, and from that point of view the constraint he feels is as genuine as if it were uncontroversial, as if everyone else felt it as powerfully as he does. Suppose someone then insists that from an "objective" point of view there is no real constraint at all, that the constraint is

merely subjective. If we treat this further charge as the external skeptic's regular complaint, then it is pointless and misleading in the way we noticed in Chapter 2. It gives a chain novelist no reason to doubt or abandon the conclusions he reaches, about which interpretations fit the text well enough to count, for example, or so poorly that they must be rejected if other interpretations, otherwise less attractive, are available.

The skeptical objection can be made more interesting, however, if we weaken it in the following way. It now insists that a felt constraint may sometimes be illusory not for the external skeptic's dogmatic reason, that a genuine constraint must be uncontroversial and independent of other beliefs and attitudes, but because it may not be sufficiently disjoint, within the system of the interpreter's more substantive artistic convictions, ever actually to check or impede these, even from his point of view.[3] That is a lively possibility, and we must be on guard against it when we criticize our own or other people's interpretive arguments. I made certain assumptions about the structure of your aesthetic opinions when I imagined your likely overall judgment about *A Christmas Carol.* I assumed that the different types of discrete judgments you combine in your overall opinion are sufficiently independent of one another, within the system of your ideas, to allow some to constrain others. You reject reading Scrooge's supposed redemption as hypocritical for "formal" reasons about coherence and integration of plot and diction and figure. A decent novel (you think) would not make a hypocritical redemption the upshot of so dramatic and shattering an event as Scrooge's horrifying night. These formal convictions are independent of your more substantive opinions about the competing value of different literary aims: even if you think a novel of original sin would be more exciting, that does not transform your formal conviction into one more amenable to the original sin interpretation. But suppose I am wrong in these assumptions about your mental life. Suppose we discover in the process of argument that your formal convictions are actually soldered to and driven by more substantive ones. Whenever you prefer a reading of some text on substantive grounds, your formal convictions automatically adjust to endorse it as a decent reading of that text. You might, of course, only be pretending that this is so, in which case you are acting in bad faith. But the adjustment may be unconscious, in which case you think you are constrained but, in the sense that matters, you actually are not. Whether any interpreter's convictions actually check one another, as they must if he is genuinely interpreting at all, depends on the complexity and structure of his pertinent opinions as a whole.

Our chain-novel example has so far been distorted by the unrealistic assumption that the text you were furnished miraculously had the unity of something written by a single author. Even if each of the previous novelists in the chain took his responsibilities very seriously indeed, the text you were given would show the marks of its history, and you would have to tailor your style of interpretation to that circumstance. You might not find any interpretation that flows through the text, that fits everything the material you have been given treats as important. You must lower your sights (as conscientious writers who join the team of an interminable soap opera might do) by trying to construct an interpretation that fits the bulk of what you take to be artistically most fundamental in the text. More than one interpretation may survive this more relaxed test. To choose among these, you must turn to your background aesthetic convictions, including those you will regard as formal. Possibly no interpretation will survive even the relaxed test. That is the skeptical possibility I mentioned earlier: you will then end by abandoning the project, rejecting your assignment as impossible. But you cannot know in advance that you will reach that skeptical result. You must try first. The chain-novel fantasy will be useful in the later argument in various ways, but that is the most important lesson it teaches. The wise-sounding judgment that no one interpretation could be

best must be earned and defended like any other interpretive claim.

A Misleading Objection

A chain novelist, then, has many difficult decisions to make, and different chain novelists can be expected to make these differently. But his decisions do not include, nor are they properly summarized as, the decision whether and how far he should depart from the novel-in-progress he has been furnished. For he has nothing he *can* depart from or cleave to until he has constructed a novel-in-process from the text, and the various decisions we have canvassed are all decisions he must make just to do this. Suppose you have decided that a sociorealist interpretation of the opening sections of *A Christmas Carol* makes that text, on balance, the best novel-so-far it can be, and so you continue the novel as an exploration of the uniformly degrading master-servant relation under capitalism rather than as a study of original sin. Now suppose someone accuses you of rewriting the "real" novel to produce a different one that you like better. If he means that the "real" novel can be discovered in some way other than by a process of interpretation of the sort you conducted, then he has misunderstood not only the chain-novel enterprise but the nature of literature and criticism. Of course, he may mean only that he disagrees with the particular interpretive and aesthetic convictions on which you relied. In that case your disagreement is not that he thinks you should respect the text, while you think you are free to ignore it. Your disagreement is more interesting: you disagree about what respecting this text means.

LAW: THE QUESTION OF EMOTIONAL DAMAGES

Law as integrity asks a judge deciding a common-law case like *McLoughlin* to think of himself as an author in the chain

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

Call him Hercules.[4] In this and the next several chapters we follow his career by noticing the types of judgments he must make and tensions he must resolve in deciding a variety of cases. But I offer this caution in advance. We must not suppose that his answers to the various questions he encounters *define* law as integrity as a general conception of law. They are the answers I now think best. But law as integrity consists in an approach, in questions rather than answers, and other lawyers and judges who accept it would give different answers from his to the questions it asks. You might think other answers would be better. (So might I, after further thought.) You might, for example, reject Hercules' views about how far people's legal rights depend on the rea-

sons past judges offered for their decisions enforcing these rights, or you might not share his respect for what I shall call "local priority" in common-law decisions. If you reject these discrete views because you think them poor constructive interpretations of legal practice, however, you have not rejected law as integrity but rather have joined its enterprise.

Six Interpretations

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

He is a careful judge, a judge of method. He begins by setting out various candidates for the best interpretation of the precedent cases even before he reads them. Suppose he makes the following short list: (1) No one has a moral right to compensation except for physical injury. (2) People have a moral right to compensation for emotional injury suffered at the scene of an accident against anyone whose carelessness caused the accident but have no right to compensation for emotional injury suffered later. (3) People should recover compensation for emotional injury when a practice of requiring compensation in their circumstances would diminish the overall costs of accidents or otherwise make the community richer in the long run. (4) People have a moral right to compensation for any injury, emotional or physical, that is the direct consequence of careless conduct, no matter how unlikely or unforeseeable it is that that conduct would result

in that injury. (5) People have a moral right to compensation for emotional or physical injury that is the consequence of careless conduct, but only if that injury was reasonably foreseeable by the person who acted carelessly. (6) People have a moral right to compensation for reasonably foreseeable injury but not in circumstances when recognizing such a right would impose massive and destructive financial burdens on people who have been careless out of proportion to their moral fault.

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

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

What about (3)? It might fit the past decisions, but only in the following way. Hercules might discover through economic analysis that someone who accepted the economic theory expressed by (3) and who wished to reduce the community's accident costs would have made just those decisions. But it is far from obvious that (3) states any principle of justice or fairness. Remember the distinction between principles and policies we discussed toward the end of the last chapter. (3) supposes that it is desirable to reduce accident costs overall. Why? Two explanations are possible. The first insists that people have a right to compensation whenever a rule awarding compensation would produce more wealth for the community overall than a rule denying it. This has the form, at least, of a principle because it describes a general right everyone is supposed to have. I shall not ask Hercules to consider (3) understood in that way now, because he will study it very carefully in Chapter 8. The second, quite different, explanation suggests that it is sometimes or even always in the community's general interest to promote overall wealth in this way, but it does not suppose that anyone has any right that social wealth always be increased. It therefore sets out a policy that government might or might not decide to pursue in particular circumstances. It does not state a principle of justice, and so it cannot figure in an interpretation of the sort Hercules now seeks.[6]

Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards. That style of adjudication respects the ambition integrity assumes, the ambition to be a community of principle. But as we saw at the end of Chapter 6, integrity does not recommend what would be perverse, that we should all be governed by the same goals and strategies of policy on every occasion. It does not insist that a legislature that enacts one set of rules about compensation today, in order to make the community richer on the whole, is in any way committed to serve that same goal of policy tomorrow. For it might then have other goals to seek, not necessarily in place of wealth but beside it, and integrity does not frown on this diversity. Our account of interpretation, and our consequent elimination of interpretation (3) read as a naked appeal to policy, reflects a discrimination already latent in the ideal of integrity itself.

We reach the same conclusion in the context of *McLoughlin* through a different route, by further reflection on what we have learned about interpretation. An interpretation aims to show what is interpreted in the best light possible, and an interpretation of any part of our law must therefore attend not only to the substance of the decisions made by earlier officials but also to how—by which officials in which circumstances—these decisions were made. A legislature does not need reasons of principle to justify the rules it enacts about driving, including rules about compensation for accidents,

even though these rules will create rights and duties for the future that will then be enforced by coercive threat. A legislature may justify its decision to create new rights for the future by showing how these will contribute, as a matter of sound policy, to the overall good of the community as a whole. There are limits to this kind of justification, as we noticed in Chapter 6. The general good may not be used to justify the death penalty for careless driving. But the legislature need not show that citizens already have a moral right to compensation for injury under particular circumstances in order to justify a statute awarding damages in those circumstances.

Law as integrity assumes, however, that judges are in a very different position from legislators. It does not fit the character of a community of principle that a judge should have authority to hold people liable in damages for acting in a way he concedes they had no legal duty not to act. So when judges construct rules of liability not recognized before, they are not free in the way I just said legislators are. Judges must make their common-law decisions on grounds of principle, not policy: they must deploy arguments why the parties actually had the "novel" legal rights and duties they enforce at the time the parties acted or at some other pertinent time in the past.[7] A legal pragmatist would reject that claim. But Hercules rejects pragmatism. He follows law as integrity and therefore wants an interpretation of what judges did in the earlier emotional damage cases that shows them acting in the way he approves, not in the way he thinks judges must decline to act. It does not follow that he must dismiss interpretation (3) read in the first way I described, as supposing that past judges acted to protect a general legal right to compensation when this would make the community richer. For if people actually have such a right, others have a corresponding duty, and judges do not act unjustly in ordering the police to enforce it. The argument disqualifies interpretation (3) only when this is read to deny any such general duty and to rest on grounds of policy alone.

Expanding the Range

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

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

But sometimes the expansion will be deliberate and controversial. Lawyers celebrate dozens of decisions of that character, including several on which the modern law of negligence was built.[8] Scholarship offers other important examples.[9]

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

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

Now suppose a different possibility: that though liability has in many and varied cases actually been limited to an amount less than interpretation (5) would allow, the opinions attached to these cases made no mention of the principle of interpretation (6), which has in fact never before been recognized in official judicial rhetoric. Does that show that interpretation (5) fits the legal record much better, or that interpretation (6) is ineligible after all? Judges in fact divide about this issue of fit. Some would not seriously consider interpretation (6) if no past judicial opinion or legislative statement had ever explicitly mentioned its principle. Others reject this constraint and accept that the best interpretation of some line of cases may lie in a principle that has never been recognized explicitly but that nevertheless offers a brilliant account of the actual decisions, showing them in a bet-

ter light than ever before.[10] Hercules will confront this issue as a special question of political morality. The political history of the community is *pro tanto* a better history, he thinks, if it shows judges making plain to their public, through their opinions, the path that later judges guided by integrity will follow and if it shows judges making decisions that give voice as well as effect to convictions about morality that are widespread through the community. Judicial opinions formally announced in law reports, moreover, are themselves acts of the community personified that, particularly if recent, must be taken into the embrace of integrity.[11] These are among his reasons for somewhat preferring an interpretation that is not too novel, not too far divorced from what past judges and other officials said as well as did. But he must set these reasons against his more substantive political convictions about the relative moral value of the two interpretations, and if he believes that interpretation (6) is much superior from that perspective, he will think he makes the legal record better overall by selecting it even at the cost of the more procedural values. Fitting what judges did is more important than fitting what they said.

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

Hercules' answer will depend on his convictions about the two constituent virtues of political morality we have considered: justice and fairness.[12] It will depend, that is, not only on his beliefs about which of these principles is superior as a matter of abstract justice but also about which should be followed, as a matter of political fairness, in a community whose members have the moral convictions his fellow citizens have. In some cases the two kinds of judgment—the judgment of justice and that of fairness—will come together. If Hercules and the public at large share the view that people are entitled to be compensated fully whenever they are injured by others' carelessness, without regard to how harsh this requirement might turn out to be, then he will think that interpretation (5) is plainly the better of the two in play. But the two judgments will sometimes pull in different directions. He may think that interpretation (6) is better on grounds of abstract justice, but know that this is a radical view not shared by any substantial portion of the public and unknown in the political and moral rhetoric of the times. He might then decide that the story in which the state insists on the view he thinks right, but against the wishes of the people as a whole, is a poorer story, on balance. He would be preferring fairness to justice in these circumstances, and that preference would reflect a higher-order level of his own political

convictions, namely his convictions about how a decent government committed to both fairness and justice should adjudicate between the two in this sort of case.

Judges will have different ideas of fairness, about the role each citizen's opinion should ideally play in the state's decision about which principles of justice to enforce through its central police power. They will have different higher-level opinions about the best resolution of conflicts between these two political ideals. No judge is likely to hold the simplistic theory that fairness is automatically to be preferred to justice or vice versa. Most judges will think that the balance between the opinions of the community and the demands of abstract justice must be struck differently in different kinds of cases. Perhaps in ordinary commercial or private law cases, like *McLoughlin,* an interpretation supported in popular morality will be deemed superior to one that is not, provided it is not thought very much inferior as a matter of abstract justice. But many judges will think the interpretive force of popular morality very much weaker in constitutional cases like *Brown,* because they will think the point of the Constitution is in part to protect individuals from what the majority thinks right.[13]

Local Priority

I must call special attention to a feature of Hercules' practice that has not yet clearly emerged. His judgments of fit expand out from the immediate case before him in a series of concentric circles. He asks which interpretations on his initial list fit past emotional injury cases, then which ones fit cases of accidental damage to the person more generally, then which fit damage to economic interests, and so on into areas each further and further from the original *McLoughlin* issue. This procedure gives a kind of local priority to what we might call "departments" of law. If Hercules finds that neither of two principles is flatly contradicted by the accidental damage cases of his jurisdiction, he expands his study

into, say, contract cases to see which of these principles, if either, fits contract decisions better. But in Hercules' view, if one principle does *not* fit accident law at all—if it is contradicted by almost every decision in the area that might have confirmed it—this counts dramatically against it as an eligible interpretation of that body of law, even if it fits other areas of the law superbly. He will not treat this doctrine of local priority as absolute, however; he will be ready to override it, as we shall soon see, in some circumstances.

The compartmentalization of law into separate departments is a prominent feature of legal practice. Law schools divide courses and their libraries divide treatises to distinguish emotional from economic or physical injury, intentional from unintentional torts, tort from crime, contract from other parts of common law, private from public law, and constitutional law from other parts of public law. Legal and judicial arguments respect these traditional divisions. Judicial opinions normally begin by assigning the case in hand to some department of law, and the precedents and statutes considered are usually drawn exclusively from that department. Often the initial classification is both controversial and crucial.

Compartmentalization suits both conventionalism and pragmatism, though for different reasons. Departments of law are based on tradition, which seems to support conventionalism, and they provide a strategy a pragmatist can manipulate in telling his noble lies: he can explain that his new doctrine need not be consistent in principle with past decisions because the latter, properly understood, belong to a different department. Law as integrity has a more complex attitude toward departments of law. Its general spirit condemns them, because the adjudicative principle of integrity asks judges to make the law coherent as a whole, so far as they can, and this might be better done by ignoring academic boundaries and reforming some departments of law radically to make them more consistent in principle with others.[14] But law as integrity is interpretive, and compart-

mentalization is a feature of legal practice no competent interpretation can ignore.

Hercules responds to these competing impulses by seeking a constructive interpretation of compartmentalization. He tries to find an explanation of the practice of dividing law into departments that shows that practice in its best light. The boundaries between departments usually match popular opinion; many people think that intentional harm is more blameworthy than careless harm, that the state needs a very different kind of justification to declare someone guilty of a crime than it needs to require him to pay compensation for damage he has caused, that promises and other forms of explicit agreement or consent are a special kind of reason for state coercion, and so forth. Dividing departments of law to match that sort of opinion promotes predictability and guards against sudden official reinterpretations that uproot large areas of law, and it does this in a way that promotes a deeper aim of law as integrity. If legal compartments make sense to people at large, they encourage the protestant attitude integrity favors, because they allow ordinary people as well as hard-pressed judges to interpret law within practical boundaries that seem natural and intuitive.

Hercules accepts that account of the point of compartmentalization, and he shapes his doctrine of local priority accordingly. He allows the doctrine most force when the boundaries between traditional departments of law track widely held moral principles distinguishing types of fault or responsibility, and the substance of each department reflects those moral principles. The distinction between criminal and civil law meets that test. Suppose Hercules thinks, contrary to most people's opinion, that being made to pay compensation is just as bad as being made to pay a fine, and therefore that the distinction between criminal and civil law is unsound in principle. He will nevertheless defer to local priority. He will not claim that criminal and civil law should be treated as one department; he will not argue that a criminal defendant's guilt need only be established as probable

rather than beyond a reasonable doubt because the probable standard fits the combined department as well as any other.

But Hercules will not be so ready to defer to local priority when his test is not met, when traditional boundaries between departments have become mechanical and arbitrary, either because popular morality has shifted or because the substance of the departments no longer reflects popular opinion.[15] Compartments of law do sometimes grow arbitrary and isolated from popular conviction in that way, particularly when the central rules of the departments were developed in different periods. Suppose the legal tradition of a community has for many decades separated nuisance law, which concerns the discomfort of interference that activities on one person's land cause to neighbors, from negligence law, which concerns the physical or economic or emotional injuries someone's carelessness inflicts on others. Suppose that the judges who decided the crucial nuisance cases disdained any economic test for nuisance; they said that an activity counts as a nuisance, and must therefore be stopped, when it is not a "natural" or traditional use of the land, so that someone who starts a factory on land traditionally used for farming is guilty of nuisance even though the factory is an economically more efficient use. But suppose that in recent years judges have begun to make economic cost crucial for negligence. They say that someone's failure to take precautions against injuring others is negligent, so that he is liable for the resulting injury if the precaution was "reasonable" in the circumstances, and that the economic cost of the precaution counts in deciding whether it was in fact reasonable.

The distinction between negligence and nuisance law no longer meets Hercules' test, if it ever did. It makes some sense to distinguish nuisance from negligence if we assume that nuisance is intentional while negligence is unintentional; then the distinction tracks the popular principle that it is worse to injure someone knowingly than unknowingly. But the developments in negligence law I just described are not

consistent with that view of the distinction, because failing to guard against an accident is not necessarily unintentional in the required sense. So Hercules would be ready to ignore the traditional boundary between these two departments of law. If he thought that the "natural use" test was silly, and the economic cost test much more just, he would argue that the negligence and nuisance precedents should be seen as one body of law, and that the economic cost test is a superior interpretation of that unified body. His argument would probably be made easier by other legal events that already had occurred. The intellectual climate that produced the later negligence decisions would have begun to erode the assumption of the earlier nuisance cases, that novel enterprises that annoy people are necessarily legal wrongs. Perhaps the legislature would have adopted special statutes rearranging liability for some new forms of inconvenience, like airport noise, that the "natural" theory has decided or would decide in what seems the wrong way, for example. Or perhaps judges would have decided airport cases by straining the historical meaning of "natural" to reach decisions that seemed sensible given developing technology. Hercules would cite these changes as supporting his interpretive argument consolidating nuisance and negligence. If he persuades the profession to his view, nuisance and negligence will no longer be distinct departments of law but joint tenants of a new province which will shortly attract a new name attached to new law school courses and new treatises. This process is in fact under way in Anglo-American law, as is, though less securely, a new unification of private law that blurs even the long-established and once much firmer boundary between contract and tort.

A PROVISIONAL SUMMARY

In the next three chapters we continue constructing Hercules' working theory of law as integrity by exploring in more detail issues raised in three departments of adjudication: common-law cases, cases turning on statutes, and cases of constitutional dimension. But first we will take stock, though this means some repetition, and then consider certain objections to the argument so far. Judges who accept the interpretive ideal of integrity decide hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community. They try to make that complex structure and record the best these can be. It is analytically useful to distinguish different dimensions or aspects of any working theory. It will include convictions about both fit and justification. Convictions about fit will provide a rough threshold requirement that an interpretation of some part of the law must meet if it is to be eligible at all. Any plausible working theory would disqualify an interpretation of our own law that denied legislative competence or supremacy outright or that claimed a general principle of private law requiring the rich to share their wealth with the poor. That threshold will eliminate interpretations that some judges would otherwise prefer, so the brute facts of legal history will in this way limit the role any judge's personal convictions of justice can play in his decisions. Different judges will set this threshold differently. But anyone who accepts law as integrity must accept that the actual political history of his community will sometimes check his other political convictions in his overall interpretive judgment. If he does not—if his threshold of fit is wholly derivative from and adjustable to his convictions of justice, so that the latter automatically provide an eligible interpretation—then he cannot claim in good faith to be interpreting his legal practice at all. Like the chain novelist whose judgments of fit automatically adjusted to his substantive literary opinions, he is acting from bad faith or self-deception.

Hard cases arise, for any judge, when his threshold test does not discriminate between two or more interpretations of

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

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

example, that political decisions should mainly respect majority opinion, and yet believe that this requirement relaxes and even disappears when serious constitutional rights are in question.

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

No mortal judge can or should try to articulate his instinctive working theory so far, or make that theory so concrete and detailed, that no further thought will be necessary case by case. He must treat any general principles or rules of

thumb he has followed in the past as provisional and stand ready to abandon these in favor of more sophisticated and searching analysis when the occasion demands. These will be moments of special difficulty for any judge, calling for fresh political judgments that may be hard to make. It would be absurd to suppose that he will always have at hand the necessary background convictions of political morality for such occasions. Very hard cases will force him to develop his conception of law and his political morality together in a mutually supporting way. But it is nevertheless possible for any judge to confront fresh and challenging issues as a matter of principle, and this is what law as integrity demands of him. He must accept that in finally choosing one interpretation over another of a much contested line of precedents, perhaps after demanding thought and shifting conviction, he is developing his working conception of law in one rather than another direction. This must seem to him the right direction as a matter of political principle, not just appealing for the moment because it recommends an attractive decision in the immediate case. There is, in this counsel, much room for deception, including self-deception. But on most occasions it will be possible for judges to recognize when they have submitted an issue to the discipline it describes. And also to recognize when some other judge has not.

SOME FAMILIAR OBJECTIONS

Hercules Is Playing Politics

Hercules has completed his labors in *McLoughlin.* He declares that the best interpretation of the emotional damage cases, all things considered, is (5): the law allows compensation for all emotional injury directly caused by careless driving and foreseeable by a reasonably thoughtful motorist. But he concedes that in reaching that conclusion he has relied on his own opinion that this principle is better—fairer and more just—than any other that is eligible on what he takes to be

the right criteria of fit. He also concedes that this opinion is controversial: it is not shared by all of his fellow judges, some of whom therefore think that some other interpretation, for example (6), is superior. What complaints are his arguments likely to attract? The first in the list I propose to consider accuses Hercules of ignoring the actual law of emotional injury and substituting his own views about what the law should be.

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

We should therefore consider the second, more interesting reading of the objection: this claims that a judge must never rely on his personal convictions about fairness or justice the way Hercules did in this instance. Suppose the critic says, "The correct interpretation of a line of past decisions can always be discovered by morally neutral means, because the correct interpretation is just a matter of discovering what principles the judges who made these decisions intended to lay down, and that is just a matter of historical fact." Hercules will point out that this critic needs a political reason for his dictum that interpretations must match the intentions of past judges. That is an extreme form of the position we have