HUMDRUM, HERO AND LEGAL DOCTRINE.

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Humdrum J. is a defender of doctrine. Hero believes that there is no way to cut off doctrinal debate from `open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary', and that this is so for all areas of law:

> ...every branch of doctrine must rely tacitly if not explicitly upon some picture of the forms of human association that are right and realistic in the areas of social life with which it deals.[1]

Hercules, J. is the sort of friend to whom some enemies are preferable. For while he pays lip service to the need for decisions to `fit' the existing materials, he `does not recognise any class of case which is so easy as to be insulated, in principle, from general political controversy',[2] he leaves indeterminate the amount of fit which will be sufficient, and he supplements every decision concerning fit with a decisive criterion of political morality, according to which `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'.[3] Hercules believes that his task is to deliver such constructive interpretations and that this is what judges typically do and should attempt to do, notwithstanding their lack of his intelligence, knowledge or certainty of success. Humdrum on the other hand, plods along drably but honourably, drawing his answers to legal questions - often quite formalistic answers to narrowly conceptual questions - from the law. Humdrum, it must be stressed, is not committed to the strong but implausible claim that law and politics never mix. He merely exemplifies an approach to judging which does not, as it were, put the human condition up for discussion with each decision:

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1 `The Critical Legal Studies Movement' (1983) 96 Harvard Law Review 563 at 567.

2 J.W. Harris, `Unger's Critique of Formalism in Legal Reasoning: Hero, Hercules and Humdrum' (1987) Vol. 11, no.43 Bulletin of the Australian Society of Legal Philosophy 199, 210.

3 Ronald Dworkin, Law's Empire, London, Fontana, 1985; 225.

he differs from both Hercules and Hero in believing that, in many situations, it is possible to arrive at conclusions of law whilst remaining completely agnostic about the justice of society.[4]

HUMDRUM

Dr Harris has argued persuasively that Humdrum does exist and that if he did not, there would be good reasons to invent him. He is a member of an authoritative community of interpretation and decision, within a particular legal tradition which deals over time with many of the most problematic, vexed and complex problems of social life. Notwithstanding that he may not be able to justify his every particular decision or the areas of law in which it occurs, in terms of some coherent underlying scheme of human association, he and the interpretive community to which he belongs recognise and serve other values which have their own distinct importance. Hobbes was convinced of this and so, with qualifications, was Locke. Unger certainly, and perhaps Dworkin also, seem less so. Much that is specifically legal exists because it is a value in law that cases be decided, disputes be authoritatively terminated and rules, interpretations and meanings be declared and agreed upon within and for the legal tradition and those affected by it. These are goals which law serves quite apart from the substantive content of what is decided, and whether it can be derived from some underlying justificatory scheme: unless, unlike Unger, one accepts lex dura sed lex as such a justificatory scheme. This, for example, is one central reason for the pyramidal hierarchies found in complex legal systems. It is not obvious that the High Court will be more closely in touch with the visions of community which underlie contract law than, say, some clever Andersonian on the State Supreme or indeed District Court. Nor that a majority will show more visionary insight than a dissenting minority on the same Bench, or for that matter on a park bench. But in law unlike philosophy, the former and not the latter have a distinctive, albeit not mechanically applicable, authoritative loading in the present and in the future, for there are other considerations at work in law than in philosophy. This is not to defend `mechanical jurisprudence' which is simply impossible, particularly at the appellate level. Interpretive communities cannot eliminate ambiguity, indeterminacy or controversy. But they can limit them, compared to what would otherwise be naturally and socially possible.[5] And it is important for all of us that they should. To note this is to observe and defend the integrity of institutions and institutionalised traditions, in a more conventional and less

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4 J.W. Harris, op.cit., 212.

5 See my `Julius Stone: Leeways of Choice, Legal Tradition, and the Declaratory Theory of Law' (1986) 10 Bulletin of the Australian Society of Legal Philosophy 158; (1986) 9,2 University of New South Wales Law Journal 26.

stipulative use of the word than Dworkin's. John Finnis has made a parallel observation, in noting that Unger and Dworkin both slight:

> the only component [of legal reasoning] that could begin to `contrast' legal with any other form of practical reasoning about social life...[A]uthority, the fiat of legislation, precedent, or custom, binding (though not absolutely) and determinative for legal reasoning (though not absolutely determinative) precisely because (though not only because) it has been made by relevant persons in relevant circumstances and because we need such exercises of authority to terminate disputes and resolve coordination problems both now and for the future, in a consistent and fair fashion.[6]

Again and for similar reasons, legal and all other authoritative text-interpreting traditions comprise many and complex conventions, rules, maxims and shared understandings, which have to do not only with desirable results but also with accepted ways of speaking, writing, reading, interpreting, giving meaning to and justifying what is spoken and written. These include interpretive canons and authorised modes of construction and interpretation; rules about the authority of institutions, texts, other potential sources, and so on. They also include Dr Harris's `models of rationality'. They mould what is said in law and what is taken to have been said. In deference to Dworkin it should be emphasised that many of them are not `rules' in any strict sense, but principles, maxims, shared conventions and understandings. In recent jurisprudential discussions formal and procedural conventions, maxims and principles have received less attention than what might be called substantive ones, those that express substantive values underlying doctrine. But both sorts are important. And the fact that texts are not transparent or self-interpreting does not necessarily mean that authoritative declarers of traditions have only their substantive, extra-doctrinal values to fall back on, or even those values they believe to be immanent in the tradition. Rather they also rely on what Humdrum relies on: what Arthur Glass has described as `the normative and regulative aspects of legal interpretation - viz. those culturally specific requirements that impose themselves upon, structure and give meaning to this interpretive practice'[7]. While such requirements are rarely capable of crisp, decisive, all-or-nothing application they are a crucial part of that pervasive `invisible discourse

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6 J.M. Finnis, `On "The Critical Legal Studies Movement"', (1985) 30 American Journal of Jurisprudence 21 at 24.

7 Arthur Glass, `Dworkin, Fish and Legal Practice' (1986) 10 Bulletin of the Australian Society of Legal Philosophy 203, 224.

of the law',[8] of which James Boyd White writes. As White remarks:

> Behind the words...are expectations about the ways in which they will be used, expectations that do not find explicit expression anywhere but are part of the legal culture that the surface language simply assumes. These expectations are constantly at work, directing argument, shaping responses, determining the next move, and so on. Their effects are everywhere, but they themselves are invisible...It is these conventions, not the diction, that primarily determine the mysterious character of legal speech and literature - not the `vocabulary' of the law, but what might be called its `cultural syntax'.[9]

These conventions are frequently invisible to those who obey them, as much as to perplexed and bewildered laymen. That is part of their power. Where they are in play it is rarely as guides to fundamental substantive visions, or simply as recipes for discovering some pre-given meaning implanted in texts by their authors. Rather they are what Popper calls second-order traditions[10] - traditions about how to deal with the primary stuff to be interpreted - which are commonly deployed in complex traditions to reduce complexity and enable coordination among members of the traditions' authorised trans-temporal interpretive communities. Neither hierarchy nor interpretive conventions have any direct, tip-of-the-iceberg connection with the values or visions which might underlie any particular area of law. But it would be a bold or ignorant judge who made as little of them as Hero or Hercules do.

Thirdly, we should be grateful for Humdrum/Harris's reminder that law, like many other complex, enduring and distinctive traditions in social life has other ways of distinguishing between the internal and external than objectivist ways. In particular:

> When it comes to doctrinal reasoning, Humdrum believes that there are sometimes sufficient reasons to be found in a body of received legal materials for disposing of controverted questions about the present law, and that he will be upholding the law if he finds them. Even when such reasons are not sufficient to dispose of a case, they operate to restrict the rulings between which a choice must be made, and in that way distance his judgment from open-ended ideological controversy. His

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8 `The Invisible Discourse of the Law. Reflections on Legal Literacy and General Education' in Heracles' Bow, Madison, Wisconsin, University of Wisconsin Press, 1985.

9 Ibid., 63.

10 K.R. Popper, `Towards a Rational Theory of Tradition' in Conjectures and Refutations, London, Routledge and Kegan Paul, 1969.

> experience falsifies Hero's assumption that `everything can be proved'.[11]

Like Humdrum I am convinced that commonly `[t]he test which determines whether a proposition is or is not part of legal doctrine is...one of history, not one of political philosophy: is the proposition contained in some source-material which the tradition of his court regards as embodying law'.[12] I would however like to suggest a Dworkinian gloss here, which may already be inherent in Humdrum's practice, though I am not sure. Though I am not persuaded that judges do or should interpret law in terms of the particular values Dworkin stipulates, I do believe that their activity is interpretive in something like the way he describes. I hope that on reflection Humdrum would be prepared to concede to Hercules that legal materials are not merely chosen and applied, or even chosen between, by judges - are not always simply available to be read off - but must be interpreted in the following theoretical sense, which occurs:

> when members of particular communities who share practices and traditions make and dispute claims about the best interpretation of these - when they disagree, that is, about what some tradition or practice actually requires in concrete circumstances.[13]

The passage quoted, if detached from Dworkin's own view of what makes interpretations `best', emphasizes the wisdom of his `chain-novel' view of law: the need, even in hard cases for a judge to continue the particular tradition he is in rather than, say, one he might have preferred to be in.

Of course Unger might concede that judges act in the ways described above, but consider that a reason to condemn them and to emphasise the arbitrary character of law. I do not. There are, as I have suggested, values served by judges like Humdrum, quite apart from the instantiation in a particular area of a defensible scheme of human association; indeed quite apart from whatever it is that they decide in substance. And they include the values Dr Harris gives: predictability, separation of powers and the `rule of law' which, he usefully explains elsewhere, goes beyond the usual catalogue of virtues to include the assumption that:

> the books are not simply closed when a difficult case arises. It is taken for granted that pre-existing legal materials may bear on the answer. `Law', tout court, consists of rules and doctrine, and the rule of law involves both. When `the law' (in the sense of presently valid rules) is unclear, a court which appeals to doctrine is still applying `the law' (in the sense of the

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11 J.W. Harris, op. cit., 213.

12 Ibid.

13 Ronald Dworkin, op.cit., 46.

> historic system or systems which form part of its tradition).[14]

HERO

I might stop there. However, Dr Harris is not only recommending Humdrum, J. for his own virtues. He also prefers him because of the inadequacies of his competitors. In particular, the title of Dr Harris's paper directs us to Unger, and the choice between him and the others appears stark:

> Are Hero's demolition strategy and Hercules' mix of politics and authority the only alternatives? Must we conclude that, if we want to answer questions of law, we must justify our political institutions - that, only if we can show how the community exhibits integrity, can we purport (with Hercules) to know the law: and if we cannot show this, we must (with Hero) rubbish the law?[15]

Harris recognises that if Hercules is an equivocal friend he is equally and for the same reasons an equivocal foe. He is, after all, committed to make the existing tradition - not any other - the best it can be. That means that he must draw deeply from it. He is certainly not out to undermine it, even if some writers fear that might be the result of his `judicial politicking'.[16]

Hero, on the other hand, has no such glorifying ambitions. Indeed, on Harris's account, Hero is a `rubbisher', out to `ditch legal reasoning'[17], to `trash' and demolish existing law and legal institutions and replace them with a totally new conception of law, one conducive to empowered democracy. In the process of demolition, he exploits doctrine not as Hercules does to find some coherent underlying scheme, but like some dialectical white ant seeking through `deviationist doctrine' to expose the ricketiness of apparently solid structures and burrow away at them until they fall. He is neither constrained by what constrains conventional lawyers, nor prepared to countenance what they take to be decisive

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14 J.W. Harris, `Legal Doctrine and Interests in Land', **Oxford Essays in Jurisprudence**, Third Series, ed. John Eekelaar and John Bell, Clarendon Press, Oxford, 1987,172.

15 J.W. Harris, `Unger's Critique of Formalism in Legal Reasoning: Hero, Hercules and Humdrum', 211.

16 Ibid., 216.

17 Ibid., 219.

arguments. He scorns institutional deference.[18] Even more important Hero has, according to Dr Harris:

> disdain for the conventional doctrinal crutch: Hero will not employ a conventional doctrinal argument even to support a legal interpretation which would favour the socially disadvantaged. Hero must resist any temptation to manipulate doctrine even to serve good ends, because to do so would only encourage the false formalist belief that sufficient reasons can be found in given legal materials to settle a question of law without reference to full-blown ideological debate.[19]

At least in regard to doctrine, then, it would appear that Unger is a revolutionary `maximalist', determined to overthrow the existing legal structures and to do so without relying on them in any way.

This interpretation of Unger does not appear to me to do his argument justice, either in general or with particular reference to doctrine. That does not mean that Hero's strategy would be any more palatable to Humdrum (or to me) than the one Dr Harris criticizes. It is, however, different - subtler, more complex and more formidable - than that one.

Let me begin with **Passion** - the book, not the state. That, its author tells us, is a work of modernism, a movement which has a distinctive account of `our relation to the contexts of our ideas and actions'.[20] According to this modernist account, three things are true about such contexts. First, everything happens and is thought within some formative context or other; it `is ordinarily shaped by institutional or imaginative assumptions that it takes as given.'[21] Secondly, though it is common for people living and working within contexts to imagine that they are natural and inevitable, they are not. All contexts could be different and all contexts can be broken:

> At any moment people may think or associate with one another in ways that overstep the boundaries of the conditional worlds in which they had moved till then. You can see or think in ways that conflict with the established context of thought even before you have deliberately and explicitly revised the context.[22]

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18 Ibid., 204.

19 Ibid.

20 Roberto Mangabeira Unger, **Passion. An Essay on Personality**, New York, The Free Press, 1984, 7.

21 Ibid.

22 Ibid., 8.

These two theses - everything occurs in a context and all contexts can be broken - are not inconsistent, because '[c]ontext-breaking remains both exceptional and transitory. Either it fails and leaves the pre-established context in place, or it generates another context that can sustain it and the beliefs or relationships allied to it.'[23] Conditionality, the dependence on particular contingent non-natural contexts can never be overcome. However, and this is Unger's third thesis, it may be 'loosened'.

> For contexts of representation or relationship differ in the severity of the limits they impose upon our activity...
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> A conceptual or social context may remain relatively immunized against activities that bring it into question and that open it up to revision and conflict. To the extent of this immunity, a sharp contrast appears between two kinds of activities: the normal activities that move within the context and the extraordinary transformative acts that change the context.
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> But you can also imagine the setting of representation or relationship progressively opened up to opportunities of vision and revision. The context is constantly held up to light and treated for what it is: a context rather than a natural order. To each of its aspects there then corresponds an activity that robs it of its immunity. The more a structure of thought or relationship provides for the occasions and instruments of its own revision, the less you must choose between maintaining it and abandoning it for the sake of the things it excludes. You can just remake or reimagine it.[24]

You cannot, however, do just as you like. And nihilism is no virtue. On the contrary, in case this seems mere talk, consider Unger's criticism of:

> a relentless utopianism that denounces all institutional arrangements and systems of rights by reference to an unattainable standard of complete freedom from any instituted form of social life.
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> This misguided variant of modernism...[fails] to accept the actual world of history and personality. In this world every defiant vision must either die away or find a new sustaining context of ideas, habits, or institutions. The extreme modernist responds to this fact by becoming a spirit on the run.[25]

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23 Ibid., 9.

24 Ibid., 10.

25 Ibid., 63.

Unger makes a similar point against what he calls the existentialist answer `to the question - what lies on the other side of arbitrary constraint':

> It sees nothing on the other side but the pure and purely negative experience of freedom itself. The aim becomes to assert the self as freedom and to live freedom as rebellion against whatever is partial and factitious in the established social or mental structures. The existentialist position...fails to acknowledge that enduring social and mental orders may differ from one another in the extent to which they display the truth about human freedom. Consequently , it is also powerless to deal adequately with a basic objection: freedom, to be real, must exist in lasting social practices and institutions; it cannot merely exhaust itself in temporary acts of context smashing.[26]

One might think that this regard for institutions only applies to post-revolutionary ones. On this view all we have is an iconoclast determined to smash existing icons but insisting on deference to his *own*, once they are in place. Lenin did the same. But this is untrue of much of what Unger has to say of existing practices and structures and of what he says of the future.

Unger is committed to the loosening of constraining contexts wherever they are found, of resisting any pretensions they have to naturalness or inevitability. It is in this sense that Unger speaks of `structure-revising structures', of relativizing the contrast between routine activities within the system and extraordinary ones about it, of forms of social life that are highly immunized against challenge versus structures of `heightened plasticity', and so on. It is in this sense too that he speaks of `revolutionary reform' and in praise of `negative capability', `the practical and spiritual, individual and collective empowerment made possible by the disentrenchment of formative structures':

> Disentrenchment means not permanent instability, but the making of structures that turn the occasions for their reproduction into opportunities for their correction. Disentrenchment therefore promises to liberate societies from their blind lurching between protracted stagnation and rare and risky revolution. The formative contexts of the present day impose unnecessary and unjustifiable constraints upon the growth of negative capability.[27]

What does this mean for doctrine? Law is a powerfully entrenched structure of thought and of control. Unger wants to `disentrench' it. So far we are with Hero. But Unger recognises two legitimate ways of questioning an existing order which fade into each other - one he calls visionary

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26 Unger, `The Critical Legal Studies Movement' 661.

27 Ibid., 650.

insight; the other, which his discussion of contract law is supposed to exemplify, `internal development'. What is missing from Dr Harris's account is any discussion of the constructive role that Unger gives to the latter. Dr Harris discusses deviant doctrine as a way of drawing out concealed assumptions and inconsistencies in existing doctrine, where people thought, or hoped, they had coherence. That is certainly one side of it. But there is another. Internal development is thought of as a method not merely of bringing down the temple from within, but of developing constructive possibilities - both in imagination and in reality - which are prefigured implicitly, tacitly, exceptionally, in the present. Like Humdrum, the Hero who practises internal development also `accepts a social theory according to which the products of social experiment will inevitably reflect, to some degree, the patterns of the past, so that, in assessing them in advance history matters'.[28] He will, it is true, seek to subvert existing doctrine from within but not to replace it with something completely new and unrelated to what went before. On the contrary, he will probe `small-scale variations, manifest in the nuances of contemporary doctrine, [which] suggest larger possible variations';[29] his programme `for reconstructing the basic institutional arrangements of society can be inferred, by internal development, from the criticism of existing institutional practices and ideals';[30] he does not oppose to what exists `a timeless, utopian blueprint.' Rather, `[n]o matter how radical the proposed rearrangements may appear, they represent the adjustment of an historically unique institutional system in the light of a series of historically given though possibly self-correcting ideals.'[31] His programme, `no matter how radical its implications - represents a recognizable extension of present law and legal thought'.[32] It is indeed `superliberalism'.[33]

As Harris recognises, Unger insists that this process can only occur piecemeal. And while `enlarged doctrine' breaks down the distinction between argument within and argument about doctrine, it remains, Unger insists, doctrine:

> [S]uch a development still maintains the threshold features of doctrinal practice: the claim to justified influence upon the exercise of state power and the willingness to develop a legal system, step by step, from a position initially compatible with its authoritative

28 J.W. Harris, `Unger's Critique of Formalism in Legal Reasoning: Hero, Hercules and Humdrum', 211.

29 Unger `The Critical Legal Studies Movement' 570.

30 Ibid., 570.

31 Ibid., 592.

32 Ibid., 614.

33 Ibid., 602.

> materials, its institutional context, and even its received canons of argument.[34]

That is why it is wrong to suggest that Hero 'must resist any temptation to manipulate doctrine even to serve good ends', that he would never use a 'doctrinal crutch'. His whole strategy rests upon it. Of course his crutch contains no irreplaceable parts, no necessary contexts. He is not able to say that the law necessarily favours his client, for he believes it never necessitates particular conclusions. But he can expose any false necessities for which an opponent might contend, and advocate as legally open a view he prefers. Unger does not want to 'ditch' doctrine. He wants to 'expand' it. While neither option would be congenial to Humdrum it needs further argument to show that they amount to the same thing.

CONCLUSION

Unger is more formidable than Hero. That of course does not make him more congenial. He sets no store by what Humdrum respects: institutional and traditional integrity. So notwithstanding the eloquence and power of his vision it can be a frightening one. Thus his determination to expose and undermine the 'false necessity' of formative contexts has led to one strand, and not a minor one, in his imaginings which has something in common with Hero the rubbisher of law. Thus sometimes the social order he envisages as 'empowered' ominously resembles a bubbling cauldron rather than anything that could be called a social order:

> From the idea of a state not hostage to a faction, existing in a society freed from a rigid and determinate order of division and hierarchy, we might move to the conception of an institutional structure, itself self-revising, that would provide constant occasions to disrupt any fixed structure of power and coordination. Any such emergent structure would be broken up before having a chance to shield itself from the risks of ordinary conflict.[35]

This awful vision is, as Finnis remarks, 'not a world for children'.[36] It is hard to know whom it is a world for.

Nevertheless, there is another strand which seems to me to lie deeper in his thought, that of revolutionary gradualism. If like Unger you are committed to radical social transformation,

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34 Ibid., 603.

35 Ibid., 591-92.

36 Op. cit., 39.

but (unlike almost anyone else in CLS[37]) have reflected deeply on some of the transformative tragedies of this century and do not wish to be forced to choose between conservatism and cataclysm; what do you do? You might try, by immanent criticism, to weaken the hold of existing structures over people's lives and minds; and to draw, from the present, intimations of a more appealing future, a future to which piecemeal, incrementally and beginning from what exists, the present might be transformed. Such `revolutionary reform' is what Unger recommends for politics and social life. I oppose it for what it slights and threatens. But if one must be Promethean this seems to me a more credible, less frivolous way than most. It is also exactly what he recommends for legal doctrine.

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37 See my `Critical Legal Studies and Social Theory - A Response to Alan Hunt' (1987) 7,1 Oxford Journal of Legal Studies 26 at 37-39.