RÉPONSE AUX ARTICLES DE RONALD DWORKIN

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Réponse aux articles de Ronald Dworkin

I am very grateful to the Revue Internationale de Philosophie, to its Director, Michel Meyer, and to all the contributors to this issue. It is an honor to have such a fine collection of scholars discuss and criticize my work, and a great benefit to me that this publication makes my work available to a much larger audience than I would otherwise be able to reach.

I am not confident enough of my ability in French to make any detailed comment on the essays of Benoit Frydman, Julie Allard, Gérard Timsit and Jean-Fabien Spitz. But I am able to recognize their contributions as original, distinctive and insightful. I find Frydman's introductory essay highly instructive on the connections between my work and the interests of continental philosophers. Allard's suggestion of analogies between my ideas and Kant's great legacy is not only flattering but illuminating. Timsit's account of my use of the metaphor of a chain novel is both accurate and penetrating. Spitz's analysis of my views about equality, liberty and value pluralism is fresh and particularly valuable. My thanks to them all.

I can comment with somewhat more assurance on the essays in English. Stephen Guest proposes a new theory, which he calls "law as justice," about how judges should decide hard cases. Law as justice asks judges to recognize, first, that justice is a matter of equality of respect, and second that justice so understood has a variety of different dimensions that are pertinent to legal and judicial practice. Equality of respect requires, first, equal respect for citizens as the authors of the laws that govern them, next, equal respect in protecting the legitimate expectations that have been encouraged by past statutory and judicial pronouncements, and, finally, equal respect in the substantive treatment of individuals by the state. These different dimensions of equality pull in opposite directions when a judge is asked to enforce a statute or precedent or permit an official action which he believes does not, in itself, treat all citizens with equal respect. Guest offers several examples: the Fugitive Slave Laws of antebellum America, for instance, or a contemporary British statute that prohibits the husband of a

woman who is dying of a painful disease to help her to a death of greater dignity she passionately wants. Guest believes that in these circumstances a judge must make an overall judgment, which he calls a judgment of justice, weighing these different dimensions against one another to minimize what he calls the overall equity deficit of the decision.

Guest suggests that my own view, according to which judges should seek integrity in the law, aiming together to achieve a state of affairs in which all citizens enjoy the benefit of whatever principles provide the best justification of the law as a whole, should be regarded as a second-best strategy. Perhaps if all the judges in a jurisdiction adopted that strategy they would realize the real goal of law as justice better than they would if they collectively adopted any other strategy. But Guest leaves open the possibility that in certain circumstances a very different collective strategy – a practice of treating only clear legislative enactments and precedent decisions as law, perhaps – would bring the community closer to what law as justice would endorse.

Plainly, however, Guest thinks that law as justice could be applied directly by judges, without any second-best strategy, because he uses his examples to illustrate exactly that possibility. Each judge would weigh the competing demands of the different dimensions of equal respect and decide hard cases by declaring the law to be what, in that judge's opinion, best achieved overall justice. This would not mean, Guest emphasizes, that judges rewrite law to suit their own convictions: it rather means that they use their own convictions to state what, in their opinion, the law actually is. So a judge in the Diane Pretty case he discusses might hold that properly understood the law does not forbid Mrs. Pretty's husband to assist her in suicide because that would too grossly deny her equal respect as a human being. Or that judge might decide that the law does indeed forbid that assistance, because ruling otherwise would too grossly deny British citizens equal respect by substituting the judges' judgment of morality for the judgment of the elected representatives of those citizens. In neither case would the judge be constrained by any need to show that his own weighting of these two dimensions of equal respect was reflected in the decisions of other judges in any other cases. He might confess, with no embarrassment, that the present law of Britain would be generally very different from what it is if other judges were disposed, in other cases, to weigh the two dimensions as he does.

I respectfully disagree because, in my view, integrity is itself a dimension of equal respect. Indeed, in a community divided in moral and political judgment and instinct, it is a peculiarly important dimension of equal

respect. We cannot expect of our fellow citizens, either as individuals or collectively in politics, that they treat us as we think justice on the right conception requires. But we can demand of ourselves and of them that we treat each other evenhandedly, that is, that we deny no one the respect we accord others according to our own convictions about what equal respect means. Law as integrity assumes that we can make sense of and enforce that demand collectively, in politics and adjudication, as well as individually, and, for the reasons I set out in my book, *Law's Empire*, I believe that we should. Instructing our lawyers and judges to pursue that goal not only in itself expresses that crucial dimension of equal respect for all citizens – it counts as a collective declaration of equal citizenship – but pursues the goal as effectively as can be done. Judges will disagree about what integrity requires in particular cases, but if each recognizes a general duty to integrate his decisions with those of fellow judges and legislators, integrity will be better served that if they all disowned such a duty and pursued justice according to their own lights on every occasion. Integrity, I still believe, is not second but first best.

Guest thinks that if we do pursue integrity as first best, we might cheat people of what they are owed on the other dimensions of equal respect that he lists. We might increase rather than decrease the equity deficit over the long run. But I do not believe we could have any reasonable ground for that prediction. Suppose we asked judges to follow Guest's advice directly, and to weigh the different dimensions of equal respect for themselves in each case, ignoring any demand of integrity. These judges would of course disagree about what justice requires. Guest himself would have an opinion about the best decision in each case; but how could he predict, for each case that might arise in the future, that the judge who decides that case will agree with rather than reject his opinion? He would need an incredible amount of information not only about the kinds of cases likely to come before the men and women who will be judges in the future, and about the moral and political convictions that they are likely to have. It may be that if judges followed law as justice directly they would, in the long run, come closer to the decisions that Guest himself would reach than if they followed law as integrity or, indeed, any other strategy. But it seems equally likely that they would not. If I am right that integrity is itself a dimension of equal respect, then asking judges to respect rather than disregard that integrity seems the best bet even we accept Guest's goal of improving equality of respect in the long run.

Michael Rosenfeld believes that my claim, that there is characteristically one right answer to any legal question, is defeated by the facts of

moral pluralism in our culturally and ethically cosmopolitan societies. The Fourteenth Amendment of the American Constitution declares that American government must accord everyone "equal protection of the laws." Suppose a judge has to decide whether that very abstract provision makes abortion illegal or whether, on the contrary, it makes it unlawful to ban abortion, and suppose America is roughly evenly divided between people who think abortion murder and those who think that any ban on abortion is a savage injustice to women. Rosenfeld believes that there can then be no right answer to the legal question whether the equal protection clause requires or forbids states to make abortion illegal, or permits them to do either. True, as he says, my ideal judge Hercules could develop a liberal conception of equality that would favor the rights of women, and hold that the equal protection clause forbids constraints on abortion. But a more conservative and equally brilliant judge could with equal plausibility construct a different conception of equality that would protect what he would call unborn children. Legal theory must give up the myth of a single right answer to such hard legal questions and instead try to develop norms of "comprehensive pluralism" that mediate among different conceptions of the right and the good in a dynamic interplay of some kind.

For most of his essay, Rosenfeld seems to assume the truth of a particular form of moral subjectivism or some other form of moral skepticism. Subjectivism of this form declares that if there is any moral truth at all, that truth can consist only in consensus, so that if there is deep controversy within a community about some moral issue, then there is no truth about that issue for that community. Rosenfeld appears to embrace this subjectivism when he says that my right answer thesis would be superior to rivals if there were "consensus" about moral principles, when he says that I "must be able to rely on a hermeneutic approach subject to intersubjective verification and approval," and when he says that the limited analogy that I draw between law and literature hurts my case for a right answer in law because there obviously is no right answer to the question which of several great poems is the greatest.

Moral subjectivism is a widely held position, certainly among lawyers even if no longer so much among moral philosophers. My one-right-answer thesis plainly depends on rejecting that and other forms of skepticism, as commentators recognized long ago.[1] I have tried to make plain, on a great variety of occasions, why I reject subjectivism and all other forms of

1. See, e.g., John MACKIE, "The Third Theory of Law", in Marshall COHEN, ed., *Ronald Dworkin and Contemporary Jurisprudence*, Rowman & Allanheld, 1983.

what I called external moral skepticism: indeed I argued that such theories are close to unintelligible.[2] Rosenfeld does not respond to my arguments about moral theory, or even mention them, so I must simply refer to the articles I just cited by way of response to this part of his case.

But Rosenfeld's essay also hints, at least, at a second basis for his claim, in his discussion of "comprehensive pluralism." This second basis contradicts the first one and is much more interesting. It begins in a positive theory of justice: just government requires that if different moral positions are widely represented in some community, the laws of that community must not impose one position on everyone but must instead seek some mutual accommodation among them. That is very different from skepticism because it insists that there *is* a right answer to the question how government should be conducted in a morally pluralist society. It is unclear, therefore, how Rosenfeld could plausibly rely on his own right answer to questions about justice in a morally pluralistic community to ground his conclusion that there can be no right answers to questions of law in such a community. One might think that his suggestion points the way, on the contrary, to an interpretive design for finding right answers in such a community. Judges should seek that interpretation of the law of their community that most effectively combines different and opposed moral perspectives.

Perhaps Rosenfeld assumes, however, that the principle that justice requires compromises in principle would not provide a sufficiently satisfactory fit with legal practice in, for example, the United States to count as part of the best overall interpretation of that practice. If so, I would agree. A legal community that embraced comprehensive pluralism would be more like a community that accepted what I called "checkerboard" solutions in *Law's Empire* than a community that insisted on integrity. The Supreme Court did not seek to settle the abortion issue through some compromise between those who think that abortion is murder and those who think that forbidding abortion is a form of slavery. It is not clear how the Fourteenth Amendment could be interpreted to permit such a compromise.

But that only means that Rosenfeld's principle is not in fact helpful in finding right answers to legal issues in the United States and other nations that have rejected his comprehensive pluralism. There is another, rival,

2. See, e.g., Chapter 5, *Is There Really No Right Answer in Hard Cases?*, and Chapter 7, *On Interpretation and Objectivity*, in A Matter of Principle, Harvard University Press (1985) and, especially, *Objectivity and Truth. You'd Better Believe It*, 1996 Phil. & Pub. Affairs vol. 25 No. 2 p.87, reprinted in *The Philosophers Annual*, vol. XIX (1996) and available on the internet at www.nyu.edu/gsas/dept/philo/faculty/ dworkin/papers/objectivity.html.

principle of political morality that in fact provides a much better fit with American legal practice. This is the liberal principle that when a nation is divided in the conceptions its citizens hold about what lives are good, or what religious convictions are true, the state must not enforce any one such position against those who dissent from it. That principle does not require or permit government to stand neutral on moral issues about what one citizen can justifiably do the person or property of another: even if the community is divided about women's rights, for instance, the state must nevertheless decide what rights women have and how best to protect them. But the principle does require government to remain neutral when the rights and interests of citizens are not at stake, however, as they are not in issues of personal ethics or religious conviction. I have argued that the Supreme Court's abortion decisions are best justified by appealing to that principle.[3]

Not everyone in the United States accepts the liberal principle I just described. Many would reject it. But I believe that the principle is true, and that it fits American practice sufficiently well to serve as an eligible interpretation of the equal protection clause, for example. The liberal principle was, it is true, rejected by the Supreme Court in its 1986 decision in *Bowers* v. *Hardwick*, which sustained a Georgia law making sodomy a crime.[4] But the Court's decisions since then have been heavily influenced by the liberal principle it rejected in that case, and the Court recently overruled the *Bowers* decision in its 2003 decision in *Lawrence v. Texas,* which struck down a similar Texas statute on the ground that *Bowers* was inconsistent with principles embedded in American constitutional law as a whole.[5]

However, the one-right-answer thesis does not depend on whether the liberal principle does fit American practice well enough now to figure in the best interpretation of that practice. The right-answer thesis depends, in the end, on the philosophical issues about skepticism and truth that I discuss in the materials I cited earlier. I call attention to the liberal principle, in this context, only to suggest that a nation has a better response to ethical, religious and moral pluralism than checkerboard compromises.

3. DWORKIN, *Life's Dominion*, Knopf, New York (1993).
4. 478 US 186 (1986).
5. 539 US 558 (2003).