Ronald Dworkin: The Moral Quest

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Issue

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Ronald Dworkin
by Stephen Guest
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1.

Ronald Dworkin, who died on February 14 of this year, began to contribute to *The New York Review of Books* in 1968. His strong opinions and lucid prose helped to give the paper its distinctive tone, and he achieved through those writings on the law and politics of our time a level of public recognition and influence that is rare for a legal academic.

But much as he loved the public arena and the cultural limelight, he was fundamentally a theorist—originally a legal philosopher and then a moral and political philosopher whose interests expanded finally to include the theory of knowledge and the philosophy of religion. His theoretical development followed a personal path, and because he and I were friends and colleagues for many years, I saw much of it happen.

John Earle

Ronald Dworkin, Martha's Vineyard, August 2005

Ronnie and I were part of an unusually fortunate cohort of analytic philosophers and lawyers, formed in the 1960s, who were prepared to take moral questions seriously and who believed that both reasoning and intuition had a role in their resolution. Following the lead of John Rawls in the US and H.L.A. Hart in England, a group of younger scholars began to write about substantive moral, legal, and political questions, and to talk to each other regularly about their work in progress. We were also exercised by political and legal developments like the Vietnam War, the civil rights movement, and controversies over abortion and sexual freedom.

Ronnie was a brilliant member of this group. He left Yale in 1969 to become professor of jurisprudence at Oxford, but he visited the US regularly and in any case it was becoming a transatlantic conversation. A lot of important work in these fields appeared in the 1970s and 1980s, including two of Ronnie's most influential books, *Taking Rights Seriously* (1977) and *Law's Empire (1986)*. By the time he began to split his time between Oxford and NYU Law School in 1987 and we began to teach together, he held a preeminent position as a philosopher of law. But his intellectual ambitions were much broader. As it turned out, he wanted to produce a modern version of Plato's *Republic*.

Ronnie presented his theoretical writings as they developed to the colloquium in law and philosophy that he and I conducted at NYU for twenty-five years. But mainly the colloquium was an occasion for intensive discussion with many of the people working in these fields, and for close critical attention to their work. We developed a format that almost always produced an illuminating discussion. A paper would be submitted in advance, to be read by all participants. On Thursday morning Ronnie and I would meet for an hour of preliminary dissection, and at noon the author would appear for two to three hours of questions and argument, continued over lunch.

We would then part to prepare for the public colloquium, which began at four with a presentation of the paper and initial questions by Ronnie or me, followed by responses from the author and further questions from the other of us. After that we opened it up to the audience, subject to an agenda of issues that we had identified. We ended at seven, but if the guest was not from NYU, this was followed by a dinner at which the discussion continued. The colloquium was a course that about fifteen law and philosophy students took for credit, but most of the audience were auditors, including many faculty from NYU and other universities in the area; so the students met separately with Ronnie in a seminar every Wednesday to discuss the papers on their own.

Ronnie was always eager to present his own ideas as widely as possible, as shown by his Herculean schedule of global speaking engagements, but in the colloquium he focused happily, with admirable generosity and interpretive skill, on the work of others. He was usually critical and often combative, but the general reaction of those who were subjected to this nine-hour ordeal was gratitude. The

advantage of all that work was that no one felt they hadn't been understood. I do remember one occasion, though, when we had Michael Walzer for a marathon engagement of two weeks in a row, and at the end we complimented him on his stamina and resourcefulness in responding again and again to all the questions, objections, and arguments we had thrown at him. "What was the alternative?" he replied sardonically.

When Ronnie or I presented a paper, the other took on the critical role alone, so I had a close view of the extension of his work into general moral and political theory, and the foundations of truth and objectivity in evaluative and other domains. He continued also to write about law, finding much to deplore as the Supreme Court moved to the right, but his search for the ultimate ground of his moral convictions led him gradually to quite another plane. He had never done graduate work in philosophy, but he succeeded, not without anxiety, in turning himself from a legal theorist into a general philosopher of large ambition and depth of view. It took courage, despite the air of effortlessness that has always been his style.

2.

The third edition of Stephen Guest's comprehensive study (the first and second editions appeared in 1992 and 1997) covers Dworkin's work from beginning to end, culminating in the big book *Justice for Hedgehogs (2011)*,[1] which brings everything together in a unified theory of value—personal, moral, political, and legal. The only thing missing is Dworkin's book on religion, which was published posthumously this fall,[2] but Guest discusses some of its themes in connection with an earlier book, *Life's Dominion (1993)*, as well as *Hedgehogs*. Though Guest's book appears in a series called *Jurists: Profiles in Legal Theory*, Dworkin's transformation has turned this final edition into something much broader: it is a valuable guide and reference to the full range of his writings and the controversies to which they have given rise. It goes without saying that to appreciate Dworkin it is essential to go to the writings themselves, with their eloquence and argumentative density, especially *Law's Empire* and *Hedgehogs*.

Guest was a student of Dworkin's who remembers his supervisions as "brilliant occasions," and the spell has not faded. Guest writes as an uncompromising partisan, rebutting every criticism of Dworkin that he thinks significant enough to report, and showing little sympathy for the critics. This position of defender of the faith is especially conspicuous in the first half of the book, where several chapters concentrate specifically on the philosophy of law, and on the dispute between Dworkin and the legal positivists that first made him famous and that has been such a prominent feature of the literature of jurisprudence over the past forty-five years.

In the preface Guest observes with real insight that everything in Dworkin's philosophy follows from his acceptance of Hume's principle that you can't derive an "ought" from an "is." In other words, no matter how many descriptive facts you establish about a situation or an action, nothing follows about its rightness or wrongness, or about what ought or ought not to be done, without the addition of some further evaluative premise that can be applied to those facts. There is a big difference between Dworkin and Hume, however. Hume believed that value judgments were the expression of a special moral sentiment or feeling, and that they could not be true or false: the additional "premise" was not even a candidate for truth, so the resulting "ought" judgment couldn't be true either.

Dworkin, in contrast, believed that value judgments are not merely expressions of feeling or preference: they aim to say what is really good or bad, right or wrong, just or unjust, in virtue of the objective principles and reasons applicable to the choice before us. The right answer doesn't depend on one's belief, so value judgments, like statements of descriptive fact, may be either true or false. Most of Dworkin's work is a defense and exploration of this domain of objective value—an attempt to show that it makes sense to seek objectively right answers to difficult questions of law, of morality, and even of how to live. By "objectively right answers" he meant answers that depend not on our beliefs or attitudes, but solely on what is supported by the best reasons or the best arguments. And as Guest makes clear, Dworkin also held a radical view of the pervasiveness and inescapability in human understanding of this type of inquiry.

Dworkin believed that the domain of value—of norms determining what we should do—was one of those basic types of thought that could not be either justified or refuted from outside. Just as a mathematical proposition can be established or refuted only by a mathematical proof, and a scientific claim can be established or refuted only by scientific evidence, he thought that a moral judgment can be supported or undermined only by moral argument. The fact that people engage in such arguments, and that they believe that others who disagree with them are mistaken, shows that most people take it for granted that value judgments can be objectively true or false. The contrary view that they are essentially subjective is a revisionist philosophical position that Dworkin says is incompatible with our everyday thoughts and practices.

But Dworkin also held definite and distinctive views about the content of this domain and the right method for discovering the truth about it, whether we are interested in justice, law, or the meaning of life. He argued, firstly, that the domain of value is a unity, and that its components must be consistent with one another: there cannot be irreconcilable conflicts among genuine values.

Secondly, the truth in this domain cannot be simply read off from our evaluative and moral concepts, because the content of those concepts is itself the object of evaluative disagreement: so the investigation of moral and evaluative truth must be a process of interpretation, and this interpretation must itself be an exercise of value judgment, trying to make the best unified sense of the whole system of our judgments of good and bad, right and wrong, by testing each of them in the light of the others. So if the values of liberty and equality seem to conflict, we must try to reinterpret them so that they do not.

Thirdly, the guiding value that succeeds in unifying our values is that of dignity, which in turn has two interdependent components: equality and individual responsibility. Dworkin believed that these complementary values enabled him to dissolve all the traditional tensions within moral and political theory—between morality and self-interest, between liberty and equality, between the right and the good.

This is a truly Platonic level of ambition. Plato argued for the convergence of justice and the good of the individual by identifying the virtue of justice with an ordered condition of the soul. Dworkin argued, as Guest puts it, that "the critically ideal life is the best life we could lead if we had at our disposal the material and other resources that the best theory of justice entitles us to have." So not only those who are unjustly impoverished are denied good lives, but also those who are unjustly enriched. If a more just system of taxation would leave a wealthy person with less disposable income and wealth than he actually has in a very unequal society, then according to Dworkin his life will be less of a success, whatever he does with it, than it could be if he lived under a more egalitarian system.

Likewise, there is no conflict between the values of liberty and equality, because the equality that morality requires of a political system is equality in the resources that people need to exercise their individual responsibility for their lives—equality in the conditions of liberty. That equality is a condition of the equal value of liberty for the different individuals in the society. By making people equal in their means, we leave them free to take responsibility for the choice and pursuit of their ends. A just society respects everyone's dignity in that sense—showing them equal concern, but also ensuring their personal responsibility for their lives.[3]

This is undeniably a noble vision, opposed to the pluralism about values that implies that conflict among them is inevitable and that there is no social choice without loss. Isaiah Berlin was a prominent advocate of that pluralist position, and the title of *Justice for Hedgehogs* picks up the challenge of Berlin's distinction between unifiers and multipliers to come down squarely on the side of unity. This also determines Dworkin's method of interpretation, which he believed applies in every domain where questions have to be answered that go beyond the purely descriptive or scientific facts.

Dworkin believed that whether we are asking about the meaning of a poem or the existence of a legal right in a difficult case, interpretation consists in making the object as good as it can be, relative to its purposes. In other words, given two readings that are consistent with the text, it is an argument for the truth of one of them that it would make the poem, or the law, a better poem or law than the other would. Thus truth in interpretation is dependent on value, and judgments in all domains requiring interpretation are necessarily value judgments of some kind or other—though they start out from the descriptive facts.

This general theory of interpretation is one of Dworkin's most controversial proposals. There seems clearly to be a difference between making the best sense of something and giving it a reading that makes it as good as possible. It is true that whenever we are faced with a normative system like law, whose point is to govern conduct, we cannot understand it simply as a pattern of behavior. We have to see it as an internalized set of standards and principles that the participants take to justify their behavior. But we need not share that point of view in order to understand it, even though we must rely on our own capacity for value judgments when we interpret how others see things as right that we believe to be wrong, and vice versa. We will not understand a bad system unless we see how its participants see it as good. But that seems different from showing it in its best light, as Dworkin proposed.

3.

The evaluative basis of interpretation is central to Dworkin's conception of law, and its application to that case need not depend on its truth for artistic or historical interpretation. In *Justice for Hedgehogs* Dworkin finally declared that law is a part of morality—not just that moral reasoning plays a part in determining what the law is. Of course he meant that it is a very special part of morality, concerned with what, in light of general principles of political legitimacy and fairness, together with the pertinent legislation, institutions, and precedents, a society is morally justified in coercing people to do or not do.

By the same token, Dworkin believed that a legal right is a moral right—the right to be free from interference by the state or other individuals in its exercise. This doesn't mean that there is no distinction between what the law is and what it ought to be. But it means that even an unjust law creates legal rights and obligations only in virtue of a moral justification for enforcing the decisions of a democratically elected legislature, for example. In hard cases where a result cannot be read off from the facts, statutes, and precedents,

the answer has to be determined by the best moral interpretation of the principles that justify the legal system. Sometimes, as in the recent dispute over the constitutionality of the Defense of Marriage Act, the appeal on both sides to basic moral principles is very clear.

The positivist view to which Dworkin's is opposed—represented notably by H.L.A. Hart—is that law is a social institution and that what the law is depends on social facts about legislation, courts, etc., from which it can be empirically determined, without relying on value judgments or moral reasoning, which rules are actually in force. Sometimes there are hard cases to which no right answer can be deduced from the existing social materials. In those cases, positivists hold, judges who are required to make a decision will in effect make new law, which is then added to the social facts in the form of a precedent. They may very well engage in moral reasoning to arrive at their decision, asking for example what is the best interpretation of "equal protection of the laws" with respect to the federal government's treatment of same-sex marriage. But contrary to Dworkin, they would argue that this is not a way of discovering what the law is: rather it is a reason for deciding that this is what the law will be from now on—just as when a legislator votes for or against a law because he believes it would be right or wrong.

There is a much cruder form of positivism according to which value judgments have no place whatever in the process of adjudication. This has become the standard declared jurisprudential theory of nominees to the US Supreme Court, but nobody believes it, least of all the nominees. When Chief Justice John Roberts said his role was like that of an umpire, calling balls and strikes, he was saying what everyone in earshot knew to be false, because this pious falsehood has become an obligatory part of the confirmation ritual.

In fact, judges have to make value judgments all the time, not only in major constitutional cases, but in cases of negligence, employment discrimination, defamation, copyright infringement, and so on. Moreover, the public, insofar as it takes an interest in legal developments, expects the justices of the Supreme Court to make their decisions on moral grounds. They know which justices are liberal and which are conservative, they can often predict how the vote will go on a controversial issue, and even if they disagree with the outcome most of them don't think there is anything wrong with the process, provided that the justices are really deciding on the basis of principles they believe to be correct.

As for the dispute between Dworkin and the positivists over how to describe what is going on in such cases, my impression is that for the most part both the judiciary, whatever they may say in confirmation hearings or in their theoretical moments, and the public understand the process in Dworkin's way. Judges on multijudge panels who disagree about the disposition of a contested case think and say that the other side is wrong about what the law is: that they are making a mistake of law, not merely—as a positivist would have to say—a mistake about the best way to decide this case, given that the law is indeterminate. The public and the Supreme Court were clearly divided not only over whether the federal government should recognize same-sex marriage, but over whether the Defense of Marriage Act was already unconstitutional. Neither side thinks that the Court made it unconstitutional: some believe that the Court got it right, and others believe that the dissenting minority was right, but both sides believe that the right answer didn't depend on the Court's decision.

Of course this could be a collective illusion, perhaps one that serves to inflate the law's authority and majesty, by attributing to it both a moral aura and an unearned objectivity when it goes beyond its basis in clearly established social fact. Guest defends Dworkin's view that the only way to make sense of positivism is to see it as a morally based view of the law—an interpretation in something like Dworkin's sense—whereby it is *morally* best to count as law only what can be derived from statutes and other social facts without moral reasoning, both because this makes the law clearer and more predictable, and because it usefully shrinks law's moral authority. Guest quotes H.L.A. Hart, arguing in favor of a clear separation of the identification of law from its moral assessment:

> What surely is most needed in order to make men clear sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny.

If one thinks of the American legal system before the Civil War, with its constitutionally protected compromises over slavery, it seems strained to understand the truth about what the law was as part of morality—what was morally required and permitted in light of the morally best overall justification of the existing institutions, laws, and precedents. Looking at it from our external perspective, a positivist reading seems both more natural and morally preferable. But Dworkin's alternative is possible; indeed it may correspond to the understanding of many of the participants at the time, including Abraham Lincoln.[4] And it is certainly attractive as an aspiration for the kind of moral authority we should want to create in the legal systems under which we live.

As Guest points out, resistance to Dworkin's theory often comes from the belief that there really isn't any objective truth about morality or other values—that there are just conflicting attitudes—so that a moral interpretation of law would destroy law's objectivity. Dworkin's conviction that law is part of morality and that the good of individuals, political justice, and legal rights can be unified in a mutually supporting system flows from his unshakable conviction that questions of value have answers, just as do questions of fact, and that there is a distinctive way to think about them—though just as in science, the quest for truth is open-ended. Fortunately he had time to set out this vision in full, in a body of work that will keep his memorable voice alive.

1 Reviewed in these pages by A.C. Grayling, April 28, 2011. ↩

2 *Religion Without God* (Harvard University Press, 2013). An excerpt appeared in the April 4, 2013, issue of *The New York Review*. ↩

3 See his Balzan lecture " Law from the Inside Out," *The New York Review*, November 7, 2013, for a forceful statement of this view. ↩

4 Dworkin's view about this example was complicated. He believed that the Fugitive Slave Law was not constitutionally valid, but that even if it had been, the rights it gave to slave owners for restitution of their property would have been overridden by a much more powerful nonlegal moral right. In other words, though the law might have created a prima facie moral right, law is only part of morality, and extralegal moral reasons would make such a law, though valid, too unjust to enforce. ↩

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