RONALD DWORKIN

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WHEN I WAS a very junior member of the Harvard Law School faculty—an assistant professor in his late 20s—I spent one Saturday afternoon each month meeting informally with a remarkable little group that occasionally included John Rawls, sometimes included Saul Kripke and Robert Nozick, usually included Judith Jarvis Thomson, and nearly always included Charles Fried, Frank Michelman, Tom Nagel, Tim Scanlon—and, of course, Ronald Dworkin. The meetings typically centered on a paper one of us was in the process of thinking through. I still remember my own timid presentation of an early draft of a paper I called "Trial by Mathematics," exploring some issues surrounding the fallacies of quantification, the misuse of probability theory, and the roles of precision and ritual in the trial process. Everyone in the group, as I now recall the conversation, had some interesting and distinctive perspectives to offer, but no one's observations were more penetrating or provocative than Dworkin's. The epistemological and ethical questions he posed sharpened my analysis immeasurably, something for which I remain grateful to this day, more than four decades later. Although my paper, later published in the *Harvard Law Review*,[1] didn't touch on any of Dworkin's philosophical work or his specific jurisprudential concerns, his interests were wide-ranging, his intellectual appetites voracious, and his generosity to younger colleagues boundless.

Ronald Dworkin is the preeminent legal philosopher of the past half century. We will not soon see his like again. Author of numerous path-breaking books in the field, most importantly *Law's Empire* and *A Matter of Principle*, he has most famously made the case that law—contrary to the view of celebrated positivists such as H. L. A. Hart—is more than "a matter of what legal institutions . . . have decided."[2] As Dworkin elegantly demonstrates in the body of his work, that positivist view offers "no plausible theory of theoretical disagreement in law."[3] For, as Dworkin so convincingly shows, fundamental disagreement not just about what the law *ought* to be but also about what it *is* does in fact take place—indeed, it pervades our discourse. Using that compelling observation, Dworkin makes a devastating argument against the positivist account that such disagreement is a mere illusion. And Dworkin argues further against the purely pragmatic accounts in which law is simply a matter of deciding which choices will maximize the community's ability to achieve its substantive aims.

1 See Laurence H. Tribe, "Trial by Mathematics: Precision and Ritual in the Legal Process." *Harvard Law Review* 84 (1971).

2 Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), 7; see generally H. L. A. Hart, *The Concept of Law* (New York: Oxford University Press, 1961).

3 Dworkin, *Law's Empire*, 6.

It is perhaps unsurprising that Dworkin's prose and his central ideas have come to express conventional wisdom in discourse about law. If his points of view no longer seem strikingly original, it is Dworkin's elegant and invariably lucid explanations that are responsible. In numerous venues, most prominently *The New York Review of Books*, Dworkin made his distinctive take on legal philosophy universally accessible and widely, if not universally, accepted. Although somewhat less successful than his deconstruction of the reductionist views that he has challenged, Dworkin's efforts to develop and defend a constructive path of his own, one he calls "law as integrity," impressively and seamlessly combine the perspectives of both conventionalists who treat "statements of law [as] backward-looking factual reports" and pragmatists who treat such statements as "forward-looking instrumental programs."[4]

At the heart of Dworkin's affirmative contribution is a picture of the law as an enterprise that provides "the best constructive interpretation of the community's legal practice," where fundamental principles of justice, fairness, procedural due process, and equality not only hold sway but also furnish the frame of reference for measuring the coherence and integrity of competing accounts of legal rules and precedents.[5] Famously, Dworkin analogized a judge deciding a new case to an author writing the next chapter of a chain novel.[6] That analogy has been much written about and criticized, and Dworkin's underlying aspiration to defend a unified theory of law as a whole has been subjected to withering attack. But, whatever its failings, Dworkin's analogy and the unifying vision that drives it offer an inspiring deep glimpse into the inner structure of constitutional, legislative, and judicial decision-making far more revealing than the theories that treat those processes as largely disconnected. It is doubtless true that Dworkin's chain-novel picture of legal analysis has much more to say to and about judges than it has to say to or about other lawmakers, whether legislative or executive or popular. But that Dworkin's work is in that sense juricentric does not detract much from its power in illuminating a large swath of what is worth saying about law today.

Along the way to constructing his admittedly court-centered theory, Dworkin explored and developed some fundamental distinctions that are all but taken for granted in current political and popular discourse about legal matters—like the distinctions between general legal concepts and particular legal conceptions that embody those concepts, or among policies, rules, standards, and principles—distinctions without

4 Ibid., 225.
5 Ibid.
6 Ibid., 228.

which one can hardly imagine conducting intelligent legal conversation today. It would be a mistake to test Dworkin's contribution by asking whether he has forever abolished legal positivism, pragmatism, or realism as major pillars of legal discussion, or by asking whether everybody keeps his distinctions in mind when talking about law. By that standard, no legal philosophy could be worthy of the name. Rather, the question to ask about Dworkin's work is whether we can imagine intelligent legal discourse today that does not at least in part stand on his shoulders. I for one cannot.

Applying his general conceptual framework, Dworkin has done a great deal to show that conventional assumptions about such supposed tensions as that between liberty and equality are the products not of inherent features of the underlying concepts but of parochial premises regarding their meaning and elaboration. In exploring the implications of his general views for such specific topics as the selection of Supreme Court Justices, the appropriate contexts for judicial deference to or disdain toward the judgments of the politically accountable branches of government, the rights and wrongs of race-based affirmative action, and such life-and-death problems as those posed by abortion and assisted suicide, Dworkin has written dozens of illuminating and intellectually accessible essays in *The New York Review of Books* and elsewhere. Whether one agrees or disagrees with him, he has contributed enormously to wide public understanding and appreciation of potentially intractable moral and political puzzles and to their centrality to the most difficult legal controversies.

That is no mean feat; most legal philosophers both in our time and in earlier periods have found themselves choosing between obscurity and inaccessibility, on the one hand, and reductionist oversimplification, on the other. Not so with Dworkin. One cannot but admire his ability to expose and then fairly explore the structure of legal and moral questions of significance to experts and lay readers alike. That he has had less of value to add to the debates about constitutional structure, from the separation of powers to federalism, than to the discussions about constitutional substance, from free speech to privacy and autonomy and equality, detracts little if at all from the conclusion that his has been a towering contribution not just to jurisprudence and legal philosophy in general but also to constitutional analysis in particular.

Having said that, I must note my unending surprise at Dworkin's sunny assumption that reason would dissolve the deepest differences underlying our legal and especially our constitutional outlooks. In addressing the explicit use of race by government in so-called "affirmative action" programs that are designed to overcome a history

of racial subordination and to exploit the many benefits of racial diversity in education and elsewhere, Dworkin seems tone-deaf to a variety of objections that, to my ears at least, sound in a constitutional register. And for him to write, as he has, that "[c]olorblindness . . . has *no* basis in moral principle"[7] is to overstate the point considerably, a fault not uncharacteristic of Dworkin's often excessive claims to moral certainty.

Likewise, in Dworkin's conviction that the abortion controversy would be resolved if only people got the issues straight and made the distinctions that he thinks reason requires, he seems to me strangely blind to the deepest wellsprings of disagreement. Those are matters that I explored in greater detail in my review in *The New York Review of Books* of Dworkin's book *Life's Dominion* and will not undertake to rehearse here.[8]

"Religion Without God," one of Dworkin's posthumously published essays in *The New York Review of Books*, is characteristic of both the strength and the weakness of his thought. On the one hand, Dworkin makes a powerful case that "com[ing] to understand what the religious point of view really is and why it does not require or assume a supernatural person" would enable us "to lower, at least, the temperature of these battles by separating questions of science from questions of value."[9] On the other hand, he does not fully absorb the lesson of his own observation that the "new religious wars are now really culture wars,"[10] an observation that ought perhaps to temper his optimism about the possibilities of what some have called *reasoning together*. But it was part of Dworkin's charm as well as his genius that he was eternally optimistic about the horizons of reason. For that, I think, we should all be more grateful than critical.

More than 40 years ago, when I first met Ronnie in his office at Yale Law School, as I was trying to decide whether to accept Yale's invitation to join its law faculty or to accept the offer that I was fortunate enough to receive at the same time from Harvard, he asked me a question that I've been turning over in my mind ever since. His question: What role should political and especially moral philosophy

7 Ronald Dworkin, "The Court and the University," *The New York Review of Books* (May 15, 2003), 8, 11; available from http://www.nybooks.com/articles/archives/2003/may/15/the-court-and-the-university/

8 Laurence H. Tribe, "On the Edges of Life and Death," *New York Times* (May 16, 1993), BR1; available from http://www.nytimes.com/1993/05/16/books/on-the-edges-of-life-and-death.html?pagewanted=all&src=pm

9 Ronald Dworkin, "Religion Without God," *The New York Review of Books* (April 4, 2013), 67.

10 Ibid.

have in the study and teaching of American constitutional law? Given the degree to which the United States Constitution reflects a historically contingent and deeply compromised cobbling-together of disparate rather than entirely coherent parts, I didn't have what seemed to me a satisfactory answer at the time.

The mark of a great teacher is to ask questions that drive the listener into a lifelong search for answers. Ronald Dworkin was a great teacher as well as a great legal philosopher. He taught that none of us can be either without at least aspiring to be the other. And he did more: He not only taught us all what questions to ask; he also left some tantalizing hints of what the answers might resemble.

Elected 2008

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