Ronald Dworkin

Edited by ARTHUR RIPSTEIN

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Ronald Dworkin occupies a distinctive place in both public life and philosophy. In public life, he is a regular contributor to *The New York Review of Books* and other widely read journals. In philosophy, he has written important and influential works on many of the most prominent issues in legal and political philosophy. In both cases, his interventions have in part shaped the debates he joined. His opposition to Robert Bork's nomination for the United States Supreme Court gave new centrality to debates about the public role of judges and the role of original intent in constitutional interpretation. His writings in legal philosophy have reoriented the modern debate about legal positivism and natural law. In political philosophy, he has shaped the ways in which people debate the nature of equality; he has spawned a substantial literature about the relation between luck and responsibility in distributive justice; he has reframed debates about the sanctity of life. His work has also been the focus of many recent discussions of both democracy and the rule of law. This volume contains new essays on Dworkin's key contributions by writers who have themselves made important interventions in the debates.

Arthur Ripstein is professor of law and philosophy at the University of Toronto. An associate editor of *Philosophy & Public Affairs*, he is the author of *Equality, Responsibility and the Law* and co-editor of *Practical Rationality and Preference* and *Law & Morality*.

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Contents

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Introduction: Anti-Archimedeanism

ARTHUR RIPSTEIN

> I said I thought that legal philosophy should be interesting. He jumped on me. "Don't you see?" he replied. "That's your trouble." I am guilty of his charge.
>
> – Ronald Dworkin

Ronald Dworkin occupies a distinctive place in both public life and philosophy. In public life, he is a regular contributor to *The New York Review of Books* and other widely read journals. In philosophy he has written important and influential works on many of the most prominent issues in legal and political philosophy. In both cases, his interventions have in part shaped the debates he joined. His opposition to Robert Bork's nomination for the United States Supreme Court gave new centrality to debates about the public role of judges and the role of original intent in constitutional interpretation. His writings in legal philosophy have reoriented the modern debate about legal positivism and natural law. In political philosophy he has shaped the ways in which people debate the nature of equality; he has spawned a substantial literature about the relation between luck and responsibility in distributive justice; he has reframed debates about the sanctity of life. His work has been the focus of many recent discussions of both democracy and the rule of law.[1]

Dworkin's public and philosophical voices are closely connected. He criticizes Robert Bork for his deficient views about the relation between law and morality, the proper conception of democracy, and the philosophy of language. During the Vietnam War, he used his general account of the relation between law and morality to explain the relation between draft resistance, civil disobedience, and the rule of law. His account of equality of resources frames his interventions in public debates about health insurance. His understanding of debates about the sanctity of life engaged with both public debates and more abstract questions about the relation between political and personal morality. Dworkin also played a significant role in facilitating the first contact between prominent South African lawyers and

the African National Congress. He concluded a lecture in 1984 by saying "You may find it odd that the lawyers' contest about styles of adjudication finally turns in the way I claim on ideals of community, that volumes of philosophy speak in the fall of every judge's gavel. It may be odd, but I'm sure it's true, and even a little thrilling."[2]

EARLY PHILOSOPHICAL DEVELOPMENT

A journalist who recently wrote about Dworkin described him as regarding biographical questions as "odd and trivial."[3] His life attracts a certain amount of interest, in part because of his remarkable ability to give clear and polished lectures in complete paragraphs, without depending on any text or written notes, and without any apparent expenditure of effort. People who have dined with him wonder whether his famed discussion of the person with a taste for plover's eggs is more than a philosopher's example. Dworkin has no doubt had an interesting life, but the aim of this book is to engage with his ideas. In the light of his own views about the relations between authors and the texts they write, it seems appropriate to keep this biographical section even briefer than is standard in books in this series.[4]

Dworkin was born in Providence, Rhode Island, in 1931, one of three children. He attended Harvard on a scholarship, studying philosophy, and went on to Oxford as a Rhodes Scholar. Dworkin was by all accounts an outstanding student at Oxford. H. L. A. Hart, who was then the University Professor of Jurisprudence at Oxford and widely regarded as among the most important legal philosophers of the twentieth century, was a reader for his final examinations and surreptitiously kept a copy of Dworkin's papers for himself.[5] Hart later intervened to have Dworkin appointed as his successor to the Chair in Jurisprudence.[6]

At Oxford, Dworkin's interests shifted from philosophy to law, and after completing his degree he attended Harvard Law School. In an interview in the NYU Law School alumni magazine, he describes law school at Harvard at the time as easy for anyone "reasonably adept at moving arguments around."[7] He then clerked with Judge Learned Hand of the United States Court of Appeal. Hand was by then semi-retired and directed Dworkin to read and comment on the Holmes Lectures which he was to give at Harvard Law School the following year.

After clerking, Dworkin practiced law for several years with Sullivan and Cromwell in New York City before accepting a teaching position at Yale Law School. At Yale he taught basic courses, and he also taught a course

together with Robert Bork. In 1969 he accepted the position of Professor of Jurisprudence at Oxford, succeeding Hart. In 1975 he moved half of his appointment to NYU Law School.

Hart and Hand were each significant influences on Dworkin's intellectual development. In each case, he reacted against their views, and his considered responses to them will emerge in different ways in some of the essays in this book. The general direction of the reactions can be described fairly briefly. Hart defended the position in legal philosophy known as legal positivism, according to which law and morality are fundamentally distinct. By this Hart did not mean to deny that law and morality frequently overlap, but rather to claim that they were conceptually distinct, so that questions about what the law is on a particular matter are always conceptually distinct from questions about what the law should be. The difference between what the law is and what it should be is, of course, familiar to anyone who has ever been morally dissatisfied with particular laws, but Hart elevates this intuitive distinction to a broader philosophical account of law. For Hart, the separation between questions of what the law is and what it should be reveals a deeper distinction. Hart regards questions of what he calls "critical morality" – the morality by which we think we should decide what to do and assess the actions of others – as substantive, so that the answers to them depend on the content of morality. Law, on Hart's understanding, is fundamentally different, because questions about whether something is legally required are answered in a different way, by looking to the sources of a law, such as legislative decisions or judicial precedents, rather than to the law's moral merits. In this respect, legal rules are more like the rules of a game, such as chess, than like moral rules, because any legal question can be answered by considering the authoritative sources. Those sources may sometimes be unclear or even inconsistent. If they are, on Hart's account, a judge or other decision maker has no law to apply, and so can be understood only as making new law.

Dworkin ultimately rejects all aspects of Hart's approach. He rejects Hart's positivism, he rejects the idea that the law on a particular question can be identified exclusively by its sources, he rejects the idea that the law has gaps in it, and, most important, he rejects the very idea of the sort of conceptual analysis of law that Hart claimed to provide. The rejection of this approach to legal philosophy is among the most prominent features running through all of Dworkin's work. In rejecting Hart's account of the nature of law, Dworkin, at least in part, rejects the question that it is supposed to answer. At the same time, he denies that the rejection of those questions means that he has simply changed the subject. Instead, he argues

that the question that Hart took himself to be answering is really a version of the question that he, Dworkin, provides a better answer to. For Dworkin, questions about law are always questions about the moral justification of political power, and any answer to those questions that purports to be about something else must be interpreted as an oblique answer to that moral question.

Dworkin also reacted against the ideas of Learned Hand. Hand is now most remembered in the legal academy for several of his decisions in the law of tort, which have given inspiration to economic analyses of tort law. Dworkin's response was to a different aspect of his work, captured in the Holmes Lectures that Hand presented at Harvard Law School the year after Dworkin clerked for him. Hand was deeply critical of judicial review of legislation, which he regarded as antidemocratic. His views about judicial review led him to advocate judicial restraint and deference to legislative intent. Those aspects of Hand's view of the judicial role are well-represented in the contemporary American judiciary. More striking was his readiness to explicitly acknowledge the implications of this view for the United States Supreme Court landmark decision in the case of *Brown v. Board of Education*, which called for the end of segregation in schools.[8] Against the dominant academic trend, Hand thought that *Brown* was wrongly decided. Dworkin's grounds for rejecting Hand's arguments have remained a central theme of his writings on the American Constitution. They also inform his broader views about the nature of law and legal interpretation. For Hand, the moral language that frames constitutional provisions does not give citizens enforceable claims against the state. For Dworkin, that same moral language is pivotal to the constitution as a whole. This language is not simply a hortatory preface to its legal provisions, but the legally mandated tools for interpreting the other parts.

The third important influence that Dworkin has acknowledged is the great political philosopher John Rawls. Rawls is widely credited with bringing the ideas of freedom and equality together in modern political philosophy and for the reintegration of normative political philosophy. Dworkin openly endorses many aspects of Rawls's approach to political philosophy and constitutional law, writing in a "Confession" at the end of an essay on Rawls and the law "some of you will have noticed a certain congruence between the positions in legal theory I say Rawls's arguments support and those I have myself tried to defend, and you may think this is no accident. So I offer you a confession, but with no apology . . . each of us has his or her own Immanuel Kant, and from now on we will struggle, each of us, for the benediction of John Rawls."[9] At the same time, Dworkin also reacts against Rawls, in particular against his view that political philosophy is sharply

distinct from the ethical questions that each of us must answer in deciding how to live our lives. As a consequence, he also rejects Rawls's conclusions about the nature of public reason and the types of argument that are acceptable parts of public debate. If political morality and personal morality are continuous, no line can be drawn between those parts of moral argument that are acceptable parts of public discourse and those that are not.

SOME KEY THEMES

Dworkin is a difficult person to write about in general terms, in part because he is still working actively on all of the questions that are taken up in this book. Indeed, he has already responded in print to a draft version of one of the chapters included here, and, as this book goes to press, he is working on another book that will bring together the central themes of all of his work.

The details of Dworkin's achievements and interventions are considered in the various chapters of this collection. My aim in this brief introduction is to say something about the relations between them and the underlying themes that they share, and to situate those themes in relation to recent developments in philosophy more generally. Underlying all of Dworkin's work is a particular understanding of the nature and role of practical philosophy. This distinctive view of practical philosophy is expressed in virtually every question that he seeks to address. Dworkin engages with many seemingly technical issues in legal and political philosophy, but he always does so in a way that frames them so that they are continuous with public debates. His tools are unmistakably those of a philosopher – drawing distinctions between various seemingly similar questions, and working through the implications of hypothetical examples.

ANTI-ARCHIMEDEANISM

The most significant and most central theme of Dworkin's work is his rejection of all attempts to address questions in moral, legal, or political philosophy from a standpoint outside of our ordinary ways of thinking about them. He thus refuses to engage in what is sometimes taken to be the defining project of philosophy, that is, the project of finding an "Archimedean point" outside of our ordinary ways of thinking about things, a point that will give us some special purchase on the questions that we find most difficult to address. Expounding the principle of levers, Archimedes is reported to have said "give me something to stand on and I can move the world."

Archimedes's metaphor has appealed to philosophers ever since. From Plato to Habermas, philosophers have sought to find some standpoint outside of the human practices that puzzled them from which to evaluate those practices. Dworkin explains that Archimedean theories "purport to stand outside a whole body of belief, and to judge it as a whole from premises or attitudes that owe nothing to it."[10]

This image of standing outside the ordinary can be understood in two fundamentally different respects: it can be understood in terms of our particular beliefs about particular topics, such as judicial review or assisted suicide, or, alternatively, it can be understood in terms of our ordinary ways of reasoning and debating such topics. The first way of understanding what counts as ordinary moral thought is inherently conservative and, more significantly, ultimately incoherent, because nobody seriously entertains the possibility that particular views are correct simply because they are widely held. Ordinary moral thought itself includes the idea that people can relate their particular views to their other views, offer general grounds for them, and so on. The second way of understanding ordinary moral thought, by contrast, takes account of this and indeed elevates it to the central command of moral thought. On this view, which Dworkin implicitly endorses in all of his writings and has explicitly developed in a few more recent pieces, the only kind of arguments about practical life that is of any significance is the kind of familiar, first-order arguments that we all know how to recognize.

In the twentieth century, Archimedean approaches to philosophy have been subject to criticism from a wide variety of quarters, ranging from Wittgenstein's attack on certainty, through W.V.O. Quine's holism[11] and Wilfrid Sellars's attack on the idea that knowledge has a foundation[12] of a presuppositionless mode of discourse, to Donald Davidson's claim that only a belief can justify another belief.[13] Whatever the force or merits of these criticisms, they have all focused primarily on the problems with the Archimedean metaphor in theoretical philosophy. The task of the anti-Archimedean is comparatively easier here, because the first-order claims that philosophers seek to understand are (at least usually) not themselves controversial. Philosophers may wonder about what entitles us to talk about physical objects, say, but, except for the skeptic manufactured to serve as the interlocutor in such a debate, nobody seriously doubts the conclusion that we are entitled to do so. Even skeptics are happy to follow Hume's advice and "speak with the vulgar" about such things. If an Archimedean point can be found, the skeptic about knowledge or physical objects can be answered. The failure of attempts to find such an Archimedean point may lead people to wonder if something has gone wrong, and in the twentieth century many

philosophers suggested that something had, indeed, gone wrong, and that at bottom the skeptic is not entitled to an answer. Anti-Archimedeans in theoretical philosophy typically deny that ordinary thought and argument have either realist or anti-realist implications.[14]

But Archimedeanism owes its prominence not just to philosophical concerns about skepticism. Indeed, it has always owed much of its appeal – Plato and Habermas provide very different illustrations – to its promise to provide a secure point that will enable us to stand above the fray of *normative* argument and resolve the disputes that animate it. Much legal and constitutional thought of the twentieth century was drawn to Archimedean positions. Oliver Wendell Holmes noted that law "abounds" in moral language, and he went on to dismiss it as a façade covering what were, ultimately, nothing more than questions of social policy. In the 1930s, the "Legal Realist" movement in the American legal academy had carried the Holmesian idea further. In what became the manifesto for that movement, "Transcendental Nonsense and the Functional Approach,"[15] Felix Cohen argued that legal concepts were mere obfuscations, and that the only things that withstood serious scrutiny were assessments about the likely effects of competing resolutions of legal debates. Although realism itself collapsed by the 1950s, its spirit lives on. Many American academic lawyers will say that "we are all realists now." More significantly, the Archimedean picture that motivated it survived in the form of an emphasis on questions of policy and the desire to treat any other forms of moral argument as meaningless.

All of Dworkin's contributions to philosophy reflect his resolute rejection of Archimedeanism. He has written directly on the topics of truth and objectivity in practical discourse, but his most significant contribution does not come so much from those arguments, which are broadly continuous with prominent positions elsewhere in philosophy and are, in his own view, "pointless, unprofitable, wearying interruptions."[16] The most important response to Archimedeanism comes from Dworkin's engagements with the fundamental questions of legal and political philosophy from a resolutely anti-Archimedean perspective. Dworkin has not rested content with making the abstract point that only first-order normative argument can resolve normative disagreements. Instead, he has offered a model of the alternative.

FROM REFLECTIVE EQUILIBRIUM TO INTERPRETATION

In an early article, and again, at more length in *A Theory of Justice*, John Rawls introduced the idea of what he called "reflective equilibrium" as an

account of the nature of moral justification. Rawls remarks that "justification is argument addressed to those who disagree with us, or to ourselves when we are of two minds. It presumes a clash of views between persons or within one person, and seeks to convince others, or ourselves, of the reasonableness of the principles upon which our claims and judgments are founded. Being designed to reconcile by reason, justification proceeds from what all parties to the discussion hold in common."[17] Rawls suggests that the best way to achieve justification in this sense is to seek an equilibrium between the general principles that seem most compelling and the considered judgments that we make about particulars.

The Rawlsian account of moral justification has attracted wide support in moral philosophy, though it has also attracted criticism from those who are unwilling to regard considered convictions about particular cases as anything more than evidence of socialization or useful heuristics.[18] Rawls's approach precludes the possibility that any particular set of normative claims, such as the utilitarian or Legal Realist emphasis on consequences, has an "epistemic or logical head start."[19] Instead, both general principles and considered judgments are potentially subject to revision.

Dworkin's approach to justification is continuous with the Rawlsian account, but it is more ambitious in two ways. First, on Rawls's own deployment of it, reflective equilibrium began as a general account of the decision procedure for ethics, but in his later work, Rawls argued that a narrower reflective equilibrium, confined to questions about the legitimate use of coercion, was the appropriate object of justification in political philosophy. Dworkin argues that a careful interpretation of ordinary practices of moral argument reveals a much greater continuity between personal and public morality. That continuity does not require that every person organize his or her life around impartiality or the achievement of justice, but it does require that public arguments resound with the convictions of ordinary citizens about what is valuable in their lives. As a result, "public reason" cannot be sequestered from comprehensive views about value, even if the best public arguments turn out to demand that the state remain neutral in many particular disputes. Second, Dworkin broadens the idea of reflective equilibrium to a more general account of *interpretation*, which is concerned with explaining how our judgments about various domains of value can be correct. To understand the meaning of a work of art is to engage in an interpretive exercise that seeks to account for the work's artistic features in terms of a view of its value. To interpret a statute is to explain the meaning of its clauses in terms of an account of the values underlying the legal system in general. Moral justification is yet another special case of this interpretive exercise.