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# A Matter of Principle, 19 J. Marshall L. Rev. 237 (1985)

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# BOOK REVIEW

## A MATTER OF PRINCIPLE BY RONALD DWORKIN, HARVARD UNIVERSITY PRESS, CAMBRIDGE, MASSACHUSETTS, AND LONDON, ENGLAND, 1985, 417 PP., $25.00.

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No one involved in the legal community today can be unaware of the disturbing signs of malaise that have appeared in recent years. Surveys have shown that a large number of young attorneys are dissatisfied with their work,[1] and law school faculty members widely report their impressions of student dissatisfaction with the very field which they are striving to enter.[2] Although the articulated reasons for this dissatisfaction among legal practitioners include complaints that salaries for legal work are lower than expected, and that such work is unchallenging and routinized,[3] my impression is that there is also a lack of commitment to the value of the enterprise in which attorneys are engaged. Many lawyers have simply failed to find satisfying answers to the basic questions of legal philosophy which would allow them to take pride in their work.

In an article that touched off a mild furor in the academic legal community,[4] Paul Carrington blamed the cynicism and nihilism present in law students today on the attacks made on the legal system by the Critical Legal Studies movement, a group of scholars who have attacked from a generally far left position many of the fundamental assumptions of American law.[5] Published responses to Car-

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1. See the discussion of the A.B.A. National Survey of Career Satisfaction/Dissatisfaction in Hirsch, *Are You On Target?*, BARRISTER 1, 17 (Winter 1985).

2. *See, e.g.*, Weinstein, *The Integration of Intellect and Feeling in the Study of Law*, 32 J. LEGAL EDUC. 87 (1982) (discussing the difficulty students have in adjusting to the professional role of the attorney).

3. *See* Hirsch, *supra* note 1, at 20-21.

4. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984).

5. *See* Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983).

rington[6] have stressed, however, that cynicism and nihilism can be found as readily in the mainstream of legal thought as in its radical critics' thought. If scholars of the Critical Legal Studies movement are the source of this nihilist infection, then how can one explain the serious incidence of the disease in graduates of law schools where the most "radical" thing any faculty member has done in recent years has been to vote for Walter Mondale, and where most of the faculty, if pressed, would identify Roberto Unger as a Neil Simon character?[7] To the extent that the cynicism and nihilism of today's law school graduates is the product of their law school experience, I believe that it flows not from any radical theory that they may have come across, but from their constant exposure to a simplified version of positivism, the dominant legal philosophy of the twentieth century.

To the positivist, law consists of a set of rules adopted in conformance with some master rule of validation. In a dispute to which one of these rules clearly applies, it is the duty of the court to follow the rule. But since so many rules are unclear, at least at their edges, and since there will be disputes to which no rule applies, courts must often exercise discretion. In such cases, courts weigh arguments of social policy and choose the decision which best promotes the overall welfare of the community. No matter what the court's decision is, it becomes, by virtue of having been made, the "right answer" to the problem. Prior to the decision no one "right answer" existed; two or more possible "right answers" existed as legitimate alternatives. Legal decisions that result from such an exercise of court discretion, therefore, cannot be wrong. Such decisions may follow foolish policy choices, but because the judge had no duty to act on standards other than policy preferences, his decision cannot be wrong in any absolute sense.

This may be an oversimplification of positivism as set forth by its most significant twentieth century exponents.[8] Nevertheless, it is clear that this is the form of positivism that currently constitutes the "ordinary religion" of the law school classroom and the legal system as a whole. It is also the doctrine that Ronald Dworkin, Professor of Law at New York University and University Professor of Jurisprudence at Oxford University, has consistently attacked for two decades.

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6. See the correspondence collected in Martin, *"Of Law and the River," and of Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1 (1985). Robert Gordon, in a letter to Carrington, insists that such people as Oliver Wendell Holmes, Thurman Arnold and Grant Gilmore can more plausibly be labelled "nihilists" than "a romantic Christian Hegelian like Roberto Unger." *Id.* at 14-16.

7. Unger is the particular target of Carrington's attack. *See supra*, notes 4-6.

8. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW (1961); J. RAZ, THE CONCEPT OF A LEGAL SYSTEM (1970).

In his new book, *A Matter of Principle*, Dworkin develops, refines, and elaborates the themes that he set forth in his 1978 book, *Taking Rights Seriously*.[9] His present offering, like that earlier work, is a collection of previously written essays grouped together by subject matter. *Taking Rights Seriously* was hailed as one of the most important books on the philosophy of law in recent decades. In this new book, Dworkin responds to criticism that was leveled at the thoughts expressed in his previous volume. While doing so he develops his thought and clarifies his philosophy. It is, therefore, unlikely that *A Matter of Principle* will be considered as important as *Taking Rights Seriously*, simply because that prior work first made Dworkin's philosophy available to a wide audience. Still, *A Matter of Principle* is itself a significant, provocative, and interesting book.

The first group of essays in *A Matter of Principle* generally deal with Dworkin's contention that the law consists not only of rules, but also principles. These principles, which have not always been enacted or explicitly validated through some master rule, are more general statements of the ideals underlying the legal system as a whole. To Dworkin, both rules and principles are sources of legal rights. Nevertheless, principles are to be distinguished from rules and from policies.

Policies seek to implement goals, particularly the overriding goal of increasing the general welfare of the community. Principles according to Dworkin, however, are not concerned with welfare maximization, but rather are concerned with the vindication of rights. Policies are the stuff of legislative decisions; the democratic process is the appropriate forum for weighing competing policies. But in Dworkin's view, judges must act according to principle, not policy, because where principle dictates an outcome, arguments of general welfare must be ineffective. Only competing principles are proper matters for judicial consideration.

With these first essays as background, Dworkin's next set of essays addresses the proper judicial approach to deciding cases. Dworkin agrees with the positivists that when the rules are clear they control, and that in such cases the litigants have the right to a decision consistent with those rules. To this extent, Dworkin, who has been described by some as a modern-day natural law theorist, clearly breaks with the classical natural law position, which holds that a specific rule has no force and creates no rights if inconsistent with the overriding system of natural law.[10]

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9. R. DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

10. John Mackie describes Dworkin's thought as neither positivism nor a theory of natural law. Mackie, *The Third Theory of Law*, R. DWORKIN AND CONTEMPORARY JURISPRUDENCE (Cohen ed. 1984).

In cases where no rule clearly controls, Dworkin breaks with positivism and insists that there is a single, correct answer. The answer can be found through a consideration of the principle or principles applicable to the case. Dworkin readily concedes, however, that the right answer will often be a matter of sharp dispute, and that neither side will be able to deliver an irrefutable "knockout punch" of an argument for its position. Still, contends Dworkin, this does not mean that one side is not right and the other wrong. He maintains that some arguments are better than others in an objectively demonstrable way, and that judges are duty bound to rule in favor of the side providing the strongest argument based upon principle. A judge, according to Dworkin, may not use a decision merely to advance his or her preferred policies as if he or she were a legislator.

In one of the most interesting essays in the book, entitled "How Law Is Like Literature," Dworkin analogizes a judge to a literary critic. He points out that literary criticism constantly asks questions that are not directly answered by the text. As an example, Dworkin uses the question of whether Hamlet and Ophelia were lovers before the play begins. The fact that scholars take such questions seriously, and that there are answers to such questions that are more in keeping with the overall nature of the work than contrary answers would be, demonstrates the way in which scholars pursue truth even in the face of some inevitable degree of uncertainty.

When a literary scholar finds no definite answer to a relevant question in the text, he does not have discretion to answer the question as he chooses. He must provide an answer that is sufficiently consistent with the underlying themes of the work so that his answer will be superior to alternative answers. If he does not, his answer will be correctly labelled "wrong." Likewise, Dworkin believes that in the absence of clear rules, judges may not rely on their favorite policies, but must turn to principles present in the legal system as a whole. An answer inconsistent with these principles can be correctly labelled as wrong.

What is the difference between taking the positivist position that there is no right answer in hard cases, and taking Dworkin's position that there always or almost always is a right answer even though the correctness of the right answer cannot always be made absolutely clear? In attempting to answer this question, Dworkin points to the fact that attorneys invariably frame their arguments as assertions that their clients have the right to a favorable decision, rather than arguing that the judge should merely exercise his or her discretion in favor of their clients. Dworkin's position gives legitimacy to those arguments. It places a stronger duty on judges to decide cases and explain their decisions in light of an intellectually honest and rigorous analysis of discoverable standards. It does not

allow judges to assume that their own preferences may properly come into play. Moreover, Dworkin's position allows us to criticize judicial decisions in hard cases not merely upon the grounds that they are unwise as a matter of policy, but also upon the grounds that they are wrong.

If the simplified, popular form of positivism is valid, then what we as lawyers do is far less important than we would want to imagine. For if all legal decisions are either mechanical adherence to clear rules or discretionary choices among competing policies, the lawyer is largely irrelevant to the decision making process. A competent layperson could quickly learn to research the law in order to discover the clear rules, and he or she could also articulate why a decision in his or her favor would be a generally beneficial thing.

Under positivism, therefore, all of the lawyer's arguments about rights and entitlements in hard cases become mere window dressing that is simply used to mask what is really going on, a judge doing what he or she wants to do. It is little wonder that lawyers and law students who are forced to articulate the language of rights, correct and incorrect decisions, and closely reasoned arguments, while believing that the whole enterprise turns merely on the personal preferences of the decision maker, would become cynical and dissatisfied with their work. The chief virtue to Dworkin's view of the decision making process may be that it allows all of us involved in the process, as participants or critics, to believe in the value and legitimacy of what we are doing.[11]

So, under Dworkin's philosophy, hard cases have right answers and those answers are to be found in principles, not policies. If the reader stays with Dworkin this far, the next question demanding an answer is how do we distinguish principles from policies? If we cannot or if the distinction is purely semantic and a judge's favorite policy may simply be recast in different words as a principle, Dworkin's argument may have done nothing worthwhile. And far worse, his argument may have provided judges with a more potent weapon with which to impose their policy choices.

Dworkin is very clear about what does not constitute an argument of principle. In making this point, he takes on some of the more popular current theories of legal analysis. Dworkin maintains that arguments of general welfare, whether those of classical utilitarianism or the wealth maximization theories of Posner[12] and the

11. This is not to say that the popular view of positivism does not provide its own psychological benefits. The most prominent, it seems to me, is that it allows lawyers to avoid having to conclude that the positions which they must advocate are "wrong," since hard cases do not have "right" and "wrong" answers, merely plausible alternatives for the exercise of judicial discretion.

12. *See* R. POSNER, THE ECONOMICS OF JUSTICE (1981).

"Law and Economics" school of thought, are policy arguments and therefore not appropriate standards for judges to invoke. Dworkin devotes two essays to a broad attack on the concept of wealth maximization as the basic principle underlying judicial decision making.

Dworkin also attacks the view that the "intent" of the framers should control in matters of statutory and constitutional construction.[13] In the essay entitled "The Forum of Principle" he explains why he believes that focusing on the legislators' state of mind at the time that the provision in question was enacted is misguided and futile. Most important is his discussion of the difference between abstract and concrete intentions, which coexist in a legislator's mind, but which may well conflict in the analysis of a particular problem.

Dworkin also rejects, as a principle of constitutional analysis, the position of John Hart Ely and others, which holds that the ultimate purpose of the constitution is to maintain properly functioning democratic processes rather than to dictate the specific content of the decisions reached by those processes.[14] Dworkin's criticism is largely based upon the fact that "democracy" is defined in different ways in different cultures, and that the choice of a definition is not itself a choice involving process, but involves a choice of substance instead. This is no doubt correct, but I think his criticism of Ely is far less successful than his critique of Posner and the advocates of "original intention." Ely's concept of democracy is not far removed from the adherence to principle urged by Dworkin. Ely seems to be committed to the concept that government should treat all citizens equally and with dignity and respect. Although the semantics may differ (Ely sees this as a matter of "process," Dworkin calls it "substance"), I believe the real problem is that working from substantially similar assumptions, they still differ about specific controversial cases, such as *Roe v. Wade*.[15]

Dworkin, then, rejects utilitarianism, wealth maximization, the intent of the constitutional framers, and commitment to process as central foundations in the search for principle. Instead, he turns to what he conceives of as the central principle from which all the rest seem to flow. To Dworkin, that principle is one of equality. Specifically, he believes that all citizens are entitled to governmental treatment which extends them equal dignity and respect. This leads to the third set of essays in the book, which contain Dworkin's definition and defense of liberalism.

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13. Probably the most prominent advocate of this position is Raoul Berger. *See* R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

14. *See* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

15. 410 U.S. 113 (1973).

The core principle of equality leads to the related principle that government may not legitimately act to declare a chosen way of life as less worthy than another. As Dworkin puts it, "government must be neutral on what might be called the question of the good life."[16] But this is not skepticism; it does not mean that liberals have no position on right and wrong. Liberals, rather, believe that fundamental equality is right. Liberalism, however, is not libertarianism. It is permissible to restrict liberty in furtherance of the fundamental right of equal treatment. On the surface, this is paradoxical because liberalism must be illiberal about those who would deny its basic premises. It may, however, be the only way to avoid having the principle destroy itself.[17]

Ultimately, Dworkin's commitment to neutrality and equality must allow one fundamental exception. There is no neutrality with respect to the principle of neutrality, and there is no equality for the principle of inequality. On one level this is logically troubling. Dworkin can be charged with self-interest. In his liberal state, the most effective members of the political and legal community will be those who can skillfully reason from principles to policies and rules, that is, people like Ronald Dworkin. This alone, however, is no reason to reject his arguments.

Certainly, self-interest also taints illiberal theorists. In their ideal polity, they would be the happiest of citizens. Still, it remains true that the belief in neutrality and equality most ultimately rest, just as must all its competitors, on an ultimate concept of the good society and the good life. Moreover, this concept must itself rest not on an argument but on conviction, despite the fact that it cannot be clearly demonstrated.

Finally, Dworkin applies his theories to specific issues. In his discussion of the *Bakke* decision[18] he concludes that "reverse discrimination" is not a violation of the principle of equality because it cannot be taken to imply an attitude on the part of government that its "victims" are somehow less worthy individuals than its beneficiaries. On the question of obscenity, he concludes that there is a right to the private consumption of pornography although not to its public display. This conclusion is grounded in his contention that however misguided, a belief that such consumption promotes the

16. R. DWORKIN, A MATTER OF PRINCIPLE 191 (1985).

17. This same position is espoused by Bruce Ackerman in his important work SOCIAL JUSTICE IN THE LIBERAL STATE (1980). To Ackerman, the struggle for power must, in the liberal state, be carried on by rational argument, but certain fundamentally illiberal arguments are labelled as illegitimate. One may not support an argument by resorting to the position that he or she is "intrinsically superior to one or more of his fellow citizens." *Id.* at 11.

18. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

good life must be respected, at least in the absence of a demonstrated link to violations of another's rights.

In the "fair trial-free press" debate, Dworkin ultimately supports the criminal defendant. Although the press certainly does have rights, the so-called "right to know" of the public at large is not founded on principle, but rather is a matter of policy. Even though this policy may outweigh many conflicting policies, when it collides with a matter of principle, such as the right to a fair trial, it must yield.

In one of the more interesting essays in the book, Dworkin attempts to delineate the conditions under which civil disobedience is proper in a democratic society, and under what circumstances government should respond with punishment. Although this essay was originally a speech addressed specifically to the West German anti-nuclear movement, its relevance to issues such as the sanctuary movement and recent anti-apartheid activity makes it timely and useful beyond its original context.

In short, *A Matter of Principle* is a useful and important contribution to the literature of jurisprudence. Dworkin does not prove all of his points or leave positivism broken and vanquished, but how could he? As his own theory concedes, even right answers in hard cases will continue to be matters of sharp dispute, and the issues discussed in this book are among the "hardest cases" of all.

Ultimately, what is most important in the field of jurisprudence is that the dialogue continue. Dworkin's earlier work, *Taking Rights Seriously*, responded to H.L.A. Hart. Critics in turn responded to that work. *A Matter of Principle* takes the dialogue a step further. For that reason, even if Dworkin is wrong, his work is important; even if the reader disagrees with it, the book will prove valuable. At the very least, Dworkin has forced positivists to refine and more clearly articulate their own views.

Critics have claimed that the positivism Dworkin attacks is a straw man, an oversimplified caricature of a more subtle theory that does place restraints upon judges and does, therefore, make the work of the advocate meaningful.[19] Still, it is this simplified version that many lawyers believe in, and it is this version that is consciously and unconsciously transmitted to many law students. If Dworkin does nothing more than force positivists to be better positivists and take pains to communicate why their theories do not lead to a legal system where the only options in decision making are mechanical adherence to rules or unbounded discretion, then what

19. *See generally* RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE (Cohen ed. 1984) (several of the essays).

he has done is of great importance.

This is not to say that the work is valuable only for its ability to provoke response. Much of what Dworkin sets forth is useful and largely correct. This is especially true of the principle-policy distinction, and the assertion that there is a correct answer in hard cases. Where Dworkin runs into trouble is in his attempt to universalize his system of thought to cover all areas of law. It is instructive that his specific examples are so often drawn from areas such as constitutional and criminal law. The overriding importance of principle and the lesser regard for policies of welfare or wealth maximization in the jurisprudence of these areas is evident. But elsewhere in the law, such as in common tort law litigation or litigation under the antitrust statutes, it seems obvious not only that courts are heavily involved in weighing policies, but also that such activity is far less objectionable than it would be in other contexts.

When Posner and others attempt to extend the useful concept of wealth maximization too far they become easy targets for Dworkin. Similarly, however, Dworkin's thought loses some of its persuasive power when it is put forward as always being the proper way for a court to proceed. Principle may be more important than policy, and there may be areas of law where principle is the only proper consideration, but I doubt that policy can be entirely eliminated as a proper judicial concern.

A few words should be said on the style of the book. One of Dworkin's advantages is the fact that although he is dealing with very difficult concepts and questions, his work is accessible. The pieces vary in both length and depth, as would be expected of a collection of articles originally written for such diverse places as the New York University Law Review and the New York Review of Books. Nevertheless, a reader with a genuine interest in the subject matter and some general background knowledge of how courts work will be able to follow the arguments. On the other hand, since these essays are part of an ongoing debate between Dworkin and his critics, those who have read *Taking Rights Seriously* and the works of Hart and others will have less of a sense of having walked in during the middle of the show.

As is inevitable in any collection of previously published essays, there is some overlap, but it is minimal and at times the repetition of key ideas in different contexts is helpful. Another minor problem, also inevitable given the nature of the book, is the fact that some of the essays are direct responses to other theories or articles with which the reader may not be familiar. To be sure, Dworkin summarizes the views of his adversaries, but at times one gets the impression of an experience not unlike watching a televised debate and turning down the sound every time a disfavored candidate begins to

speak. Ultimately, this is less a criticism of Dworkin's book, however, than an admonition to the reader seriously concerned with the issues discussed to seek out and read these competing views in full.

Whether one practices, teaches, or enforces the law, all members of the legal community spend time consciously or unconsciously thinking about basic questions or jurisprudence. The first step in overcoming a sense of malaise of cynicism about legal work is to understand what that work actually is and should be. For those who are interested in pursuing these descriptive and normative questions of legal philosophy, it is fortunate that Dworkin's thought is conveniently available in print. *A Matter of Principle* is a valuable book. It is interesting, provocative, and well worth the time of anyone who cares about law and legal institutions.