

TRIBUTE TO RONALD DWORKIN[†]

AND A NOTE ON PRAGMATIC ADJUDICATION

I am honored to be asked to speak at this dedication to Ronald Dworkin, an illustrious figure in modern legal thought. I was touched to learn that Dworkin himself had asked me to speak. For our intellectual relationship is essentially one of antagonism,¹ even antipathy. To be an *invited* skunk at a garden party is an unusual experience, and one that argues generosity on Dworkin's part, and perhaps a spirit of mischief on the editors' part. It is only fitting, in the circumstances, that I should be the caboose on this train of praise.

Although there are seemingly vast areas of disagreement between us,² I not only respect his work, I agree wholeheartedly with what may prove to be the most enduring part of it, though predictions of that sort are perilous. I refer to his criticism of positivism, and specifically of the positivism advocated by H. L. A. Hart in *The Concept of Law*. Dworkin has demonstrated convincingly that American judges, at least, are not legal positivists; they (or should I say we) draw their legal ideas from a variety of sources besides positive, in the sense of enacted, law. I would like Dworkin to have acknowledged that he was indeed speaking about *American* judges; much of the disagreement between him and Hart might have dissolved had each acknowledged that his own concept of law was not universal but was based rather on the character of the legal system he knew best, American in Dworkin's case and English in Hart's—more precisely the *traditional* English legal system, for it has, as Dworkin now emphasizes and Lord Hoffmann's tribute to Dworkin illustrates, begun to evolve in the direction of the American. I even agree with at least one thing that Dworkin has written in the *New York Review of Books*: "we must not allow our Constitution and our shared sense of decency to become a suicide pact," he wrote in the wake of the terrorist attacks of September 11, 2001.³

[†] This a slightly revised and extended version of remarks delivered on April 17, 2006, on the occasion of the dedication of volume 63 of the *N.Y.U. Annual Survey of American Law* to Ronald Dworkin.

1. See, e.g., Richard A. Posner, *Conceptions of Legal "Theory": A Response to Ronald Dworkin*, 29 ARIZ. ST. L.J. 377 (1997); Richard A. Posner, *Dworkin, Polemics, and the Clinton Impeachment Controversy*, 94 NW. U. L. REV. 1023 (2000).

2. See, e.g., RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 20, 46, 119, 300, 337–38, 350–51 (2003).

3. Ronald Dworkin, *The Threat to Patriotism*, N. Y. REV. BOOKS, Feb. 28, 2002, at 44, 47. This phrase has its origins in Justice Jackson's dissent in *Terminiello v. City of*

I am less happy with other aspects of Dworkin's jurisprudential thought, such as his distinction between principles and policies and his insistence on the priority of the former in guiding judges; in his further insistence on the fusion of constitutional law with moral theory; in what seems to me the unrealism of his conception of judicial capabilities; and in his right-answers thesis. Lord Hoffman in his tribute to Dworkin embraced Dworkin's conception of judicial capabilities and his right-answers thesis, and stated that always when he disagrees with his fellow judges it is because he thinks he is right and they are wrong on the legal issue in question. That is not how I react to most disagreements with my fellow judges. Sometimes I think I am right and they are wrong, but in the really interesting cases I am more apt to think that right and wrong do not enter the picture, that we disagree not because one of us has made a mistake but because, as a consequence of differences in values, temperament, life experience, or our conceptions of the judicial function, we are not reasoning from common premises.

As for Dworkin's derision of pragmatism (philosophical as well as legal)—to which he has applied such terms as “dog's dinner”⁴ and “empty,”⁵ comparing me both to a “bulldog”⁶ and to an “ostrich”⁷ (covering quite a lot of ground in the bestiary)—there we are at complete loggerheads. The fundamental difference between us is that he believes that there is such a thing as moral reasoning and that it should guide judges, and I, while not doubting that there is such a thing as *morality* and that it influences law, believe that moral *reasoning* is just a fancy name for political contention.

But remember the words I used in describing our differences—*seemingly* vast areas of disagreement between us; this formula allows for the possibility that the disagreements between us may not really run very deep, that they may be largely a matter of our using different vocabularies to express our views of sound pub-

Chicago, 337 U.S. 1 (1949). What Justice Jackson actually said was: “The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.” *Id.* at 37 (Jackson, J., dissenting).

4. Ronald Dworkin, *Pragmatism, Rights, Answers and True Banality*, in *PRAGMATISM IN LAW AND SOCIETY* 359, 360 (Michael Brint & William Weaver eds., 1991).

5. Ronald Dworkin, *Philosophy & Monica Lewinsky*, N.Y. REV. OF BOOKS, Mar. 9, 2000, at 48, 52 (reviewing RICHARD A. POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON* (1999) and RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999)).

6. Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718 (1998).

7. Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L. J. 353, 375–76 (1997).

lic policy and the judicial duty to implement them. A graduate student in philosophy at the University of Pittsburgh, Lisa Van Alstyne, is writing an interesting doctoral thesis in which she denounces Dworkin and me as a pair of functionalists both of whom in our separate ways have grievously misconceived the character of tort law.⁸

I can't go much deeper into such matters here, though in the extension of these remarks below I amplify my view of our disagreement a bit. For I must save time to say a word about Dworkin the critic. He is of course a polemicist of remarkable power and a distinct ruthlessness; if you have any doubt about the ruthlessness, ask Robert Bork, who is still smarting. I too have felt the lash of Dworkin's critical polemics—on more than one occasion, but most dramatically when in a review of my book on Clinton's impeachment (in Mr. Silvers' journal) he accused me of having violated the canons of judicial conduct by discussing Clinton's travails before the theoretical (and it *was* merely theoretical) possibility of an indictment against that miscreant had been extinguished, though after Clinton was acquitted by the U.S. Senate.⁹ It is the only time, in my 24 years as a judge, that I've been accused of a judicial impropriety. Fortunately, who should ride to my rescue but John Frank, a crusty old lawyer (since deceased) of indubitable rectitude, probity, stuffiness, and distinction, who wrote a letter to the *New York Review of Books* where Dworkin's criticism of me had appeared in which he said, no, Posner had not violated the canons of judicial ethics, he had merely demonstrated very bad taste.¹⁰ Well, since *de gustibus non est disputandum*, Frank's timely intervention may have saved me from the ignominy of a reprimand by higher judicial authority, a fate that my friend Judge Guido Calabresi, after publicly comparing President Bush to both Hitler and Mussolini, rather to Bush's disadvantage—and this at the height of the 2004 Presidential election campaign—was unable to escape.¹¹

But this is not the whole story of Dworkin the critic. An article that he wrote many years ago forcefully criticizing my views about wealth maximization,¹² though it overstated his case, was convinc-

8. For an early version, see Lisa Van Alstyne, A Failure to Secure the Autonomy of Legal Norms: Andrei Marmor's Positive Law and Objective Values 8–12 (2006) (on file with author).

9. Dworkin, *supra* note 5, at 48.

10. John P. Frank, *A Question of Ethics*, N.Y. REV. BOOKS, May 25, 2000, at 63.

11. See Mark Hamblett, *Council Finds Judge's Apology Fulfills Sanction*, N.Y. L. J., Apr. 13, 2005, at 2.

12. Ronald Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980).

ing and caused me to alter those views, albeit grudgingly of course, and with a lag. I am grateful for the criticism. Dworkin the critic is seen at his most constructive—and by many of you in this room, I am sure—in the law and philosophy colloquium over which he presides both here and at University College in London. I have had the privilege and pleasure of presenting large swatches of book manuscripts three times at the colloquium. Not only the insights that Dworkin generously shares with the speakers on those occasions, the discussions that he orchestrates, and the improvements in my books that have resulted, but also the courtesy with which he delivers his penetrating criticisms, make these occasions memorable and wipe out the smart of our combats.

At the dinner following the tributes to Dworkin, he took the podium and a brief exchange ensued between the two of us. Recurring to my remarks about the difference between Lord Hoffman's Dworkinian conception of judicial method and mine, Dworkin asked me how I could decide a case on any basis other than a view of what the right decision was. I answered as follows: For the judge, the duty to decide the case (and with reasonable dispatch) is primary. He does not choose his cases, or the sequence in which they are presented to him, or decree a leisurely schedule on which to decide them. This is something that law professors have difficulty understanding, since they choose their topics and need not let go of a paper until they are satisfied that they are right. I have felt in a number of cases that I was skating on thin ice. I did not feel that I had the luxury to defer decision until certitude descended on me.

Often at my level of the judiciary (less often in the Supreme Court), the judges do share the premises of decision—they agree for example that the purpose of contract law is to promote efficiency in transactions—and when that is so, a decision based on instrumental reason is possible. Pragmatism can help guide the reasoning process in such a case by inviting the judges to consider practical consequences—what decision will conduce to achieving the purpose of the area of law in question? And Dworkin asked, but what about the cases in which the judges do not agree on the premises of decision? How can pragmatism help them then? Those are cases in what I call the open area, where the conventional materials of judicial decision-making run out and the judges, if they are to decide the case rather than throw up their hands, are compelled to make a legislative judgment. Such a judgment, like that of the offi-

2007]

TRIBUTE

13

cial legislature, will inevitably reflect the preferences of the legislator-judge, and so we should ask how legislators' preferences are formed when they are not under strong pressure from their constituents¹³—when they have, in basketball parlance, a free shot. The answer is that legislators in their open area are guided by values, temperament, life experiences, and their conception of the scope and limits of the legislative function. You can disagree with their judgment and give reasons for your disagreement, but rarely can you say they are wrong. And so it is with judges. All that is clear—and it is not nothing—is that we want legislators to think hard about the consequences of proposed legislation, and we should want judges to do likewise when the mantle of legislator is thrust upon them. Would Dworkin disagree?

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13. I am indebted for this point to Liam Murphy, who was also in attendance at the dinner.

