Law from the Inside Out

Ronald Dworkin contributed over one hundred articles, reviews, and commentaries on law beginning in March 1968. The following was originally given as a talk at the Palazzo del Quirinale in Rome in November 2002, when he received the Balzan Prize for his "fundamental contributions to Jurisprudence, characterized by outstanding originality and clarity of thought in a continuing and fruitful interplay between legal and political theories and with legal practices." It is presented here with small changes. Ronald Dworkin died on February 14 of this year.

Law is at the cutting edge of many different disciplines and I am going to try to illustrate this point by talking about my own career, not because I believe that everything I think is right, but because my career has illustrated a marked trajectory from the very concrete to the very abstract.

My last book, Justice for Hedgehogs (2011), offers a panorama of the work I have done over half a century: not just a survey but an integration, trying to explain how it all fits together. I began my professional life as a young lawyer in a grand Wall Street law firm. My work could not have been more detailed and less abstract then. I wrote elaborate bond indentures and studied the balance sheets of giant corporations, helping them to satisfy the laws that allowed them to raise more money and grow greater still.

Since then, in an academic career at several institutions, my interests have grown steadily more abstract. But in each case the intellectual pressure I felt developed from the bottom up, not the top down. I took up steadily more abstract philosophical issues only because the more practical and political issues that first drew my attention seemed to me to demand a more philosophical approach or law, such a satisfactory resolution. I will try to illustrate that process of philosophical ascent.

When I left Wall Street to join a law school faculty, I took up a branch of law—constitutional law—that is in the United States of immediate and capital political importance. Our Constitution is not only a collection of legal rights, it declares that it is immune from government violation. That means that even a democratically elected parliament, representational in its composition, has no legal power to abridge the rights the Constitution declares. But it declares these individual rights in very abstract language, often in the language of abstract constitutional clauses, for example, that government shall not deny the freedom of speech, or impose cruel punishments, or deprive anyone of life, liberty, or property without due process of law, or of the equal protection of the law.

The Supreme Court has the final word on how these abstract clauses will be interpreted, and a great many of the most consequential political decisions taken in the United States over its history were decisions of that Court. The terrible Civil War was in part provoked by the Supreme Court’s decision that slaves were property and had no constitutional rights; racial justice was severely damaged, after that war, by the Court’s decision that racially segregated public schools and other facilities did not deny equal protection to those in authority and finding out what they have said.

In most cases this is a relatively easy matter. There are books that set out civil codes and record the other decisions of parliaments and the past rulings of judges. Lawyers know where these books are kept, and how to read them. But what if lawmakers speak in abstract language and what they can say can be read in different ways? The United States Constitution forbids "cruel" punishments. Does that rule out capital punishment—the death penalty?

Even more fundamentally, legal positivism is based on severe misunderstandings of the natural law tradition. It assumes that the law is the way we share the concept of a triangle, that is, that we all agree on the tests to use to decide whether a legal rule is false or true. But we do not. For us, the concept of law—like other political concepts such as the concept of justice—is an interpretive concept: a theory of law is a normative claim about the tests that we should use to judge claims of law. A theory of law is a special kind of political theory, and so what law is cannot be separated completely from what it is.

Once we reject positivism, however, we need another, different theory of law. In a series of articles and then in Law’s Empire, in 1986, I offered a theory. A claim of law should be understood as a claim about the best interpretation of past and contemporary legal and political practices in the nation in question. We need a theory of what interpretation is—what counts as a successful interpretation—in order to fill out this interpretive theory. I proposed what I came to call a "value" theory of interpretation. An interpretation must fit the data—it must fit the practices and history it claims to interpret—but it must also provide a justification for those practices. It must, as I sometimes put it, show the practice in its best light.

The first requirement—of fit—is not enough. The best interpretation of one interpretation of a complex set of legal data may fit well enough to count. The second requirement—of justification—is therefore crucial. It shows why positivism fails as a general explanation of law. We cannot identify law without assuming some justification, however weak, in political morality.

This interpretive theory of interpretation is, and of what makes one interpretation succeed and another fail, cannot hold only for legal reasoning, however. It must hold for interpretation in general, and so I was required to explore other domains of interpretation. In one important chapter of Justice for Hedgehogs, I concentrated on artistic and literary interpretation. I tried to show how the interpretive theory illuminates the agreements and conflicts among critics in all these domains.

The interpretive theory of law raises deeper questions about moral philosophy. It supposes that one claim about the law—that capital punishment is unconstitutional, for instance—can be true and its opposite false, even though its truth depends on a moral theory about the best interpretation of the Constitution as a whole. But for many decades now most influential moral philosophers have denied this. They insist that claims about moral
ity—that capital punishment is morally wrong, for example—is not really a judgment and so cannot be either true or false. Since judgments about moral rights and wrongs are not analytically true or false, philosophers say, it makes no sense to think that they are either true or false. We must either concede that such judgments are, strictly speaking, nonsense, or we must suppose that they are not really judgments at all, but only expressions of emotion or recommendations for conduct. New from PUBLIC AFFAIRS

Fourth, this "anti-realism" in theory about morality, as it is called, would cause great trouble for the interpretative account of law I defend. We would have to say something that seems crazy, which is that nothing we say about the law is true—or false either. That may be an attractive conclusion to reach in a philosophy seminar room, but not in a court of law. A judge who sentenced a defendant to jail while admitting that the judge's own view of the law is only an emotional expression would probably be sent to jail himself.

So I had to take sides about this deep issue of moral theory. In an article in 1991, and then subsequently, I argued that this article in the first part of Justice for Hedgehogs, I argued that the "anti-realism" in moral theory is not coherent. Consider the proposition that rich people have no moral duty to help the poor of their own community. If that proposition is not true, then it is not true that rich people have that duty, and that is itself a false statement: truths about human actions can be true or false, then that one can't be true either, so anti-realism is self-defeating.

Now that simple statement may seem too quick and an argument, and in fact it took me many pages to explain it. I had to consider a great variety of metaphysical arguments, proposed by a great many very distinguished philosophers, for the position I called "anti-realism." I was forced to attempt to summarize those arguments now, but only to emphasize that this excursion into the history of moral philosophy, and I'm sure for the purposes of some of the next of the book, I'm sure that this isn't a very challenging task. For those interesting in understanding the political philosophy of the abstract theories of logic and perhaps in understanding the questions at the heart of any political life. A theory of justice, or a theory of justice that is not just about colors, that's true, right, truly right answers are true, but not only if we further and try to identify, so far as we can, that these things are not the same, what things are right, truly, truly right really important, they're right, right, right, right, right, right. Whatever that means, that's the ontology of the modus that we have to think about, what we do to others, what we are, and what we do to others.

Therefore, I proposed two fundamental principles that I believe can provide the most coherent and attractive answers to all those questions in different areas that directly important—important from everyone's point of view—that each of us succeeds in their own circumstances, mean, I argued, relying on Immanuel Kant's thesis that no one respects his own humanity who does not respect humanity in other people, that we can define what we owe to other people as part of what we owe to ourselves. The key is the idea of dignity: it belongs to our own dignity to respect the dignity of our moral agent. I could not, however, defend this account of personal and moral responsibility without recognizing the persistent challenge to any theory of responsibility: the argument that people cannot be responsible because, in a deterministic universe, people have no free will, cannot actually make choices, and so cannot be responsible for choice. The so-called "free will" problem has been a threat to human responsibility for many centuries. I argued that it has been misunderstood: the claim that we lack responsibility because we lack free will must be understood as an ethical and not just a physical or metaphysical thesis, and that once the challenge is understood that way, the better answer is that people are morally responsible after all.

That brings us to politics, and to the great political virtues. The concept of justice, liberty, equality, and democracy, like the concept of law, interpretative concepts. We argue about the right way to understand these concepts by arguing about how they should be understood given the crucial role they play in political discourse. I propose, again, that we should understand them as reflecting the two principles of dignity that I have argued are fundamental in private morality: these two principles form the spine of public political morality as well. And again we need to delve into them together so that they offer mutual support, not conflict.

We achieve true economic equality, for example, not when everyone has the same wealth, but no matter what decisions he has made in the course of his life, but when what one has depends on those decisions, and not on good or bad luck in health, accident, or inheritance. That idea of equality ties together the moral ideal of personal responsibility and the political ideals of distributive justice. But how can equality so understood be achieved in a real political economy when good and bad luck are facts of life? I proposed that I believe to be an economically sophisticated approach to theory of taxation by way of an example: a redistributive tax system should be modeled on a hypothetical insurance scheme. The fortunate should pay, by way of taxes, what that model suggests they would have paid, by way of premiums in an actual insurance market; the unfortunate should receive, by way of social benefits, what they would have been entitled to receive in that insurance market.

I recognize that this account of the philosophical basis of economic equality is much too condensed. I have explained it at much greater length elsewhere, particularly in my book Sovereign Virtue (2000). My point, yet again, is only to suggest the interconnectedness among corporate legal issues, questions of personal ethics and morality, broad political issues of social policy, and the most abstract, ra- refined philosophical and metaphysical puzzles. They can't be separated, and my own career has been driven by their deep integration.

For the author's discussion of free will, see Chapter 10 of Justice for Hedgehogs (Belknap Press/Harvard University Press, 2011).

The insurance scheme is discussed in Chapter 2 of Sovereign Virtue: The Theory and Practice of Equality (Harvard University Press, 2000).

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