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Joseph Raz

Columbia Law School, jr159@columbia.edu

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REVIEW

Dworkin: A New Link in the Chain

A MATTER OF PRINCIPLE; by Ronald Dworkin.† Cambridge, Massachusetts: Harvard University Press, 1985. Pp. 425, with notes and index. \$25.00 clothbound, \$8.95 paperback.

Joseph Raz‡

This book brings together nineteen of the articles published by Professor Dworkin over the last eight years, mostly in the *New York Review of Books*, but also in learned journals and collections. Three articles, none of them of major importance, have not been published before: *Can a Liberal State Support Art?* (pp. 221-36),¹ *On Interpretation and Objectivity* (pp. 167-80),² and *Civil Disobedience and Nuclear Protest* (pp. 104-18).³ Several pieces published during the last few years are not included, of which the most important is an article on equality.⁴

The book lacks thematic unity, but it will be welcome as not only does it bring together many of Dworkin's influential articles, but it makes available to a wider audience several articles not widely known before. Of these, two are of particular importance. *Principle, Policy, Procedure* (pp. 72-103) applies Dworkin's general theory of adjudication, with its emphasis on individual rights, to issues of evidence and procedure whose sensitivity to the public costs of the judicial process seems to undermine Dworkin's apparent view that in adjudication, rights should take precedence over issues of public policy, such as administrative expedience. The second, *Do We Have a Right to Pornography?* (pp. 335-72) is not

† Professor of Jurisprudence, Oxford University, and Professor of Law, New York University.

‡ Professor of the Philosophy of Law, Oxford University, and Fellow of Balliol College.

1. An essay originally presented to a conference on public support of the arts at the Metropolitan Museum of Art, New York, in April of 1984.

2. This article draws on material in Dworkin's *My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk about Objectivity Any More*, in *THE POLITICS OF INTERPRETATION* 287 (W.J.T. Mitchell ed. 1983), written in response to Fish, *Working on the Chain Gang: Interpretation in the Law and in Literary Criticism*, in *THE POLITICS OF INTERPRETATION*, *supra*, at 271.

3. Adapted from a talk delivered at a conference on civil disobedience at Bonn, in September, 1983.

4. Dworkin, *What is Equality? Part I: Equality of Welfare*, 10 *PHIL. & PUB. AFF.* 185 (1981); Dworkin, *What is Equality? Part II: Equality of Resources*, 10 *PHIL. & PUB. AFF.* 283 (1981).

only Dworkin's most extensive and developed discussion of some of the issues of freedom of expression, but also adds to our understanding of his conception of liberalism.

As in his previous collection of essays, *Taking Rights Seriously*,⁵ Dworkin ranges widely over a variety of issues in legal and political theory and practice. He develops his ideas through a series of controversies with other writers. Most of the contributions to legal theory in this volume emerge in articles which forcefully challenge arguments about law, its interpretation, and the role of the judicial process put forward by Griffith (an English academic who criticized the conservative bias of the English judiciary), Ely, Fish, and Posner. Dworkin also likes to apply his ideas to current political-constitutional controversies. Much of Dworkin's thought in political theory emerges from his discussion of such topics as *Regents of the University of California v. Bakke*, *Steelworkers v. Weber*, The British 1979 Report of the Committee on Obscenity and Film Censorship (The Williams Report),⁶ and *Farber and New York Times v. Jascaveich*.

Compared with Dworkin's previous publications there has not been much change in the range of political concerns displayed in the book. They still revolve around the foundations of constitutional rights, such as the equal protection clause and freedom of expression, in a liberal theory whose burden is the protection of the individual against sacrifices called for in the name of the general good. At the same time, the book includes one or two essays which probe deeper into the presuppositions of Dworkin's political views. In legal theory, however, this collection marks a considerable widening of the horizon, as well as a further deepening of the foundations. The author enriches his theory of adjudication by developing the rather rudimentary ideas on statutory and constitutional interpretation expressed in *Taking Rights Seriously*. These constitute a further development of Dworkin's ideas on the nature of law. These issues alone will be the subject of the present Review.

I

THE LAW: THE HYBRID VERSION

In order better to see the degree to which the book further develops Dworkin's theory of law, it is helpful to review Dworkin's published views about the role of sources of law—in our legal systems, mainly legislation and precedent—in his conception of law. Dworkin's views roughly divide into three phases. In the first, mostly in the 1960's,⁷

5. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

6. COMMITTEE ON OBSCENITY AND FILM CENSORSHIP, 1979, CMND. SER. 5, NO. 7772.

7. See in particular R. DWORKIN, *The Model of Rules I*, in *TAKING RIGHTS SERIOUSLY* 14 (1977) (originally published as *The Model of Rules*, 35 CH. L. REV. 14 (1967)).

Dworkin is not yet propounding a comprehensive theory of law, but is rather concerned to criticize Hart's. On the surface the critique centers on the alleged inability of a theory like Hart's to allow for the existence of legal standards which have merely a prima facie rather than a conclusive force. Dworkin explains, coining his own terminology, that positivism only allows for the existence of legal "rules" which apply in an all-or-nothing fashion, so that "[i]f the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision."⁸ In contrast, a legal "principle" simply "states a reason which argues in one direction, but does not necessitate a particular decision."⁹ However, according to Dworkin's own argument during that period, some of the most important principles of American law have been laid down in the Constitution. Dworkin would require different arguments, some of which he has indeed deployed in later years, to show that Hart's theory cannot allow for the Constitution being part of American law. His stated criticism is so obviously unsustainable that one is compelled to conclude that his real target lay elsewhere. What it might have been is open to speculation.¹⁰

One suggestion is that Dworkin was implicitly arguing that Hart's theory recognizes as law only, to use Lyons's term,¹¹ "explicit" law and denies the existence of "implicit" law. Two points have to be distinguished in evaluating this possible criticism. First, to understand what the law states, to understand the plain meaning of statutes and judicial decisions, requires a good deal of background information. To start with, it requires knowledge of English, or any other languages in which the law is stated. It also requires familiarity with the beliefs about the natural and social world common in the society concerned. Without such background knowledge, much of the legal source material would

8. R. DWORKIN, *supra* note 5, at 24.

9. *Id.* at 26.

10. Recently Dworkin attempted to explain that his argument was that one cannot find "any single master rule, accepted by the great majority of legal officials, which identifies all and only those principles to which judges have appealed in argument." *A Reply by Ronald Dworkin* in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 247, 261 (M. Cohen, ed. 1984). But this point simply supports Hart's argument for the existence of judicial discretion, *see generally* H.L.A. HART, *THE CONCEPT OF LAW* 121-50 (1961), an argument which Dworkin claimed to have been challenging. For if Hart is right to claim that there is judicial discretion, then it must be the case that there is no Rule of Recognition that captures all the standards appealed to by the courts. The fact that there are standards that are quite properly appealed to by courts, but are not binding under the Rule of Recognition, proves, to Hart, the existence of judicial discretion. For this reason, I speculate above that Dworkin might have been influenced in 1967 by a different thought than the one he attributed to himself in 1984.

11. Lyons, *Moral Aspects of Legal Theory*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 49, 58 (M. Cohen ed. 1984). Lyons himself falls into the same mistake of attributing the same view to Hart.

literally make no sense at all. The law itself, and not simply its social and economic consequences, would defy comprehension. But it does not follow that all that background information is part of the law. Neither English nor the rules of its grammar are part of English or American law. They are merely background information necessary for its comprehension. When referring to implied law one has in mind not these prerequisites of intelligibility but the familiar fact that the law says more than it explicitly states, that there is more to its content than is explicitly stated in its sources, such as statutes and judicial decisions.

This thought must be self-evident to anyone who conceives of the law as the creation of human actions, and particularly as emerging from communicative acts such as the promulgation of statutes or the rendering of judgments in court. It is a universal feature of human communication that what is said or communicated is more than what is explicitly stated and includes what is implied. Notice that this very statement assumes that the distinction between what is stated and what is implied is valid. It employs the distinction to say that in using language we say by implication more than we explicitly state.

In ways which cannot be explored here, this pervasiveness of implication results from the dependence of the intelligibility of what is stated on the shared background remarked upon above. Most commonly it relies not merely on very general beliefs about language and the world but on specific concrete beliefs concerning the situation of utterance, which are necessary to make sense of what is stated by the utterance in its context. To take someone to be saying anything involves attributing to him certain attitudes and beliefs, and these create presumptions concerning the speaker which reach beyond what he states. To give but one simple example, assume a speaker says "John's wife is ill." To take him to be using the sentence to make the normal statement it is used to make, one must assume that the speaker believes or is willing to be taken to believe that John is married. Hence we say that even though he did not state the fact, he implied that John is married.

For some purposes we are interested in what was stated only, but for most we are interested in what was said, and this includes what was implied as well. Many readers may feel that however pertinent these comments may be for the interpretation of ordinary discourse, they are irrelevant for the interpretation of the law since one cannot understand law, the product of cumulative institutional action over many years, on the model of the interpretation of ordinary discourse. I do not wish to dispute the matter here. The point I am making is merely an *ad hominem* one. Those who regard law as the product of communicative activity in legislation and adjudication, whose meaning derives from the meaning of these acts that created it, find it natural to regard the law as

including a good deal that is merely implicit in legislation or in precedent. But acknowledging implicit meaning in law does not commit one to apply to legal interpretation all the common features of the interpretation of ordinary discourse. In particular, it will be observed below that the attribution of implications to the law is more circumscribed than their attribution in ordinary discourse. But it would be very surprising to find somebody like Hart, whom Dworkin is right to see as a subscriber to the communication model of the law, denying the existence of implicit law.

Even if Hart cannot be charged with deliberate denial of the existence of implicit law it is possible that his theory fails to allow room for it. It is this claim that I am speculatively attributing to the Dworkin of the first phase. More specifically Dworkin's criticism might run as follows: According to Hart law is identified by criteria of validity incorporated in a Rule of Recognition. But no general criteria of validity can be formulated which identify all the implicit law and nothing else. Hence Hart's theory fails to allow for the existence of implicit law. This criticism is right about one point. There is no test by which all that is implied by what is stated by a person or an institution can be identified, other than the simple test that it is so implied. To that extent, it is true that the Rule of Recognition does not and cannot include criteria which identify the implied law. But do we need such criteria? Isn't it enough to say that what is implied by legislation and precedent is law as well?

To expect the Rule of Recognition to include criteria for the identification of implied law is to misconceive its function. In a sense it does not even contain criteria for the identification of explicit law. All it does, and all it is meant to do, is to identify which acts are acts of legislation and which are the rendering of binding judicial decisions, or more generally, which acts create law. The Rule of Recognition does not help one to understand what is the law thus created, whether it is stated or implied. To understand that, one requires the general ability to interpret linguistic utterances, as well as the specific background information necessary to interpret the law-creating acts in whatever society is under consideration.¹² Thus this particular criticism of Hart's theory is unwarranted.

Whether or not Dworkin had something like that in mind in the sixties ceased to matter in the seventies. For once the first version of his

12. These statements have to be qualified to allow for technical rules or conventions of interpretation specific to the legal system concerned. One requires the general capacity to interpret language, and other related capacities, in order to understand those rules and conventions of interpretation, and then one uses these rules and conventions, in combination with the general background information, to interpret the law generally.

own theory of law emerged¹³ it was clear that he was now treading a different path. It is true that something like the distinction between implicit and explicit law was crucial to his theory as it then was. But implicit law is understood in a very different way from that suggested by the communication model discussed above. Given the change it may be best not to refer any more to the distinction between explicit and implicit law, as the very terms imply the communication model of interpretation. Instead I shall refer to source-based and non-source-based law. Elsewhere I have explained that according to the first version of Dworkin's theory,

to establish the content of the law of a certain country one first finds out what are the legal sources valid in that country and then one considers one master question: Assuming that all the laws ever made by these sources which are still in force, were made by one person, on one occasion, in conformity with a complete and consistent political morality . . . what is the morality? The answer to the master question and all that it entails, in combination with other true premisses is . . . the law.¹⁴

Notice first that the theory accords pride of place to legal sources, and Dworkin provides no alternative method to Hart's Rule of Recognition regarding the task of identifying them. Secondly, the law includes all the law generated by these sources.¹⁵ Beyond this source-based law, there is the non-source-based law. According to Dworkin, non-source-based law includes not what is implied by the legal sources, but what coheres with it, i.e., all the other implications of the political morality which justify the source-based law in accordance with the test of the master question. While what people and institutions imply is part of what they actually communicate, Dworkin's coherence test ignores the "implications" of acts of communication, and focuses on a certain mode of hypothetical, rational reconstruction of the "meaning" of the legal sources. Where non-source-based law is concerned these sources are understood in an ahistorical way, independent of whatever intentions and

13. This first version emerged primarily in R. DWORKIN, *Hard Cases*, in *TAKING RIGHTS SERIOUSLY* 81 (1977).

In *A Matter of Principle* Dworkin criticizes a view of the rule of law which he calls the "rule book" conception. According to it "so far as is possible, the power of the state should never be exercised against individual citizens except in accordance with rules explicitly set out in a public rule book available to all" (p. 11). This conception may sound something like the explicit content thesis. In fact it bears no relation to it. It is a view about the justification of the use of state power, rather than about what the law is. Those commonly suspected of accepting the explicit content thesis, like Hart, are all at one in asserting the state's right to use force in the public interest in some cases on which the law is silent. As Dworkin identifies no legal theorist as holding the rule book conception, and I know of no one who does, it is best to assume that Dworkin is here criticizing a very crude view which, he assumes, has some currency among the general public.

14. Raz, *Authority, Law and Morality*, 68 *THE MONIST* 295, 307 (1985).

15. Even the doctrine of mistakes, about which more will be said below, denies explicit law only its gravitational force, but not its direct force as explicit law.

believes the law-makers actually have or happened to have. Thus Dworkinian "implicit law" includes much that was not communicated by anyone, explicitly or by implication, may have never been in anyone's mind, and which may bear no relation to the political ideas or programs of anyone who ever wielded legal or political power.

Hard Cases changed our understanding of the direction of Dworkin's attack on Hart and on legal positivism generally. It is not, or is no longer, a criticism of the notion of the Rule of Recognition as the means of identifying legal sources. I venture to suggest that Dworkin's theory implies the acceptance of something that is at least like the Rule of Recognition as a necessary means for the identification of legal sources. Instead Dworkin challenges the way these legal sources are relevant to the understanding of law. He offers in effect a two-tier theory. The law consists of what the legal sources directly make into law, and of everything which coheres with this part of the law in the way explained above. The communication model for the understanding of implied law is replaced by a coherence model for non-source-based law.

Most commentators, and I suspect most readers, myself included, took Dworkin to be advocating what is essentially a hybrid theory: a communication model of source-based law and a coherence model of the rest. Legal sources are to be interpreted in accordance with the communication model to yield the source-based law. That law is then used as the basis of the coherence test to yield the rest of the law.

Given how little Dworkin actually wrote during the seventies on statutory and constitutional interpretation, it may have been rash to saddle him with any view of the relation between legal sources and the source-based law at all. But one has to admit that the little he wrote does support this interpretation. In particular I have in mind *Constitutional Cases*,¹⁶ which contains his most extensive discussion of the problem during this period. Here Dworkin relies on an obscure distinction introduced by Rawls between concepts and conceptions.¹⁷ He raises, for example, the question whether when the framers of the Constitution proscribed cruel and unusual punishment they meant the Constitution to be interpreted as referring to the concept of cruelty or to the particular conception of it which they happened to have. Here are a few quotations which convey the flavor of this part of Dworkin's discussion: "The 'vague' standards were chosen deliberately, by the men who drafted and adopted them, in place of the more specific and limited rules that they

16. R. DWORKIN, *supra* note 5, at 131.

17. Dworkin credits Gallie with the distinction, R. DWORKIN, *supra* note 5, at 103 (referring to Gallie's *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167-68 (1956)). But Gallie's distinction is very different from either Dworkin's or Rawls's. See J. RAWLS, *A THEORY OF JUSTICE* 5 (1971).

might have enacted."¹⁸ Dworkin instances the following as an aid to understanding the way the Constitution ought to be interpreted: "Suppose I tell my children simply that I expect them not to treat others unfairly . . . guided by the *concept* of fairness, not by any specific *conception* of fairness I might have had in mind."¹⁹ "Once this distinction [between concepts and conceptions] is made it seems obvious that we must take what I have been calling 'vague' constitutional clauses as representing appeals to the concepts they employ, like legality, equality, and cruelty."²⁰ "If those who enacted the broad clauses had meant to lay down particular conceptions, they would have found the sort of language conventionally used to do this."²¹

Dworkin's point here is sound and does not require the dubious distinction between concepts and conceptions. The framers of the Constitution intended to proscribe cruel and unusual punishment. They also had their own view as to what is cruel and unusual. No doubt they intended those punishments which they regarded as cruel and unusual and none others to be proscribed by the Constitution. But they chose not to proscribe them specifically (e.g., by referring to the rack, etc.) but to proscribe them because and inasmuch as they are cruel and unusual. Therefore, if they made a mistake, and if these punishments which they had in mind as examples are not cruel, or if others which they did not find cruel are in fact cruel, then the Constitution may apply in a way which may surprise its framers.²² To put the point in a way that Dworkin does not, but which I find most congenial, the Constitution, by deploying many broad moral categories, gives discretion to the courts and directs them to use it in light of the true, or the best, moral understanding of what is cruel, etc.²³ Or, to use Dworkin's own words, "[i]f courts try to be faithful to the text of the Constitution, they will . . . be forced to decide between competing conceptions of political morality."²⁴

The importance of the above for our discussion is not so much in the large measure of agreement on the role of moral consideration in adjudication which the other differences between Dworkin and Hart and other legal positivists may disguise. The important point is that moral considerations are here assigned this role on the basis of a communication

18. R. DWORKIN, *supra* note 5, at 133.

19. *Id.* at 134.

20. *Id.* at 135.

21. *Id.* at 136.

22. The fact that what is cruel under certain conditions may not be so under different conditions and vice versa adds to the force of Dworkin's point, but is not necessary in order to substantiate it.

23. The best moral understanding is not a matter of the meaning of the word 'cruelty'. The problem is not linguistic but moral. Those who disagree on whether long-term imprisonment is cruel do not differ in their knowledge of English but in their moral views.

24. R. DWORKIN, *supra* note 5.

model of the Constitution, that is, on the basis of the intentions of the framers of the Constitution. It is true that Dworkin remarks that moral considerations may have a different role to play, a different entree into adjudication. "[W]e may *not* want to accept fidelity to the spirit of the text as an overriding principle of constitutional adjudication. . . . But it is crucial to recognize that these other policies compete with the principle that the Constitution is the fundamental and imperative source of constitutional law."²⁵ As this quotation makes clear, however, interpretation proceeds by the communication model. Its results have then to compete with other legal doctrines, which presumably derive either from the interpretation of other legal sources or from the coherence model used to generate more law than is to be found by the interpretation of the sources.²⁶

I described the theory commonly attributed to Dworkin in the seventies as a hybrid theory combining the communication and the coherence models. This combination has a political logic of its own: it represents a conservative political view of the role of the judiciary. The fact that almost all Dworkin's political polemics are directed at the Right should not be allowed to disguise this fact. The two-stage procedure that his theory involves puts coherence at the moral service of the powers that be. Their ideology naturally dominates the law directly derived from the legal sources in accordance with the communication model. The coherence thesis then requires the courts to apply that same dominant ideology to hard cases that cannot be resolved by the application of the communication model. Here Dworkin clearly parts company with the legal positivists whose theory of law makes room for a theory of adjudication calling on the courts to counter rather than to propagate the ideology which underlies unsatisfactory source-based law.²⁷

Several commentators criticised this conservative tendency of Dworkin's apparent theory, in particular in its implications for countries such as South Africa where the pervasiveness of the injustice in their source-based law (i.e., their law inasmuch as it is determined by the communication model) means that the coherence test requires further injustices to be perpetuated in "hard cases" in the name of coherence. Those theorists wondered why the courts should not be morally required, when handling cases not completely regulated by source-based law, to mitigate the injustices of such legal regimes. Dworkin responded to this criticism

25. *Id.* at 136-37.

26. Now Dworkin maintains that the argument I am relying on did not represent his own position, and was merely an *ad hominem* argument. See R. DWORKIN, A MATTER OF PRINCIPLE 53. I doubt whether the text can bear this interpretation.

27. For a detailed analysis of Dworkin's conservatism at that stage, see Raz, *Professor Dworkin's Theory of Rights*, 26 POL. STUD. 123 (1978). For one alternative approach to adjudication see J. RAZ, *Law and Value in Adjudication* IN THE AUTHORITY OF LAW 180 (1979).

in the late seventies in part by indicating his willingness to give less importance to source-based law in his general theory of the law.²⁸

Quite apart from Dworkin's sensitivity to the problem of evil laws he has always been sensitive to and unhappy about the apparently hybrid character of the theory. Some of the articles in the present collection may indicate a willingness to jettison the hybrid approach and to abandon the communication model altogether, if as it seems Dworkin ever subscribed to this model, in favor of a coherence theory of source-based as well as of non-source-based law.

II

THE ROLE OF INTENTION

As one would expect in a collection of occasional articles, the issue is never fully confronted. It is dealt with almost entirely in articles devoted to various other controversies, and this makes it difficult to be too confident of one's ability to gain a clear view of Dworkin's current thinking on the subject. But there are signs that he is edging towards a unified conception of law based on the coherence model, or, if he always had this in mind, that he is developing further some of the features necessary for this conception. The full picture will emerge only in the last section of this review. But we can make here a start which will lead us, through several related issues, to our target.

The book contains, divided among several essays, extensive criticism of the communication model (pp. 38-55, 162-64).²⁹ Dworkin's criticism, on the whole very sound, is directed at theories of interpretation which misinterpret the role of legislative intention in the law. He largely concentrates on the difficulties in applying the communication model to institutions. Dworkin is rightly critical of theories of adjudication which advocate that courts should not engage in moral argument. He joins Kelsen, Hart and other legal positivists in arguing that such a judicial policy is not merely undesirable, it is impossible to pursue. Following that argument, Dworkin shows how theories which wish to free the courts from resort to moral judgment through reliance on original intent fail even if judged on their own terms.

28. See, e.g., R. DWORKIN *supra* note 5, at 340-42. Dworkin's move is to weaken the requirement that a legal principle hypothetically rationally constructed to help to solve a hard case figure in the "best justification" of the legal material. Now, a principle need only meet a certain "threshold" requirement that can be selected by reference to a criteria of moral compellingness. *Id.* at 340-341.

29. It should be observed that Dworkin's discussion revolves around a rather primitive conception of the communication model. For example, for the most part he concentrates on doctrines of interpretation that are based exclusively on author's intention. This does not take account of the existence of implied law as intention is relevant to the determination of explicit law only. But see his wider comments at pages 322-23.

Dworkin in this argument relies upon two important features of intention. First, whenever one acts intentionally one has more than one intention. When I sell my car to a friend I typically have a variety of intentions: to make a little money, to help a friend, to enable myself to buy a new car, to save myself the trouble of replacing the damaged door handle on the existing car, to transfer title to the car, to improve my bank balance which is temporarily in the red, and so on. A similar multiplicity of intentions characterize any act of legislation. Some of these intentions are legally relevant and others are not. Secondly, when it comes to the intentions of corporate bodies,³⁰ such as Congress, there is the further question of whose intentions count. Language dictates that corporate bodies have intention only in virtue of the intentions of people associated with these bodies. But it leaves open the question of whose intentions count. This matter is determined differently for different bodies. Banks, trade unions, cities, nations, courts, legislatures—there is no one simple rule applying to all of these that determines whose intentions serve to vindicate the attribution of intention to the corporate body.

Dworkin's point is not that we do not know which intentions are legally relevant, though he does point out that often this too is a matter of controversy, at least when, as is sometimes the case, much depends on the difference between two closely related intentions. His point is that the issue of which intention is legally relevant cannot itself be determined by reference to any other intention. Some commentators refer at this point to what Dworkin calls the "interpretive intention", meaning the legislator's intention as to which of his intentions shall count. This argument is, as he points out, circular. One requires some non-intention-dependent reason for assigning legal significance to the interpretative intention (pp. 52-54).

I would suggest, and I think that this is Dworkin's view too, that the answer to the above questions belongs to the concept of law, that is, to a philosophical account of what law is. Dworkin makes one point which may seem inconsistent with this. He says (pp. 42, 320-21) that legal practice may determine what intention, and whose intention counts. If it is a matter to be determined by legal practice how can it belong to the concept of law? Surely an understanding of the concept of law is required to identify what the legal practice is, and is possessed by people who may know nothing about the actual legal practices of any country. I think that the solution to this puzzle is that at the fundamental level, which intention is relevant is determined by the very notion of law, and is not a matter of legal practice. Rather, it determines what belongs to the

30. Corporate body here means corporate body in the broad sense of being formed into an association by operation of law and thereby coming to manifest in some legal or social manner attributes, rights, or liabilities of an individual.

legal practice. But it is a feature of the concept of law that it makes the content of law recursively dependent on legal practices. The concept of law determines what counts as legal practice in part through determining that, within the constraints imposed by the concept, any practice is a legal practice if given this character by another legal practice. In the terms of Hart's theory of law, for example, the concept of law determines that the Rule of Recognition (itself a social practice) and any other practice identified by it as such are legal practices. In this way what intention counts is primarily determined by the concept of law, a matter of legal practice.

Dworkin further claims that the issue of which intention counts is a matter of moral and political argument (p. 54). But so far as I can see his only argument for this is that different answers to the question yield different moral and political consequences. The argument suffers from a crucial weakness; it assumes that law is necessarily moral, so that it follows that if the law is thus and so then one has different moral duties and rights than if it were otherwise. This assumption seems to be wrong, since the connection between law and morality is contingent and dependent, in part, on whether the intentions which determine the content of the law happen to be morally worthy or not. If this is so, then one cannot argue, as Dworkin does, that the determination of whose intention counts necessarily makes a moral difference. If the law is not necessarily moral, then the question of whose intention counts, while determining what is the law, need not determine what is morally binding, for the law is not necessarily morally binding.

This is a notoriously involved issue. Rather than engage here in the controversy concerning the relations between law and morality (a matter not discussed in Dworkin's book), let me simply state my own view on the issue of whose intention counts. It is important to distinguish between the two ways in which the relevance of intentions is determined. To the extent that it is purely a matter of law, the question has a purely factual answer determined by judicial practices, by statute, etc. To the extent that the issue is one of the concept of law, it is a philosophical question, involving in its answer evaluative considerations. But that does not mean that it is a moral question. I have explained elsewhere how conceptual issues raise evaluative questions without turning into moral questions, so I will say no more on the issue here.³¹

31. See Raz, *supra* note 14. The remarks above also explain what truth there is in Dworkin's claim that "legislative intent" does not refer to a psychological notion. See, e.g., p. 321. I think that this claim is fundamentally confused. Which intentions count is partly determined by the concept of law and partly by technical legal doctrines (to the extent "legislative intention" can be a legal term of art). Either way the determination is of what intentions count for the relevant legal purposes. The intentions that count are real, if you like "psychological" intentions in all but one very common case: where the intention is attributed to a corporation or an institution. But even institutional intentions

III LAW AND DISCRETION

The main avenue through which moral considerations enter judicial deliberations remains the employment of general evaluative concepts in the Constitution and in statutes. Dworkin repeats his claim made in *Taking Rights Seriously* that when the Constitution refers to such general evaluative concepts as cruel and unusual punishment, or the equal protection of the laws, the courts have to decide by reference to a correct moral understanding of, in this case, cruelty, or equal protection, rather than by reference to the understanding that the lawmakers had of these notions. It may be of interest to note that on this very central issue Dworkin is following squarely in the footsteps of H.L.A. Hart.

Hart's position is that courts should follow the law and have discretion when the law does not determine a uniquely correct outcome in the case before them. When the law does not directly incorporate moral precepts (e.g., by abolishing the death penalty) but endorses their application by reference to them through the enactment of very general standards ("cruel and unusual punishment"), then it grants courts discretion to apply moral considerations to the case. This grant of discretion does not mean, according to Hart and others whose theories followed and developed his views, that the courts can act arbitrarily, or do whatever they like.³² It means that they ought to apply their judgment to the moral issue that the general standard directs them to consider. They are not free to act on any moral considerations in which they happen to believe. Even when courts have discretion, their discretion is almost invariably guided by law which requires it to be exercised in a certain manner and on the basis of a certain range of considerations and on no others.

In this respect courts are in a position similar to delegated legislators and administrative authorities. When these officials have discretion to make rules and regulations, or to issue decisions in individual cases, they are typically guided by law to exercise their discretion to promote goals set by statute (e.g., workplace safety) or to have regard for certain considerations stipulated by it (e.g., respecting landlords' rights, or having regard to the housing needs of the sitting tenants). Anyone who is tempted to deny that courts have discretion when they are directed to apply a preexisting law with very general standards of application, on the ground that morality has been made into law by the directive to the courts to apply moral standards, will have a hard time to avoid denying

have psychological intention at their foundations, for we attribute intentions to corporations and institutions on the ground that those who act as organs of those institutions have them.

32. See generally H.L.A. HART, *THE CONCEPT OF LAW* ch. 7 (1961); see also, e.g., J. RAZ, *THE AUTHORITY OF LAW*, *supra* note 27, at chs. 9, 10 (1979).

that delegated legislators and administrative agencies ever have rulemaking powers. What appears to be the making of a new law will, on this view, be no more than a declaration of the discovery of a preexisting law.

Dworkin used to be associated with such a view. In fact he first attracted widespread attention with an article saying that courts never make law, never have discretion,³³ that their only role is to discover and enforce preexisting law. His main article on legal theory to date is dedicated to the support of this thesis.³⁴ But all this is abandoned in the present volume. We are still told that the law always provides right answers to all legal cases, and this presumably includes the denial that courts have discretion. But the suggestion that the right answers are there to be discovered by judges, the claim that courts never make law but merely apply it, and related claims which many have come to regard as the hallmark of Dworkin's theory of law, have apparently been jettisoned. Instead we are told that "the ways in which interpretive arguments may be said to admit of right answers are sufficiently special, and complex, . . . [that] there is little point in either asserting *or* denying an 'objective' truth for legal claims" (p. 4). Judicial decisions as interpretations of the law both apply the law and create law at the same time. Courts are like authors of chapters of chain novels, who add new chapters in a way which reflects their understanding of the story so far (pp. 158-62).

All this makes it sound as if the claim that there are right answers to all legal questions, in the special and complex meaning given it by Dworkin, is the claim that judges may not decide any way they wish, and that their decisions can be evaluated as better or worse in terms of criteria which should have guided their judgment in the first place. To my knowledge, only some Realist writers and skeptics have denied that. Hart has never done so, and has done a good deal to refute the skeptics' arguments. I am not claiming that every nonskeptic shares Dworkin's view of how judges should decide cases. Dworkin's main doctrine of adjudication is that judges should settle cases by a coherence test that he has proposed. Many would dispute it.³⁵ My point is that the affirmation of the universal existence of right answers, and the denial of judicial creativity and of judicial discretion, appear to have been whittled down to the point where few would disagree. In particular, Dworkin has made these arguments compatible with the claim that judges have discretion as it is understood by Hart and by many other writers.

33. See *The Model of Rules I*, in *TAKING RIGHTS SERIOUSLY* 14 (1977). See *supra* text accompanying notes 7-10.

34. See, e.g., *Hard Cases*, in *TAKING RIGHTS SERIOUSLY* 81 (1977).

35. For my own argument to the contrary, see *Law and Value in Adjudication* in *THE AUTHORITY OF LAW* (1979).

Much of legal theory can be seen as an attempt better to understand what a court takes from the law and what it gives to it, where the application of the law stops and judicial discretion begins, what the boundary is between the law the court finds and the law it creates. The attempt does not suppose that one can distinguish among the different acts and pronouncements of courts those which belong to the one class from those which belong to the other. It supposes, however, that since we say that courts both apply and create law, it is possible to identify which aspects of their activities make them law-applying acts, and which make them law-creating acts.³⁶ While Dworkin appeared to be claiming that courts are only engaged in discovering preexisting law and nothing else, he was exempt from facing the question. Now that he has joined other legal scholars in recognizing their creative role, readers will be curious to know what analysis of the distinction he offers to rival the account of Hart or other contemporary writers.

The answer lies in his claim that judges interpret law. The conception of judicial activity as an interpretation dominates the picture of law given in the book. Law is explained through an analogy between legal and literary interpretation, an analogy meant to serve two aims. On the one hand, it is used to argue for the dependence of judicial decisions on the court's view of substantive moral and political issues. On the other hand, it is used to illustrate the complex relations between discovery and creation, and between subjective judgment and objective truth in the law.

Legal interpretation resembles literary interpretation in that both activities are governed by the aesthetic thesis. Regarding works of art, the thesis says that the role of interpretation is to show which way of understanding the text shows it as the best work of art (p. 149). Regarding law, the thesis is that interpretation shows which way of understanding the law shows it as the best law (p.160). Inasmuch as the literary analogy supports the application to the law of the aesthetic thesis, it is used to illustrate the alleged dependence of the question, "What is the law?" on moral and political issues. I shall return to this question below. It is also used as a reminder of the involved relations between creation and discovery, objectivity, and subjectivity. But here law is somewhat unlike literature, for the courts combine the role of creative artist and critic (p. 158-59). They generate new chapters of law on the basis of an interpretation of the previous chapters.

In this respect Dworkin can be seen as joining forces with Hart in

36. This contrast is a simplified version of the problem. Not every judicial decision which is no mere application of the law creates law. It does so only where the court pronounces new propositions of law which have the force of precedent. For a more accurate way of drawing the distinction, see my *Legal Rights*, 4 OXFORD J. LEGAL STUD. 1 (1984) as well as *Law and Value in Adjudication*, in *THE AUTHORITY OF LAW* (1979).

fighting the Realists and skeptics, who deny the rational dependence of the new chapters on the past, and the formalists and neutralists, who deny that courts have any business engaging in moral argument. It is true that Hart and others make this point by saying that courts have both to apply the law and to use discretion, within the bounds it allows, to develop it. Dworkin points out that both functions are encompassed within the notion of interpretation, so that in saying that judges interpret the law one is pointing both to their faithfulness to the past, and to their reliance on moral considerations which may never have entered the minds of judges and legislators in the past. In this he highlights the close interrelationship between the two aspects of the judicial activity. But he offers no analysis of their contrasting nature which could match alternative analyses offered by other writers. Saying that the answer to legal questions depends both on considerations of fit and on moral considerations is allowing that the problem exists rather than solving it.³⁷

IV THE MISSING LINK

This lacuna in Dworkin's theory is compounded in its current version because of the as yet incomplete attempt to rid the theory of its hybrid character the issue with which I started and to which we must now return. The law, we are told, consists in the best interpretation of the country's legal history. The best interpretation is the one which shows it in the best possible moral light.³⁸ That interpretation may require us to interpret the Constitution, statutes, and other relevant legal sources in accordance with the intention of the legislator or it may not. It will also specify which intentions count and what weight to give to them. The communication model is not so much discarded as subdued and humbled. It is relegated to a secondary role within the general coherence-based theory of law.³⁹

I doubt however whether the book succeeds in subduing the force of the communication model. The reason is that Dworkin wishes, as of course he should, to maintain the distinction "between interpretation and

37. In emphasizing the degree to which Dworkin has now adopted a position very close to Hart's, I have in mind only the relation between finding and making law. Dworkin has his own distinctive view on the moral considerations which should affect courts in the exercise of their discretion, to mention but one persisting difference.

38. The best interpretation need not fit all the legal history of the country. In this respect we are no better than we were in *Taking Rights Seriously*. Dworkin comments that "[t]here is, of course, no algorithm for deciding whether a particular interpretation sufficiently fits that history not to be ruled out" (p. 160). Fit is a threshold test and we are given no guidance at all on what counts as meeting the test.

39. See, e.g., the discussion on pp. 322-23 on the "limited use" of the idea of legislative understanding.

ideal. A judge's duty is to interpret the legal history as he finds it, not to invent a better history." (p. 160). That seems to mean that the coherence method applies to a given set of legal material, statutes and decisions, which constitute the legal history. It may disregard some legal material but it must make sense of much of it or it would be an invention of an ideal rather than an interpretation of an existing history. But what is this legal material? It is not a set of meaningless inscriptions on paper, etc. It is a body of interpreted history, of meaningful documents. Otherwise why fix on this legal history? If you regard the Constitution as an uninterpreted jumble of ink scratchings and regard legal theory as designed to give it meaning in accordance with the best moral theory there is, then there is no gap between ideal law and an interpretation of existing law. Under these conditions one can interpret the Constitution to mean anything at all. It can be read to mean the same as Shakespeare's Hamlet. (If, for example, it has double the number of words as the number of sentences in Hamlet, all you have to do is to read every two words as if they meant one sentence in Hamlet). Dworkin is of course aware of this. His method of coherence can only apply to the legal documents which are given their plain meaning. "When a statute or constitution or other legal document is part of the doctrinal history," he observes, "speaker's meaning will play a role." (p. 160).

Speaker's meaning is presupposed by the coherence doctrine. Once more we have the same hybrid theory we had all along. To determine the content of the law we need first something like a Rule of Recognition to identify what belongs to the doctrinal history, and that doctrinal history will be understood in accordance with the communication model to generate the material which sets the limits to what the coherence model can do. It can discard some of that legal material as mistaken, but it must cohere with much of it. Dworkin seems to claim more than his theory can deliver when he claims that legislator's intent has only the modest role assigned it by the coherence model. It is more nearly the other way round. The coherence model applies only within the limits allowed by the communication model. If I have understood Dworkin's claims in this book correctly, then the one major theoretical advance to his overall theory offered in the book is undermined by the book's very argument.