Ronald Dworkin, *Justice in Robes*


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In certain respects the book under review is reminiscent of *Taking Rights Seriously*, which Ronald Dworkin published three decades ago. Though that earlier volume bore a catchier title, *Justice in Robes* is otherwise similar in being a collection of very loosely related essays on sundry topics in legal, political, and moral philosophy. Both books display Dworkin’s truculent hostility toward legal positivism and his more polite opposition to value-pluralism (namely, the notion that basic moral values are largely independent of one another and are therefore sometimes in conflict with one another). Each of the two volumes, moreover, is at once exhilarating and exasperating. In each of them, the brilliance of Dworkin is evident; but so is his resolute blindness to the merits of some of the doctrines which he assails.

Dworkin surpasses his younger contemporaries John Finnis and Joseph Raz as the most prominent legal philosopher in his generation—a remarkable generation that encompasses a number of top-notch philosophical thinkers who studied at Oxford under H.L.A. Hart. Dworkin’s philosophical dexterity is plain in several of the chapters in the present book, especially in those relating to constitutional theory and adjudication. His ripostes to theorists of American constitutional law such as Antonin Scalia and Cass Sunstein and Laurence Tribe are telling, as are quite a few of his somewhat repetitive rejoinders to Richard Posner. Even more impressive is his anti-Archimedeanism in the context of political and moral philosophy; that is, Dworkin cogently maintains that the ontological status of moral facts and the epistemological status of moral knowledge and the semantic status of moral truths are all moral matters through and through, albeit on high levels of abstraction. (For some reason, his most important and perciipient essay on that topic—‘Objectivity and Truth: You’d Better Believe It,’ 25 *Philosophy & Public Affairs* 87 [1996]—is not included in this volume. Presumably, he will be incorporating it into a subsequent book.)

Not nearly as penetrating, however, are Dworkin’s pugnacious confrontations with legal positivism and his less shrill but equally misdirected critique of Isaiah Berlin’s value-pluralism. The latter critique is confined to the fourth chapter,
whereas the diatribes against legal positivism occupy most of the Introduction and most of the second half of the book. My objections to that critique and to those diatribes are legion, but this short review can address only a couple of points.

Let us first look at a query which Dworkin repeatedly raises, and which he directs against some of my work. One reason for his antipathy toward legal positivism is his rejection of the notion that any set of criteria will ever distinguish between legal and non-legal standards in any particular jurisdiction. Positivists, by contrast, seek to specify how such criteria are operative. This issue has been salient in my own work especially in connection with the debates between Exclusive Legal Positivists on the one hand and Incorporationists and Inclusive Legal Positivists on the other.

According to Inclusive Legal Positivists, it can be the case, though it need not be the case, that a norm’s consistency with some or all of the requirements of morality is a necessary condition for the norm’s status as a law in this or that jurisdiction. According to Incorporationists (all or nearly all of whom are also Inclusive Legal Positivists), it can be the case, though it need not be the case, that a norm’s correctness as a moral principle is a sufficient condition for its status as a legal norm in this or that jurisdiction. Exclusive Legal Positivists maintain that the very nature of law is inconsistent both with the role of moral principles as legal norms and with the role of such principles as criteria for validating legal norms.

Dworkin addresses the debates between Exclusivists and other legal positivists principally in the seventh and eighth chapters of *Justice in Robes*. He is caustic and frequently distortive in his remarks about those debates, but he makes a few interesting observations along the way. His prime complaint against Incorporationism and Inclusivism (between which he does not really differentiate) is precisely that they presuppose a distinction between legal and non-legal standards of conduct that are incumbent on people. One way in which he presses this complaint is to ask how Incorporationists can avoid the conclusion that arithmetical rules are among the laws of the land in any jurisdiction. He first raises this problem near the outset of the book: “The idea of law as a set of discrete standards ... seems to me a scholastic fiction ... The principles of arithmetic plainly figure among the truth conditions of some propositions of law—the proposition that Cohen has a legal obligation to pay Cosgrove exactly $11,422, including interest, for example—but it would be at least odd to say that mathematical rules are also legal principles” (pp 4–5). Dworkin broaches this problem afresh in his eighth chapter, where he adverts to it at four separate junctures (pp 223, 234, 238, 292 n25). In the second of those four passages, for example, he writes that “judges must often use arithmetic in deciding what legal obligations people have, even though, at least in the way most of us speak, the rules of arithmetic are not legal rules.” In the third of the four passages, he is more expansive:

It would indeed be odd to say that arithmetical principles are part of Massachusetts law; a judge who calculates damages supposing that five and seven add up to eleven makes, we want to say, a mathematical, not a legal, mistake. We can explain this linguistic preference in a variety of ways: arithmetic is in no way special to law and certainly not to the law of any particular jurisdiction, so it would be at least highly misleading, even though not unintelligible, to say that it belongs to Massachusetts law.

In the fourth of the cited passages, Dworkin seeks to wield this point against my espousal of Incorporationism. Before we look at his argument on that matter, a bit of background information is advisable. My discussions of Incorporationism—presented
mainly in my *Where Law and Morality Meet* (Oxford University Press, 2004), chaps 1–4—have laid down the following disjunctive test for the status of a norm as a law within any particular jurisdiction. Each norm that is treated by the officials within some legal system as a justificatory basis for adjudicative decisions is among the system’s laws if and only if it satisfies one of the following two conditions: either it is a product of one or more of the authoritative law-generating organs of the system, such as a legislature or an administrative agency or a court or a constitutional assembly; or it is free-floating. The term “free-floating” indicates that the norm is not the product of a formally authoritative institution such as a foreign legal system or a sporting association or a Cambridge college. Now, although the full rationale for this disjunctive test (which I have developed at length elsewhere) cannot be expounded here, the upshot of the test—in accordance with Incorporationism and in opposition to Exclusivism—is that moral principles which serve as justificatory bases for adjudicative decisions within some legal system are correctly classifiable as laws of that system.

Dworkin believes that my disjunctive test commits me to the uninviting conclusion that the rules of arithmetic are among the laws of any ordinary legal system. He writes as follows: “[Kramer] argues that law includes all standards that are both binding on judges and ‘free-floating,’ by which he means that the standard has not been adopted by any authority. When moral principles are [legally] binding on judges, they pass that test because they have not been adopted by any authority. But the principles of mathematics also pass the test” (p 292). In other words, because the rules of arithmetic are free-floating in my sense, and because they have a clear and direct bearing on the task of specifying the correct levels of damages in private-law adjudication and in other cases, I am seemingly obliged to maintain that the rules of arithmetic are laws in virtually every jurisdiction.

This purportedly devastating objection to my analysis is in fact easily rebutted. What is needed here is a distinction between the normative elements and the non-normatively factual elements of the justificatory bases for adjudicative decisions. Whenever a law of a juridical system figures in the justification for an adjudicative decision, it is a normative element of that justification. Legal norms are indeed norms; they prescribe how things ought to be. By contrast, the rules of arithmetic and the laws of logic—despite being commonly designated as “rules” and “laws”—are not norms at all. They do not prescribe how things ought to be. Instead, they are universally quantified modal propositions which declare how things necessarily are. (Much the same is true of the physical laws of nature, though of course the type of necessity is different.) Thus, notwithstanding that the laws of logic always bear on any adjudicative decision, they are among the non-normatively factual elements of any justification for a decision. They are not among the normative elements, for they are not norms. Similarly, notwithstanding that the rules of arithmetic and the physical laws of nature often bear on adjudicative decisions, they are among the non-normatively factual elements—rather than the normative elements—of any justification for a decision. In short, although the laws of logic and the rules of arithmetic and the physical laws of nature all figure in the justifications for adjudicative decisions, they figure therein as non-normative facts rather than as norms. (Some of the non-normatively factual propositions that enter into the justification for any particular decision are contingently true, whereas others are necessarily true. Obviously, I am focusing here on non-normatively factual propositions of the latter kind.) Precisely because the rules of arithmetic and the laws of logic are not norms, they are not legal norms. In other words, once we duly recognize the distinction between
norms and non-normative facts, we can dismiss Dworkin’s worry about the classification of the rules of arithmetic as legal norms in any jurisdiction.

In his chapter on Berlin and value-pluralism, Dworkin advances an array of arguments that do not withstand scrutiny. Because of constraints of space, we shall look at only one example. In an attack on Berlin’s view that governments sometimes cannot avoid acting wrongly, Dworkin asks (p 110): “When are we entitled, not simply to the negative idea that we do not know what it is right for us to do, but to the positive claim that we know that nothing that we do is right because, whatever we do, we do something wrong?” He addresses this question with the hope of showing that the notion of inescapable wrongness is at best extremely implausible if not downright incoherent. His argument, presented with reference to controversies over the banning of racist declamations, should be quoted at some length:

[W]e might be uncertain whether a government does wrong when it prohibits racist speech, or, on the contrary, it does wrong when it permits such speech. What further argument or reflection could replace this indecision with the positive conviction that government does wrong in either case?...[W]e are drawn to each of the rival positions through arguments that, if we were finally to accept them as authoritative, would release us from the appeal of the other one. If we really believe that citizens have a right to speak out even in ways that offend certain other citizens, then it would be odd also to believe that certain citizens have a right not to be offended by what other citizens say. And vice versa...It seems puzzling how we could be persuaded, at one and the same time, that citizens have a right that racial insults not be uttered and that citizens have a right to utter racial insults. But unless we can finally accept both of these claims, and at the same time, we cannot claim the positive view that we violate citizens’ rights whatever we do about racist speech (p 111).

Dworkin in this argument commits several fallacies of equivocation, for he trades repeatedly on the ambiguity of the term “right”. Two distinctions should be highlighted here: the distinction between claim-rights and liberty-rights, and the distinction between moral claim-rights or moral liberty-rights and legal claim-rights or legal liberty-rights. (A claim-right of a person consists in her being entitled to the adoption of some specified course of conduct by some other person. The other person is under a duty to engage in that course of conduct. A liberty-right of a person consists in her being permitted to engage in some specified course of conduct; a liberty-to-$\varphi$ is the absence of a duty-not-to-$\varphi$.)

With these two distinctions in mind, let us examine the following sentence from the passage above: “If we really believe that citizens have a right to speak out even in ways that offend certain other citizens, then it would be odd also to believe that certain citizens have a right not to be offended by what other citizens say.” The first right to which Dworkin refers here is clearly a liberty-right, while the second right to which he refers is equally plainly a claim-right. If the liberty-right is a legal entitlement, and if the claim-right is a moral entitlement, then there is no oddity whatsoever in the combination of beliefs which Dworkin mentions. Anybody can perfectly coherently maintain that each citizen $C$ is legally at liberty to speak in ways that seriously offend other citizens, and that $C$ is morally duty-bound to refrain from speaking in ways that seriously offend other citizens—who therefore each have a moral claim-right to $C$’s abstaining from speaking in those ways. Incoherence would be generated only if somebody were to contend that both the specified claim-right
and the specified liberty-right are legal, or that both of them are moral. No perspicacious value-pluralist would commit such an error.

Now, it may well be that C has a moral claim-right against the governmental authorities’ legally prohibiting him from speaking in ways that seriously offend other people. C has a moral claim-right against their imposing on him a legal duty to eschew a mode of behaviour which he is morally duty-bound to eschew. Such a state of affairs is perfectly possible and indeed fully credible. Governmental authorities may well be morally duty-bound to refrain from legally prohibiting certain moral wrongs. Hence, if the authorities do clamp down on racist speech by outlawing it, they will be violating citizens’ moral claim-rights against the introduction of such legal regulation.

What might also be true is that the governmental authorities are morally duty-bound to take all feasible steps to prevent people from being seriously offended in public places. If so, and if the outlawing of venomously racist speech in public places is a feasible step that will be an effective deterrent, then the authorities are morally duty-bound to proscribe such speech in such places. Any person who might be seriously affected by racist speech in public places has a moral claim-right to the government’s legal proscription of it. If the governing authorities omit to take such a step, they will be committing a moral wrong.

Thus, if the moral claim-rights broached in the last two paragraphs are indeed held by citizens, we encounter a situation in which the governing authorities cannot avoid committing a moral wrong. If they outlaw racist speech in public places, they will pro tanto be violating each citizen’s moral claim-right against the legal prohibition of such conduct. If the authorities instead forbear from legally banning racist speech in public places, they will be violating the moral claim-right of each detrimentally affected citizen to the imposition of such a ban. Pace Dworkin, the moral claim-right against the prohibition of hate speech and the moral claim-right to the prohibition of hate speech can perfectly coherently coexist. The governmental authorities can be both under a moral duty to \( \phi \) and under a moral duty to abstain from \( \phi \)-ing. What can never be the case, of course, is that the authorities are both morally duty-bound to \( \phi \) and morally at liberty to abstain from \( \phi \)-ing. A combination of such a duty and such a liberty would indeed be incoherent. By contrast, the combination of a moral duty to \( \phi \) and a moral duty to abstain from \( \phi \)-ing is impeccably coherent—precisely because a duty to abstain from \( \phi \)-ing is not at all the same as a liberty to abstain from \( \phi \)-ing.

Of course, nothing just said is sufficient to support the view that the governmental authorities in the United States or in any other country are in fact under a moral duty to outlaw racist speech and simultaneously under a moral duty to abstain from outlawing racist speech. Though neither of those moral duties is outlandish, a demonstration of the actuality of each of them would require some extensive moral argumentation. My aim has simply been to show that the combination of those two duties is not self-contradictory or preposterous. Governmental authorities might be under both of those duties, and might therefore be unable to avoid acting wrongly on the matter of racist speech. Dworkin’s brisk dismissal of the possibility of such a state of affairs is glib.

His oversimplification of the relevant issues is particularly regrettable because it is wholly unnecessary in order to sustain his thesis that every moral question or virtually every moral question lends itself to a uniquely correct answer. Fully consistent with that thesis is the prospect of inescapable wrongness; sometimes, the uniquely
correct response to a moral problem lies in opting for the lesser of two wrongs. If somebody faced with such a quandary does not choose the lesser evil in order to avoid the greater, he or she will have failed to adopt the uniquely correct course of conduct. (It should go without saying that “lesser” and “greater” need not be understood in utilitarian terms.) Any sensible proponent of value-pluralism can and should recognize this point about gradations of wrongness. In this respect as in other respects, the truth of the doctrine of value-pluralism poses no threat to the deter-minacy of morality.

Though the shortcomings of Justice in Robes are by no means trivial or few in number, the book as a whole contains many valuable insights that are worthy of careful attention. Dworkin is quite often infuriating, but is also often extraordinarily impressive. His latest book, priced very reasonably for a sizeable hardback volume, deserves a place on the shelves of everyone interested in legal or political or moral philosophy.