Introduction

Lack of appreciation of the potential richness of arguments of value is a widespread modern phenomenon. Morality is thought of as a suspect branch of knowledge, as if evidenced by the common use of scare quotes around the word, as if it needed to be held in pincers. It is interesting to speculate why. Perhaps the reason is that before the coming of age of science, belief in God accompanied confidence in the making of moral judgments, but these days people generally don't believe in God and trust only the observably true claims of science. Ronald Dworkin's theory is about ethical and moral value. Most importantly, Dworkin has in the course of five decades argued, over and again, that there are right answers to questions of value, and spelt out the implications of that fact for the social practice of law, for instance, in his famous theory of rights. Perhaps it is due to the bafflement, not to say, offense, caused by this that he hasn't yet met his great critic. No one has yet effectively attacked his theories of law and politics on the grand scale as Hart did on Bentham, and Dworkin, himself, did on Hart. I believe Dworkin makes an excellent case in his most recent book, *Justice for Hedgehogs*, for saying that arguments about value are, relative to those in science, underdeveloped and misunderstood.

Without a doubt, the ordinary view, expressed through our actions and commitments, is that there are right answers to moral questions. Why should critics single Dworkin out as if he had a unique view about the objectivity of value? Even to say he's wrong is to show the speaker's belief that there are right answers to at least that judgment of intellectual value. I've seen it firsthand for myself over three decades: the "one right answer thesis," as it has become known, is the biggest block to understanding Dworkin and

valuable seminar time is wasted on the question whether what Dworkin says *could* be true rather than discussing the question whether what he says *is* true. Dworkin is straightforward on all this. He has continually suggested that we dispense with this skirmishing about morality and instead do it by developing moral and legal arguments to solve questions of ethics, morality and justice. He has now formally expressed all this, since the publication of an important paper in 1996,[1] and he later reinforced his view in *Justice for Hedgehogs*, in his denial of "meta-ethics." Get on with thinking straight about ethical and moral questions—that's his message.

The arguments are relatively simple ones of logic. Someone, the argument goes, who states "there is no value objectivity" must contradict himself; he thereby makes a value judgment he believes to be objectively true. Philosophers who believe in the value of meta-ethics, by contrast, maintain that the meta-ethical statement that there is no value objectivity is essentially different from any directly ethical or moral statement one could make—such as "child torture is wrong." But what is the argument for that separation? No convincing one has thus far been offered. John Gray—who gave our very first paper at our Colloquium in Law and Social Philosophy at UCL in 1999—is a very good example because his thesis there was that not only was there no moral objectivity, but that very fact was a *morally good thing*. The most forceful argument against the denial of the possibility of moral objectivity is that someone who denies moral objectivity must deny the possibility of truth to the statement that child torture is wrong. He must therefore deny the truth of the statement that child torture is wrong, which is to affirm that child torture is morally permissible. These attempts to fiddle around with subjectivity are pointless: the subjectivist can't have his cake and eat it! It's not just that it doesn't make sense to deny morality, it is impossible.

Perhaps the problem is that people are unreflective about the way they themselves ordinarily think and talk; they won't acknowledge their own implicit assumption that moral argument is objective. I know from experience there is a jungle of misunderstanding. Here are a couple of examples. In 2007, Dworkin wrote an article for the *New York Review of Books* ("The Supreme Court Phalanx") in which he criticized a decision of the Supreme Court on the ground that it was unprincipled. The *Review of Books* then published a letter from an academic who did little more than express surprise that Dworkin was critical of the judges in that case since, the academic went on to say, that fact "cast doubt on [Dworkin's] unswerving support for the unelected judiciary." The academic describes himself as giving "a quiet, self-satisfied chuckle" when reading Dworkin's defense of the legislators in that

case and he asks rhetorically whether all the Supreme Court decisions that in Dworkin's view are wrong are therefore unprincipled.[2]

I find this level of criticism, transported to the pages of the *New York Review*, baffling. Why would Dworkin's claim that the judges get the law wrong on occasion be worthy of a mention in such a distinguished publication? Why would anyone suppose that the possibility of judges being right wasn't compatible with judges getting it wrong? Obviously, if judges can get it wrong then that implies that they can get it right, too. And why can't a judge be principled but make a mistake? Or if judges are sometimes unprincipled, should judges be elected? These are not difficult or deep points, yet people treat these typical positions Dworkin holds as though they were particularly 'Dworkinian' and odd. No wonder Dworkin just replied that it doesn't follow that because the Court has made an unprincipled decision that the institution of the Supreme Court is bad. It just made a bad decision. Perhaps the Supreme Court employed the wrong principles, as lawyers will point out in court, and after a decision, just as frequently as they point out the use the Supreme Court has made of the right principles. Indeed, Dworkin has on many occasions in the *New York Review of Books* both praised and condemned Supreme Court decisions on the grounds that it has, and has not, decided in accordance with principle.[3] This sort of criticism of Dworkin is strikingly banal but typical; its sort has filled law journals for decades.

All this skirmishing makes little sense because Dworkin is—and this is well known—argumentative in the very best sense of spelling out the reasons he has for the many positions he holds. He writes a lot, and his arguments are clearly laid out, original, precise and always display a very high intelligence. His set of exacting arguments for the objectivity of value has been in the easily accessible public domain for many years.

Another difficulty people have in understanding Dworkin is in his merger of practice with theory. Maybe a mystique surrounds the word "philosophy." Dworkin says we can't fully engage in practice without some idea—and ideally a good idea—of a theoretical account of what we should or should not be doing; it wouldn't make sense to be engaged in a practice unless we had at least some notion of what were right and wrong ways of going about it. Unlike the right answer thesis, the merger of theory and practice is not how we ordinarily think and so he has spent much of his working life trying to convince us of it. The difficulties people have arise from regarding "theory" and "philosophy" as suspect words, like "value." They need demystifying. They mean the same in this context. They really do freeze people up. Richard Posner is an example. He doesn't want theory—at any rate now, for he had

an influential theory of legal reasoning once—only for judges to be "pragmatic."[4] But there is no mystery and there should be no block. Theory and philosophy provide accounts that are only more abstract accounts of what we are used to and so it is difficult to see why such abstraction shouldn't be relevant to what is going on; the more abstract governs the less. I believe that dissolves the unnecessary mystique for all that is left is a more thorough account of the practice. Applied to the case of judges, I can see why the average lawyer would resist philosophical understanding if they thought it had no relevance; often in fact the practices in which they are engaged will be relatively simple (you don't need "philosophy" to help you convey a house). Again, it is a matter of how it is put. Could a judge seriously say that it is of no importance to him whether his decision is fully justified?

Look how these relatively simple points are inflated amongst Dworkin's critics. Richard Posner abandons theory. But to what point? There is nothing left to explain what judges should do when he says they should be "pragmatic." Cass Sunstein has formulated something different. His view is that this theory adds little or nothing to practical reasoning; it is that judges need only concentrate on the case in hand at an "incompletely theorized" level.[5] This is, in fact, Cass Sunstein's *theory* of judicial reasoning which, presumably, he would have to coach judges in, so that things don't get out of hand! As Dworkin says, it is like taking a man up Everest to show it is impossible for him to climb it. In the light of both Posner's and Sunstein's criticisms, Dworkin's emphasis on practical reasoning is ironic. Perhaps more than any other jurist, Dworkin wants reasoned practical solutions; it is he, after all, who thinks we shouldn't waste time on questions of meta-value, only on whether particular judgments are, actually, right. To do it at the same time as cutting off access to the fullest possible justification, to him, is an irresponsible devolution of authority.

In an interview in *The Independent* with Angela Lambert in 1993, Dworkin said he wasn't "much good at abstract thinking." I think this remark is very interesting, especially given that Dworkin is an extremely abstract thinker. It was what struck me when I first met him in 1973. He raised the deepest questions. I think in the early days of serious legal philosophy only Ronald Dworkin and John Finnis—who had the Catholic scholastic tradition to guide him on this—firmly understood that legal positivism made sense only on the assumption that it was a moral way of viewing law. Dworkin also had an early sense of the significance of the emergence in the seventies of the philosophy of language and the relevance of Quine, Davidson and particularly Kripke, and early on wrote about the connections between the

different forms of interpretation, introducing a level of abstraction that, in *Justice for Hedgehogs*, now for him spreads over the domain of all value.

But Dworkin's self-appraisal as "not good at abstract thinking" still makes sense because he thinks by example and then works backwards into abstraction. In a television interview in the seventies with Brian Magee on the then well-known *Men of Ideas* program, Dworkin said that he studied philosophy before he discovered what a "wonderful subject" law was. His early work was mostly about law. It concerned criticism of U.S. constitutional cases in the *New York Review of Books* and the development of an anti-positivist legal theory. This connection with legal cases provides a good explanation why Dworkin preferred the characterization of law as an "argumentative attitude" rather than a "model of rules." For it is in legal argument that the most consistent, coherent and advanced systematization of real moral argument takes place. Law goes backwards from cases to abstraction; moral philosophy usually goes the other way. Most academic professional moral philosophers are not particularly versed in law. Yet almost any hypothetical example that a moral philosopher thinks up will have occurred in real time at a real place and very careful (first-order) thought will have been put into resolving the problem. What's more, the form of moral knowledge the law embodies aims at coherence of statutes with judicial decisions; that is the way you convince judges to decide in your favor. Showing a moral philosopher only some of the hundreds of thousands of reported cases of the Anglo-American courts of the past three hundred years ought to be sufficient. The philosopher would discover that for every seemingly clear legal or moral rule, some human being, somewhere in the world, will throw up a situation that is new and baffling to solve. Judges and lawyers will consider the moral arguments for an ultimate proposition either way. What the legislature has decided, what previous judges have decided, will supply only part of the reasons each way. Such situations require consideration of other, hypothetical situations to test the principle: the judge's common question, common also in lawyers' offices, "What if . . . ?" Dworkin told me once that he had at times contemplated a book called *Philosophy's Tutor* that would discuss this precise point besides problems of truth and language that legal argument routinely generates.

Some lawyers who have read him and have accepted much of what he says do so because they have quickly grasped the point that legal argument amounts to virtually nothing if no value judgments are required; they get on with developing better accounts of their own fields. Two particularly distinguished lawyers, Seana Shiffrin, in constitutional law, at UCLA,[6] and Stephen Perry, in the law of tort, at Penn,[7] do this, as do a number of

significant judges. On record for saying they find Dworkin's work an excellent characterization of what they are about are former Chief Justice Arthur Chaskalson, Justice Kate O'Regan and Justice Albie Sachs, all of South Africa, Lord Hoffmann, formerly of the House of Lords in the U.K., Justice Stephen Breyer of the U.S. Supreme Court, Justice Gopal Sri Ram of Malaysia, and Justice Michael Kirby of Australia.

Among Dworkin's academic readers and critics, I would single out two prominent and well-known critics who have achieved a reputation for the consistency and detail of their criticism, one the political and legal philosopher Jeremy Waldron, the other the political philosopher Jerry Cohen. Each has frequently engaged with Dworkin personally and each has responded directly to arguments that Dworkin has offered. Together they have generated a considerable body of writing. Waldron, for example, has for well over a decade pressed on Dworkin the problem of real world disagreement.[8] His criticism takes two related forms. First, that we can't realistically expect agreement on justice and that Dworkin is therefore wrong to think that our personal convictions—taking all real circumstances into account—could supply the answer about what to do. Waldron appears to think that something outside of justice is necessary (see Chapter 6). Second, since judges are an unelected minority then the judicial review of legislation is undemocratic. I think both criticisms amount to the same thing: that we need somehow to bypass what justice might demand. I can't see how that is possible. In the real world there will always be disagreement. We can't predict whether it will in fact be resolved but it is a matter of fairness or justice whether it will be resolved in the right way. That answer must allow many different ways of resolving disagreement and so that convinces me that judicial review is not necessarily unjust. Waldron fixes a procedure—outside substantive justice—to determine the way forward, and so it naturally appears to follow that legislation by majority is superior to judicial decision. But justice determines the procedure, not the other way round, and the right procedure will be contingent on the circumstances. For example, a dispute over a miner's staked claim will probably be better determined by tossing a coin than by a majority of neighboring miners.[9]

Jerry Cohen has been a critic for even longer than Waldron. He has continually criticized Dworkin's equality of resources on the ground that equality of welfare is closer to justice. Cohen defends the counter-intuitive position that the community must pay for expensive tastes.[10] Against this, Dworkin argues that it can't be egalitarian to ignore the impact of these

payments on the choices of others—in economic terms, the lost opportunity costs to others. It is unfair—uncomradely—that I should contribute towards someone's refined tastes (he has taught himself to like fine cigars against the background of knowing their cost). Obviously, if someone was born with expensive requirements that unless satisfied caused that person to develop a serious physical condition, that person has a handicap and it is not a matter of taste; Dworkin has no quarrel with compensation here. I find the argument on this point, like Waldron's on the objectivity of justice, far short of what is required to get a real hook into Dworkin's theory. Criticism of Dworkin from Oxford is, I think, fairly ineffective. Legal philosophy is generally conducted in a different way. Under Joseph Raz, and a number of his students, three of whom are professors of legal philosophy with Raz at Balliol College, Oxford, legal philosophy is a non-normative, non-sociological and "conceptual" subject that, according to Dworkin's successor at Oxford, makes a virtue of being "uninteresting," in the sense that it is not intended to have impact on cases.[11] These philosophers write and talk rather as though they understood themselves to be the direct descendants of the tradition of Bentham, Austin and Hart, and they proclaim a doctrine of "legal positivism," although examination shows that it appears to follow only an apolitical version of that doctrine, barely discernible in Bentham but more discernible in Austin and Hart. Since it takes a proudly apolitical view of law, I can't see it being of help to lawyers, judges or law students in the preparation of arguments. Its declared lack of interest in the practice of law leads me to think that in a generation or two there will be no more legal positivism of the kind taught at Oxford at present.

Perhaps it is his extraordinary perception and moral commitment—these two seem to go together—that impresses me most about Dworkin. I single out both Waldron and Cohen—both brilliant philosophers—as people who perhaps underrate this quality. For him—for anyone—morality can't allow you a perspective outside yourself; you must take responsibility for your views. In Waldron's case, you can't be committed to a position that smoothes disagreement into something that *you* personally don't think is just, taking into account, of course, the circumstances in which disagreement occurs (this last is important). In Cohen's case, you can't, against all your convictions about equality (Cohen's background is Marxist egalitarianism), promote a state subsidy for expensive tastes.

I became a research student of Dworkin in 1973. I was very young and had just come from New Zealand. I arrived at University College, Oxford

with all the excitement of someone fresh from the South Pacific. I wanted to study with H.L.A. Hart as I admired the clarity and logic of *The Concept of Law*. But he had just become Principal of Brasenose, and I was enormously disappointed to find a letter in my pigeon-hole saying I'd been assigned to a "Mr. Dworkin." The College porter, Douglas, was a forthright man. "Ha," he said, gloating over my misfortune, "you've got Professor Dworkin. You'll discover." I knew little of Ronnie's work then, but I'd published a paragraph on his "Is Law a System of Rules?" in which I'd forthrightly dismissed his theory, saying it was not as "instructive" as Hart's.[12] I came across Dworkin—shortly before we formally met—at a seminar in which he announced that he believed in "*natural* legal rights." The audience was skeptical. I was fascinated because the idea was so absurd to me. But I rapidly got the sense. All Dworkin meant—and means—is that lawyers engage in genuine debate, doing so by making moral judgments about rights that align with already-settled legal rights.

Supervisions with Ronnie were, to me, brilliant occasions. At our first meeting, I'd brought a hand-written essay. I arrived at his room. He was stretched out horizontally on a sofa, smoking an enormous cigar, lop-sided grin on his face.[13] I sat down upright, in an angular antique chair. He was put out that my essay wasn't typed. I suggested I read the essay to him. He was chuffed by the apparently novel nature of this suggestion. "OK," he said, "That would be very *Oxford*."

One thing I've always admired in Dworkin is his ability to "talk straight," and to say it "like it is." He does not accept implausible claims. He doesn't use jargon, or do large diagrams on the blackboard, or the 101 other academic tricks. A leading U.K. public law scholar once exclaimed to me with irritation when I'd mentioned Dworkin, "I don't *do* Dworkin talk!" The irony is that "Dworkin talk" in public law is nothing other than "rights," "morality," "equality," "freedom," "principles," "rules," "legality," "policy," "integrity," and "discretion," which are jargon-free, normal words of public law discourse.

The greatest mark of Dworkin's work is the humanity present in everything he writes. Equality is at the center, playing more than the role of a redundant qualifier to general principle and having little to do with the "leveling down" form of equality pursued in crude communism. In Dworkin's work, equality concerns decency, and links respect for others with our own self-respect. Coming from the then relatively classless New Zealand of the fifties and sixties, I understood this well, and quickly: I related it to the habit we then had in New Zealand—for all its chauvinistic connotations—of seeing

others as blokes. For Dworkin, equality is not opposed to freedom but quite to the contrary celebrates it. That other person must be free, too. On the other hand, other people are part of what defines our duties, and so equality defines the limits of what we may do, as well as what we may own.

I have been lucky. Dworkin first came regularly to the UCL Faculty of Laws, generally becoming more involved from the mid-nineties with the culminating in his appointment, following William Twining, as our Quain professor of jurisprudence. That long period until 2007 when Dworkin left UCL was a golden era for me. Particularly from the mid-nineties, we were all fortunate in having the following excellent philosophers and lawyers from UCL who regularly came and contributed to the Colloquia. From the Philosophy Department, Mike Martin, Veronique Munoz-Darde, Mike Otsuka and Jo Wolff; from Laws, Julie Dickson, Dori Kimel and Riz Mokal; from Politics, Cecile Laborde, Saladin Meckled-Garcia and Colin Tyler; from the Bentham Project, Tony Draper and Philip Schofield. There were regulars from elsewhere: Ross Harrison, James Penner, Janet Radcliffe-Richards, Nicos Stavropoulos and David Wiggins. I was also landed during that period with a set of brilliant PhD students who attended all the sessions and threw themselves in wholeheartedly: Octavio Ferraz, Charlie Grapski, George Letsas, Eva Pils, Tomas Vial and Emmanuel Voyiakis. There were many students, other research students, for example, Alex Brown, Stuart Lakin and Laura Valentini. The standard they achieved was amazingly high and I'm indebted to all of them, as they know.

I have been enormously fortunate in having the best research assistant I could have hoped for. Elettra Bietti prepared the increasingly complex, and difficult to compile Bibliography, adding videos and podcasts to the long list, and she made many corrections to the text. Best, though, were her intelligent and perceptive suggestions concerning the overall coherence and substance; I'm immensely grateful to her for those.

A word, too, about UCL. Dworkin has long and wantonly trampled on the two main doctrines of our College's intellectual founder, Jeremy Bentham. We should not forget, however, that there are significant similarities between Ronald Dworkin and Jeremy Bentham. Both extol democracy, both demand principled action by government, and both think that theoretical enquiry should be motivated by a concern for practical, human outcomes.

The aim of this book is primarily to disseminate Dworkin's thought, particularly in legal theory, and particularly to give a sense of the overall coherence

he achieves with other areas of value. My final word is that to appreciate the full subtlety and moral power of Dworkin's theory, you must knuckle down and read his main works. The two great books are *Law's Empire* and *Justice for Hedgehogs*. I warn you that *Justice for Hedgehogs*, while elegantly written and full of examples, is difficult and must be taken step by step. I wonder, given the—to my mind—paucity of criticism of his main theories to date, whether it will be another generation or two before what he has said in that book sinks in.