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## *TRIBUTES*

### PROFESSOR RONALD DWORKIN

Last year, the NYU community lost an intellectual giant in Professor Ronald Dworkin. The school and the Law Review joined together to honor Professor Dworkin's writings, ideas, and of course, his legendary colloquia. Academics, philosophers, and judges gathered to pay tribute. In the pages that follow, we proudly publish written versions of those tributes.<sup>1</sup> The ceremony closed with a short video clip of one of Professor Dworkin's last speeches, titled *Einstein's Worship*.<sup>2</sup> His words provide a fitting introduction:

We emphasize—we should emphasize—our responsibility, a responsibility shared by theists and atheists alike, a responsibility that we have in virtue of our humanity to think about these issues, to reject the skeptical conclusion that it's just a matter of what we think and therefore we don't have to think. We need to test our convictions. Our convictions must be coherent. They must be authentic; we must come to feel them as our convictions. But when they survive that test of responsibility, they've also survived any philosophical challenge that can be made. In that case, you burnish your convictions, you test your convictions, and what you then believe, you better believe it. That's what I have to say about the meaning of life. Tomorrow: the universe.

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<sup>1</sup> With the exception of Professor Waldron's piece, all of the tributes were delivered at the NYU School of Law on October 2nd, 2013.

<sup>2</sup> Ronald Dworkin, *Einstein Lecture at Bern University: Einstein's Worship* (Dec. 12, 2011), *available at* <https://cast.switch.ch/vod/clips/17dqxr7fi/flash.html>.

# THE ENRICHMENT OF JURISPRUDENCE

JEREMY WALDRON\*

I have the task of conveying a sense of the importance of Ronald Dworkin's philosophical thought, particularly in the philosophy of law. I want to acknowledge what we have lost from his being no longer among us; but also I want to affirm what we gained—at Oxford, in London, in New York, in the world—from his voice and from the light of his intellect.

For we still have the writings. To name just three out of the fifteen or so books that grace the Dworkin bookshelf, there is *Taking Rights Seriously*,<sup>1</sup> a collection of papers that in 1978 transformed our understanding of rights and right answers; *Law's Empire*,<sup>2</sup> a decade later, a powerful argument about interpretation and integrity; and then in 2011, the great synthesis, *Justice for Hedgehogs*,<sup>3</sup> an affirmation of the unity of value—bringing a single vision into an ethic of dignity and a comprehensive legal, moral, and political theory.

These books embody the most thoughtful and lucid alternative to legal positivism that we have had in the modern era. I don't mean *anti*-positivism, as though Ronnie's aim was just to refute the claims of his teachers at Oxford. His work may have started that way forty-five years ago in *The Model of Rules*.<sup>4</sup> But what has been most valuable in Ronnie's jurisprudential thought is the elaboration of an alternative theory of law, which, mostly, was allowed to develop under its own elegant momentum.

In this great and graceful body of work, Ronnie gave us a living jurisprudence, one that credited the practice of law with reason and thoughtfulness, not just the mechanical application of rules. It is a jurisprudence that taught us to take seriously forms of argument that—to the bewilderment of positivists, pragmatists, and all sorts of skeptics—have lawyers and judges delving doggedly again and again into the books of the law searching for legal answers to hard cases, rather than just admitting defeat at the first sign that there was not going to be any text or precedent directly on point.

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\* Copyright © 2014 by Jeremy Waldron, University Professor, New York University. These remarks were delivered at the memorial service for Ronald Dworkin in London on June 2, in St. John's, Smith Square.

<sup>1</sup> RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* (1978).

<sup>2</sup> RONALD DWORIN, *LAW'S EMPIRE* (1986).

<sup>3</sup> RONALD DWORIN, *JUSTICE FOR HEDGEHOGS* (2011).

<sup>4</sup> Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967–68).

He had the effrontery to suggest that there were *right answers* to the legal problems posed in hard cases, and that it mattered whether we got the answers right or wrong. This was a view many disparaged, but it had the advantage of respecting the position of plaintiffs and petitioners as people coming into law to seek vindication of their rights, not just as lobbyists for a quasi-legislative solution. It was a position, too, that respected the obligation of judges never to give up on the sense that the existing law demanded something of them, even in the most difficult disputes.

Dworkin helped us chart the topography of law—for the *corpus juris* is not just a heap of norms. Beneath the explicit rules there are principles and policies that a legal system has committed itself to implicitly, over the years: deep subterranean channels of moral concern that flow through every part of the law. In an argument of stunning complexity, his 1986 book *Law's Empire*<sup>5</sup> sets out grounds for the responsibility lawyers and judges have to the law *as a whole*, including their responsibility to measures enacted by people who may not have shared their views about justice. Our job, he said, as lawyers, scholars, and judges, is to bring interpretive coherence—integrity—to the whole body of the law.

The unearthing of these principles and the burden of this integrity meant that legal reasoning, in Ronnie's opinion, *is a form of moral reasoning*. This is the artery of his jurisprudence: Legal reasoning *is a form of moral reasoning*. Certainly, it is a complicated and uneasy form, for it depends on judgments about the moral importance of contingent events, like enactment and the setting of precedents, that ordinary moralizing does not concern itself with. "Nothing guarantees that our laws will be just,"<sup>6</sup> Ronnie acknowledged. But that doesn't mean we *separate* the relation between law and morality; it means we *complicate* the relation between law and morality. Like a system of ethics that has to deal with the moral significance of promises we wish had never been made, so too the morality of law has to come to terms—*moral* terms—with statutes we wish had never been passed and precedents we wish had never been laid down. But the mark of legality is the willingness to respect those with whom we share the community, including those whose decisions we disagree with—to respect on moral grounds the legacy that they have contributed to, as we expect them to respect the legacy, the same legacy of law, that we have contributed to.

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<sup>5</sup> DWORKIN, *supra* note 2.

<sup>6</sup> *Id.* at 5.

As I said, the affirmation of this entanglement of law and morality is the artery of Ronnie's jurisprudence, and for the philosophy of law generally, these are ideas of momentous importance. They will resonate through the generations. They are not uncontroversial by any means, but the controversies they provoke are productive, sparkingly productive, in the otherwise desiccated landscape of our subject.

It is not just legal philosophy. There is Ronnie's work in constitutional law: what he called "the moral reading" of the American Constitution and his conviction that even in Britain, a bill of rights with strong judicial review was not only possible, but would strengthen democracy by strengthening the conditions that make democracy legitimate.

Then, too, there is his writing on equality in moral and political philosophy, which he began working on at the end of the 1970s—producing two articles of massive importance in the first ever issues of *Philosophy & Public Affairs*. Like many here today, I had the good fortune to attend the seminars on these and other topics, where Ronnie stood with other titans like Bernard Williams, Charles Taylor, Amartya Sen, and Derek Parfit. It is impossible to overestimate the influence of these pieces on equality—*What Is Equality? Part 1: Equality of Welfare*<sup>7</sup> and *What Is Equality? Part 2: Equality of Resources*<sup>8</sup>—in setting the agenda for the study of justice and equality in the 1980s, 1990s, and beyond.

We marveled then at the range of Dworkin's ideas. We thought he was a glamorous fox who knew ever so many things. But we didn't always see that—while he was working on the theory of equality, the jurisprudence of *Law's Empire*,<sup>9</sup> and the substance of end-of-life and abortion issues in *Life's Dominion*<sup>10</sup>—he was also laying the foundations for a unifying ethical vision which, in the manner of the hedgehog, would bring together these different facets into a comprehensive theory of justice.

The vision was unified in his great ethical work, *Justice for Hedgehogs*,<sup>11</sup> by a principle of *dignity*. Each person, said Ronnie, has a certain responsibility for the precious shape of his or her own life,

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<sup>7</sup> Ronald Dworkin, *What Is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185 (1981).

<sup>8</sup> Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981).

<sup>9</sup> DWORKIN, *supra* note 2.

<sup>10</sup> RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1994).

<sup>11</sup> DWORKIN, *supra* note 3.

and everyone has a duty to respect the conditions under which others are able to discharge that responsibility. That's what "human dignity" meant for Ronnie, and it underpins both the principles of responsibility that are so important in the luck-egalitarian side of his account of equality and the principles of mutual respect represented in the rule of law.

I talked at the beginning about what we have lost and what we have gained through Ronnie's life and work. What we have and can treasure still are the writings, the books, the articles (whether in the *Oxford Journal of Legal Studies* or the *New York Review of Books*), the jurisprudence, and the new ways of connecting ethics and political philosophy.

What we have lost, however, is the warmth of his chortling good humor, the liberality of his positions and personality, his generous and embracing charm, the strength of a mind that could sustain an argument in a lecture for ninety minutes without a note, and the dogged and delighted commitment to intellectual exchange (Ronnie was never one to allow himself the last word in an argument, and he wouldn't allow anyone else the last word either). I had the honor to engage him for years in arguments about judicial review—a disagreement that has loomed large in the pleasure and profit of exchange, but is dwarfed by everything I owe to him in the example he set through his commitment to the sunny, upland expansiveness of political philosophy pursued in the radiance of an affection for the law.

I have tried to be calm in what I've said in these remarks. But this is not just a tribute, it is a love letter to a man who thirty-five years ago at Oxford helped me find my feet, who over the years set forth for me the virtue of argument through his own good-humored example, who showed me—showed us all—how much more you can achieve by taking seriously the nobility of law's empire than by any corrosive or skeptical detachment from its aspirations. To his memory, then, I pledge a resolve—as far as I am able to carry this on, with others I hope, to continue the refreshment of jurisprudence with the insights Ronnie gave us, in a way that does justice to the generosity and unity of his vision.

## RONALD M. DWORKIN

LEWIS A. KORNHAUSER\*

Most of our memories of Ronald Dworkin are of Ronnie talking, or more precisely, Ronnie conversing, questioning, cross-examining, educating, and entertaining us in his office, in the classroom, at table, indeed everywhere. Law schools describe, with either some poetic license or some disingenuousness, their pedagogic method as Socratic. But in these halls, we had the real thing, the true Socratic interlocutor, pushing us to address the original Socratic question—Ronnie’s question too—how should we live? And now when we need him most to help us understand his loss, he is gone.

I first encountered Ronnie in his natural habitat, a seminar room—room 208 to be exact—during my first spring here. Ronnie spent that semester developing the ideas that eventually became *What Is Equality?* Parts 1 and 2.<sup>1</sup> The sessions were enormously stimulating and exotic for an economist/lawyer. I suffered a form of culture shock. In my economics graduate program, market baskets consisted of widgets and gadgets or apples and oranges. In Ronnie’s world individuals chose baskets of plover’s eggs and pre-phylloxera wine. When asked about plover’s eggs, Ronnie could, and did, describe the plumage, the nest, and where to find them.

At the time of Ronnie’s arrival at NYU in the mid-1970s, the school was, intellectually, a very sleepy place. NYU had no colloquia or regular workshops and, if by chance, some workshop happened, it was generally poorly attended and rather dull. Ronnie was among the people who changed that. He set an example in two ways.

First, he demonstrated both how valuable and how enjoyable intellectual discussion could be. He loved argument; indeed, he turned Lady Bracknell’s dismissal of argument—“I dislike arguments of any kind. They are always vulgar, and often convincing”<sup>2</sup>—almost on its head. For Ronnie, and with Ronnie, intellectual argument was to be pursued and cherished, never vulgar, and always, if not convincing, illuminating. He served as a model of intellectual engagement and conversation.

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<sup>1</sup> Ronald Dworkin, *What Is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185 (1981); Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981).

<sup>2</sup> OSCAR WILDE, *THE IMPORTANCE OF BEING EARNEST: A TRIVIAL COMEDY FOR SERIOUS PEOPLE* act III.

Second, Ronnie set an institutional example. He offered a series of seminars that gradually developed into workshops with outside speakers. Then with the arrival of Tom Nagel at the law school, these workshops blossomed into the colloquium that became the centerpiece and poster child of the intellectual renaissance at NYU.

The format that Ronnie and Tom implemented in the colloquium became the standard for other colloquia at NYU and at other law schools around the country and around the world. The format was exported either by former NYU colleagues, as at Texas; by colloquium guests, as at Stanford and UCLA; or by Ronnie or his former students, as at University College London and Oxford.

The colloquium was a wonderful, though difficult to describe, event, both intellectually and as performance. At its core lay the immense intellectual generosity of Ronnie and Tom. Each devoted enormous intellectual time and energy to understanding and critiquing the work of each guest.

For the speaker the colloquium was notoriously grueling, beginning at 11:30 a.m. in Ronnie's office, and running through an often long, intense lunch that afforded only a brief break before the main event: the three-hour Tom and Ronnie show. For speakers from outside NYU, dinner and further cross-examination followed the show and, sometimes for the hardy, drinks at Tom's or Ronnie's followed dinner. Ronnie was indefatigable and had an inexhaustible appetite for philosophical discussion. Neither food, nor wine, nor the lateness of the hour could stay the flow of Ronnie's questions, objections, corrections, and extensions.

For the audience, the colloquium was equally stimulating intellectually but much less grueling. Indeed, it was great entertainment. There was always a slight frisson when Tom, Ronnie, and the speaker entered. Tom dressed elegantly in a classic academic blazer or sober suit on one side; Ronnie, equally elegant but in a somewhat more ostentatious suit on the other; and the speaker, already lagging in the fashion wars, carefully placed between them to ensure he could not physically escape.

And then the fun began.<sup>3</sup> After a careful summary of the speaker's argument, Ronnie or Tom would begin the careful dissection and illumination of the underlying argument. As the work presented at the colloquium was always in progress, there were always

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<sup>3</sup> In the early years, before its fame and popularity forced it to a less intimate space, the architecture of room 208 further heightened the drama. At the time, before its renovation, a large table and chairs occupied the center of the room; a second, elevated tier of seats ran along the walls of the room. Ronnie, Tom, and the guest sat in the pit below; spectators, eager for intellectual combat, encircled them.

gaps in the argument to be uncovered and fallacies to be rooted out. Colloquium guests coped in different ways with the withering onslaught. Some developed entertaining defenses: the long pensive pause, the elegant disquisition, and the shouted interjection. But most adopted the only workable strategy: a sincere effort to respond to the questions asked.

This uncompromising inquiry confronted every guest, including Ronnie and Tom when they occupied the hot seat. Their ideas too were subjected to the same stringent process. We saw, for example, Ronnie's first tentative ideas about life and death attacked and developed in the colloquium, and then we read their stronger and more elegant versions in *Life's Dominion*.<sup>4</sup> Similarly, Tom's early ruminations on equality were tested in the colloquium and then developed into *Equality and Partiality*.<sup>5</sup> Indeed, the list of books the seeds of which were nourished in the colloquium is long and impressive, including Rawls's *Political Liberalism*,<sup>6</sup> Scanlon's *What We Owe to Each Other*,<sup>7</sup> Kamm's *Morality, Mortality*,<sup>8</sup> and Bernard Williams's *Shame and Necessity*<sup>9</sup> to name a few. Ronnie's last books—*Justice for Hedgehogs*<sup>10</sup> and *Religion Without God*<sup>11</sup>—were also nourished in the colloquium.

Ronnie has gone but the conversation that began with Socrates and to which Ronnie contributed so brilliantly, both in substance and in style, will continue. More mundanely, the colloquium that he and Tom created will go on under new management as well. And, bereft as we may be, we who were privileged to talk with and learn from Ronnie are better able to participate in that ongoing conversation.

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<sup>4</sup> RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1993).

<sup>5</sup> THOMAS NAGEL, *EQUALITY AND PARTIALITY* (1995).

<sup>6</sup> JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

<sup>7</sup> T. M. SCANLON, *WHAT WE OWE TO EACH OTHER* (1998).

<sup>8</sup> F. M. KAMM, *MORALITY, MORTALITY, VOLUME I: DEATH AND WHOM TO SAVE FROM IT* (1993); F. M. KAMM, *MORALITY, MORTALITY, VOLUME II: RIGHTS, DUTIES, AND STATUS* (2001).

<sup>9</sup> BERNARD WILLIAMS, *SHAME AND NECESSITY* (1993).

<sup>10</sup> RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (2011).

<sup>11</sup> RONALD DWORKIN, *RELIGION WITHOUT GOD* (2013).

## PROFESSOR DWORKIN . . . AND THE JUDGES

THE HONORABLE STEPHEN BREYER\*

When I think of Ronnie, I think of walking—walking and talking—around the pond at Chilmark, up and down the beach, along college paths at Yale, and even at a judicial meeting in the hills of southern France. Wallace Stevens wrote that “the truth” may “depend upon a walk around the lake.” Ronnie might well agree.

Ronnie was a good lawyer. Indeed, the great judge Learned Hand described Ronnie (in a letter to Felix Frankfurter) as the “law clerk to beat all law clerks.” Still, Ronnie did not remain a practicing lawyer for long. He became a professional legal philosopher and, over time, a highly influential man of ideas.

Ronnie loved ideas; he loved discussion, conversation, reading, teaching, and writing. He wanted to hear the views of others. He wanted to consider them. He wanted to expose his own ideas to criticism. He loved the back-and-forth, the intellectual exchange, of a good argument. In fact, Ronnie once praised Learned Hand by describing him as “a wonderful person to argue with.” Typical Ronnie. But still, the whole time, Ronnie was putting the arguments, the interchange, the discussion, and the thought to a more general and more valuable use: He was building bit by bit a highly influential, coherent, detailed, philosophical approach to the law.

At our judicial meeting in France Ronnie described key aspects of the basic philosophical views that made him eminent.<sup>1</sup> A “constitution,” he said, “embodies not just individual rights but collective aspirations of various kinds, one of which . . . is democracy.” But giving each person “the same vote” is not enough to give him or her good “reason to obey” even a democratically enacted law. To do that the Constitution must satisfy certain “conditions—the true conditions of democracy.” Those conditions are not simply a list of good things. Indeed, to try to write any such list is to lose faith in democracy. Those conditions, however, do include “free speech” and the requirement that the majority “treat” each individual “with equal concern and respect,” and that it not “dictate to [the individual] on matters of religion and conscience.” “[S]elf-respect” demands that each of us

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<sup>1</sup> A published version of these discussions can be found in *JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION* (Robert Badinter & Stephen Breyer, eds., 2004).

decide such matters on our own. The majority “must [also] respect . . . other basic rights.” Of course, people will disagree about what those “other conditions of democracy” are, but that is not critical. What *does* matter is that “what those conditions . . . require in particular cases, are not majoritarian issues . . . . They are moral issues . . . .”

Ronnie then spoke to me and to the others directly as judges, making a point that I believe important and correct. He said that judges cannot act like a group of English dons in the “common room” who, once they hear the lunch gong sound, assert that they have “got it just about right,” adjourn, and rush to the table. Rather, judges owe us an argument that flows from general “attitudes and convictions” that the judges cannot prove are “inescapably right,” but which they sincerely believe, which “seem right, after open argument and serious reflection,” and which “appeal only to principles that [the judges] undertake to respect in other contexts as well.” “You do not have to convince others that your argument is the best one. . . . But you should be able to convince them . . . that[,] after the deepest reflection that the circumstances permit[,] it seems the best one to you. Other institutions are under no comparable obligation . . . .” Ronnie spent his professional life deeply reflecting upon those basic conditions, examining the common aspirations that the Constitution must reflect, and embodying the results in books and articles, for which we who are judges, like the general legal public, are grateful.

All of us, however, who had personal contact with Ronnie are grateful for more. Ronnie’s students respected, admired, and liked him, for he respected, admired, and liked them. He loved, indeed, he adored, his family—Betsy and his children, then Reni, who gave him a new lease on, and a new love in, life. He was good to, he was interested in, and he was kind to his colleagues and his friends. They returned his devotion. We all are grateful, not just for Ronnie’s arguments and not just for his conversation, however sprightly; we are grateful for his life itself. It was our “rare good fortune” to have known you, Ronnie. We shall miss you very much indeed.

## THREE THOUGHTS ABOUT RONNIE

T.M. SCANLON\*

There is much to say about Ronnie. But in the few minutes that I have today I will confine myself to putting three thoughts before you: the first about confidence, the second about creating one's own life, the third about luck.

Ronnie's remarkable confidence was evident at two levels. It manifested itself in his famous eloquence: He had the confidence to finish each sentence in a triumphal manner, rather than, like some of us, to start doubting, and introducing qualifications, before completing the thought. His confidence was manifested also at a deeper level in the boldness with which he took up challenging projects. This was evident, at the beginning, in his undertaking to challenge Herbert Hart's theory of law, and then, in the last chapter of *Taking Rights Seriously*, defending the idea that there are right answers even in the hardest cases.<sup>1</sup> This chapter then grew into a bold theory of interpretation, which he applied not only to law and to philosophy, but to history and literature as well, and into an account of objectivity that addressed some of the deepest and most difficult questions in philosophy. Finally, at the end of his life, he was boldly taking on questions about physics and religion, which the more timid among us might have decided to steer clear of.

Ronnie's confidence involved no attitude of superiority—no suggestion that he knew better and could do better than the rest of us. Rather, his confident enthusiasm invited us to join him in taking on these difficult and interesting questions. Marshall Cohen once told me that when Ronnie was an undergraduate at Harvard he was already the Ronnie we knew, brilliant and full of confidence. Ronnie's own description of his time at Harvard was this: "Arriving at Harvard was wonderful," he said. "It was like a feast. Here were all these brilliant people. *And they were willing to talk with me!*" But the reaction of these brilliant people, as Marshall described it to me, was: "Here suddenly was this brilliant undergraduate. Where in the world did he come from?"

Where indeed? More than anyone I have ever known, Ronnie seemed to have created himself. And this matched his own view of how one should live. In *Justice for Hedgehogs* he writes that we each

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<sup>1</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

have an ethical duty of self-respect, which requires that “[e]ach person must take his own life seriously: he must accept that it is a matter of importance that his life be a successful performance rather than a wasted opportunity.”<sup>2</sup> A second ethical duty, he writes, is authenticity: “Each person has a special, personal responsibility for identifying what counts as success in his own life; he has a personal responsibility to create that life through a coherent narrative or style that he himself endorses.”<sup>3</sup> Ronnie took those duties seriously and lived up to them as much as anyone I can imagine.

Finally, luck. By any measure, Ronnie had a very fortunate life, as I am sure he would have agreed. In his writings on equality he imagined the possibility of neutralizing the effects of luck by means of insurance policies that would provide compensation if one did not have a certain measure of good fortune. The premiums would of course vary depending on the level of good luck that was guaranteed, and I think few could afford the premiums for an insurance policy that would guarantee a life as fortunate as Ronnie’s.

Ronnie was lucky in having the love and care of two wonderful women; lucky in his remarkable intellectual talent; lucky in being born at a time when the state of academic philosophy, American law and politics, and even the political moment in other parts of the world, provided fertile conditions for the exercise of his particular talents, allowing him to make important contributions in all of these domains. In particular, he was lucky that the New York newspaper strike occurred when it did, leading Bob Silvers and others to create the *New York Review*, which provided an ideal vehicle through which Ronnie’s brilliance could have broad and beneficial effects.

Like his confidence, Ronnie’s bounteous good fortune was not something that set him apart, but something that he generously shared with all of us. We are all supremely lucky to have been his beneficiaries.

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<sup>2</sup> RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 203 (2011).

<sup>3</sup> *Id.* at 204.

# MAKING DEMOCRACY SAFE FOR JUSTICE: A TRIBUTE TO RONALD DWORKIN

REBECCA L. BROWN\*

We have come together to celebrate the countless and diverse ways in which Ronald Dworkin's work enriched the debates of our times, and edified us as lawyers, thinkers, citizens, and human beings. While Dworkin made immense contributions in his roles of philosopher, teacher, and public intellectual, his most precious legacy to me, as a scholar of the Constitution, is the way that he helped constitutional theory reclaim its animating spirit.

Before Dworkin entered the scene, the case of *Brown v. Board of Education*,<sup>1</sup> which invalidated racial segregation in public schools, had given rise to an identity crisis in constitutional theory.<sup>2</sup> That crisis cabined morality into a realm separate from law, even at a time in our nation's history when morality was playing an increasingly salient role in public debates about democracy.<sup>3</sup> Most scholars agreed that racial segregation was a hideous wrong, but many worried that the Constitution did not provide the Supreme Court the justification necessary to force its end.<sup>4</sup>

The psychic conflict is illustrated well by Alexander Bickel's 1962 popularization of the term "counter-majoritarian difficulty" to describe why the judicial enforcement of rights is "deviant" in a democracy.<sup>5</sup> Unelected judges threaten the heart of democracy, defined as the work of the elected branches. This view resonated widely, even among those who believed, deep down, that *Brown* was

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<sup>1</sup> 347 U.S. 483 (1954).

<sup>2</sup> See generally Rebecca L. Brown, *How Constitutional Theory Found Its Soul*, in *EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN* (Scott Hershovitz ed., 2006).

<sup>3</sup> See MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 34, 34–39 (2000) (stating that the Soviet Union capitalized on the "shameful story" of America's treatment of African Americans to show a lack of commitment to equality and liberty).

<sup>4</sup> See LEARNED HAND, *THE BILL OF RIGHTS* 54–55 (1958) (challenging *Brown* as legislation from the bench).

<sup>5</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16, 18 (1962).

correct.<sup>6</sup> The nagging tension between a belief in the supremacy of legislatures and the horror of what those legislatures had wrought with Jim Crow caused constitutional theory to writhe in existential angst—recognizing a compelling moral need to protect the politically powerless, but paralyzed by a majoritarian view of democracy that branded the judiciary as deviant and of questionable legitimacy.<sup>7</sup> The enforcement of individual rights was an embarrassment, to be restrained as much as possible, in order to avoid judicial “tyranny.”<sup>8</sup>

It was a simplistic understanding of democracy that proclaimed that “[t]he more fundamental the issue, the nearer it is to principle, the more important . . . that it be decided in the first instance by the legislature.”<sup>9</sup> The question in any given case, therefore, was how much one would trade the ideal of entrusting principle to majoritarian rule for the sake of some measure of justice; any such trade-off would be a source of moral regret. This was a flat and self-contained conception of democracy, defined only by how decisions were reached, not by what they achieved. Any concession to justice was necessarily a compromise of democracy.

Dworkin challenged that understanding of democracy head-on. “Why has a sophisticated and learned profession,” he mused, “posed a complex issue in this simple and misleading way?”<sup>10</sup> For him, democracy was not in opposition to justice at all—it was a means to attain justice, through the according of equal concern and respect.<sup>11</sup> So the protection of rights, he urged, was not deviant at all—far from it. The invalidation of unjust laws represented the fulfillment of the highest end of legitimate government. It would always be a cause for moral celebration, not moral regret. Dworkin did not apologize for *Brown*, but insisted upon it.<sup>12</sup> No more would the pages of constitutional scholarship have to bow under the dismal weight of ambivalence that

<sup>6</sup> See Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 198–200 (2002) (discussing an increase in criticism of the Court from recognized authorities on jurisprudence after *Brown*).

<sup>7</sup> See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 33–37 (1996) (describing the conflicting positions on *Brown* taken privately and publicly by prominent academics).

<sup>8</sup> See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2–3 (1971) (arguing that judges necessarily abet “tyranny” if they exceed the proper sphere).

<sup>9</sup> BICKEL, *supra* note 5, at 161.

<sup>10</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 148 (1977).

<sup>11</sup> See RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 15–19 (1996).

<sup>12</sup> See RONALD DWORKIN, *LAW’S EMPIRE* 387–89 (1986) (discussing how Hercules—a stand-in for a judge of superhuman intelligence—would resolve *Brown*).

had dominated those volumes for two decades. Moral intuition and law had found reconciliation.

With that reconciliation came a new life for constitutional interpretation. Dworkin's campaign to take rights seriously gave the aspirations of our polity a front seat in the task of interpreting. Specific provisions would take on the meanings most consistent with our noblest commitments and most likely to afford dignity. Above all, he showed us that this resort to principle does not take judges outside the bounds of law, but rather represents the consummation of law.

Unlike many who loved Ronnie, I was neither his student nor his colleague. But as a young professor of constitutional law many years ago, I discovered his work and saw it as a long-awaited rain that had finally fallen on the field of study I had chosen—a field that had been desiccated by the implications of the countermajoritarian difficulty. It was only later that I had the delight of getting to know Ronnie and discovering what a lovely person he was as well. I once had the bright idea of challenging him on his opposition to any regulation of hate speech.<sup>13</sup> I tried to persuade him that his own commitment to equal concern should lead him to support restrictions on some hate speech; he insisted that equality pointed the other way, toward the freedom of speech. It was clear that he got much amusement out of my ill-fated effort to out-Dworkin Dworkin. His good-natured appreciation of the dilemma into which I was trying to box him (unsuccessfully) revealed a most remarkable love of engagement. He never lost the twinkle in his eye. He made no bones about the fact that I had failed, but with characteristic generosity, he gently said, “You have given me something to think about.” I count myself very fortunate to have seen, firsthand, the prodigious facility he brought to bear on hard problems, a virtuosity for which he was justly famous. I felt no shame in having failed to bring him down.

In the end, I think of this beautiful man's contribution as the triumph of optimism over pessimism regarding the project of self-government. The schools of constitutional thought to which he swore eternal opposition were those driven by skepticism and cynicism, pessimistic accounts portraying constitutionalism as an effort to stave off decay.<sup>14</sup> Ronnie's work, by contrast, valiantly urged that the American people can do better, that our form of government was conceived under the bright sun of enlightenment, that it committed us to

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<sup>13</sup> Rebecca Brown, *The Holberg Prize Symposium in Honor of Ronald Dworkin*, Bergen, Norway (Nov. 27, 2007).

<sup>14</sup> See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 40–41 (1997) (arguing that the purpose of the Constitution is to prevent change because societies may “rot” rather than “mature”).

the ideals expressed in the Preamble of our Constitution. “[W]e must hold to the courage of the conviction,” he wrote, “that we can all be equal citizens of a moral republic.”<sup>15</sup> With that enduring faith, Ronald Dworkin helped to reclaim for constitutional theory its itinerant soul. And in the process, he helped to make democracy safe for justice.

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<sup>15</sup> DWORKIN, *supra* note 11, at 38.

## A JOY TO HEAR HIM SPEAK

LIAM MURPHY\*

I first laid eyes on Ronald Dworkin in about 1986 up at Columbia, where I was a graduate student in philosophy. Ronnie was presenting his views about abortion, both philosophical and constitutional. Fresh off the boat from Australia, I was, naturally, a card-carrying utilitarian and legal positivist at the time. So, of course, everything Ronnie said struck me as clearly wrong. But as the discussion went on and Ronnie swatted back objections with effortless grace and good cheer, conceding no ground whatsoever, I began to feel a bit uneasy, shaken out of my rut.

This was an intellectual performance unlike any I had seen before in a philosophy department. Both in substance and style, there was a worldliness and a polish about Ronnie's discussion of philosophical issues that was entirely different from our usual scruffy, insular, hesitant, and nitpicky way of going about it. The sheer intellectual virtuosity of it was breathtaking. It was like watching a great musician give a master class, cheerfully correcting the students and demonstrating with a flourish the right way to play the piece, leaving the audience with the sense that only a small fraction of available energy and talent had been called upon.

After the discussion was over, I turned to our departmental sage at Columbia, Sidney Morgenbesser. "What did you make of *that*?" I asked. Sidney gave me his wolfish smile and said, "I call him the Teflon philosopher"—thus mischievously invoking another famous Ronald of the time. But then Morgenbesser added, with an uncharacteristic seriousness that made a big impression on me, "It is always a joy to hear him speak." I went away thinking that something important and rather challenging had just happened.

Then came the colloquium. Like Lewis, I was there from the start, but my initial perspective was that of a student. It is hard to convey the sense of excitement among graduate students in the New York area that the colloquium generated. Here were Thomas Nagel, whose way of thinking about moral philosophy we had grown up on, and Ronald Dworkin, who was the leading legal philosopher of the age and had recently created a huge stir in political philosophy with his writings on equality. And they were going to invite virtually every

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\* Copyright © 2014 by Liam Murphy, Herbert Peterfreund Professor of Law, and Professor of Philosophy, New York University School of Law.

living philosopher we studied, argued about, and looked up to. It was the hottest thing in town. We all wanted to go.

As it turned out, we were not allowed to go, at least at first. The expected crowd was too big for Vanderbilt Hall 208, and a rule was announced that only NYU-affiliated people could attend. Well, some of us snuck into room 208 anyway. The first time I did this, Bernard Williams was the guest. In they walked, three abreast, with such an evident seriousness of purpose and sense of occasion that the room immediately hushed. The discussion that followed had a sustained intellectual intensity and fertility that was unlike anything I had experienced before.

I was hooked. I was basically a regular at the Colloquium in Legal, Political, and Social Philosophy for the entire twenty-five years that Tom and Ronnie hosted it. Though I quickly came to love listening to Ronnie's astonishing introductions and his tireless engagement with the speakers, I did not fully understand what an extraordinary mind was at work until I myself presented at the colloquium in 1993, the year before I joined the faculty here. I was no longer a card-carrying legal positivist and utilitarian, but I was pretty close. I was hoping for some sympathy from Tom, who did not reject consequentialist thinking outright, but I remember distinctly feeling that I was entering the lion's den, and that Ronnie was the lion.

The way things turned out was very different. Immediately after I arrived at Ronnie's office, Tom delivered a devastating objection to my paper. I didn't understand it at first, so Tom and I looked at each other in silence. Ronnie endured this for about three seconds before he kindly and deftly explained the problem to me, and then went on to offer me various lifelines. For the next nine hours, I had the most unexpected feeling that Ronnie was on my side, that he understood better than I did what I was about, and that he was going to do his best to help me make the best of my ideas. I had seen from the audience how easily Ronnie could inhabit all varieties of philosophical position for the sake of argument. But when it was my own argument that he was running with, the level of skill and imagination that was at his disposal came through so clearly it was astonishing to me.

It is true that in the end, after making the best of your position, when you were feeling pretty good, Ronnie would typically move on to pose the fatal objection that would show that your best was, unfortunately, nonetheless hopeless, and that your only option was to abandon your non-Dworkinian foundations and start afresh with correct premises. But even at that point of defeat, you always felt that your own ideas had never looked so good.

There is so much to miss Ronnie for. From the stark impersonal fact that we have lost the philosopher who produced the most important nonpositivist theory of law in the history of the subject, and who had the greatest impact on legal theory globally over the last fifty years, to my intensely personal memories of him on his hands and knees chasing my infant twins around a sofa, or of the time he was teaching my wife Sibylle how to sail and she accidentally caused the boom to fly at the wrong moment, thus bloodying the philosopher's head, and he laughed it off so graciously. But the biggest hole that Ronnie's loss leaves in my life is the one that Sidney Morgenbesser put his finger on that day nearly thirty years ago. I have since listened to Ronnie speak for probably hundreds of hours. Sidney was right. It was always a joy to listen to Ronald Dworkin. And I miss it—I miss him, terribly.

## ON RONALD DWORKIN

ROBERT B. SILVERS\*

Starting in the late sixties, Ronnie wrote over a hundred reviews, essays, and other comments for the *New York Review of Books*. He once told me, “My life would have been very different had it not been for the *Review*.” And while I doubted this, it’s certainly true that the life of the *Review* would indeed have been very different if we had not, again and again, had Ronnie’s essays on the central moral, legal, and political questions facing the country for nearly fifty years.

It was in 1967, soon after we began, that I had a call from Stuart Hampshire, who was teaching philosophy at Princeton, and he’d become, since our beginnings, a kind of shadow editor of the *Review*. And that morning he said, “If you need someone to write on law and the philosophy of law, there’s a young professor at Yale Law School who knows more about philosophy than a lot of the people you are using, and he writes better about it,” and he gave me Ronnie’s name.

Now, in our fiftieth anniversary issue of the *Review*, we print what I take it will be one of Ronnie’s last published essays, based on his acceptance speech for the Balzan Prize at the Quirinale Palace in Rome, and there he describes the trajectory of a career that ran, as he says, from the very concrete to the very theoretical. He tells how he began his professional life as a young lawyer in a grand Wall Street law firm, charged with analyzing the balance sheets of giant corporations so they could make more money and grow greater still; and since those very concrete beginnings, his interests, as he said, steadily became broader as he left Wall Street to teach constitutional law and as he found that the language and legal history of the Constitution could not be adequately interpreted by the prevailing theories of legal positivism. For, as he writes in his Balzan essay, according to these theories, “[w]hat the law is depends, according to positivism, not on morality but only on history: on what people given the appropriate authority have declared it to be.”<sup>1</sup> And he early formulated a contrary view, which he went on to elaborate for the rest of his life, that we cannot correctly identify the law while ignoring the need for “some justification, however weak, in political morality.”<sup>2</sup>

Reading this final essay of Ronnie’s, I thought back to his first contribution, in 1968, to the paper on Stuart’s advice, which, as it

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<sup>1</sup> Ronald Dworkin, *Law from the Inside Out*, N.Y. REV. BOOKS, Nov. 7, 2013, at 54, 54.

<sup>2</sup> *Id.*

happens, was a review of a book on lawyers by a leading journalist of the time. It was a book that reported many views of prominent lawyers, and Ronnie pointed out that it allowed these lawyers to frame the questions put to them as well as answer them. He said that—and I quote him—“[i]f a reporter takes his questions from the lawyers, then he becomes the captive of conventional wisdom before he begins,”<sup>3</sup> and it is precisely that conventional wisdom, Ronnie wrote, that needed to be challenged, particularly for its implications for the rights people should have and that are denied.

For example, Ronnie argued in favor of an approach emphasizing that “the poor have rights that the majority must recognize even if it is not feeling generous, and even if its larger economic goals are not served thereby.”<sup>4</sup> Lawyers who make this claim, he wrote,

point to some recognized practice of obligation, and then argue that consistency requires extending to the poor the rights this practice generates. This strategy determined the successful arguments in the Supreme Court that a state cannot refuse an appeal from a criminal conviction because the defendant cannot pay for a transcript, and that a state cannot limit the vote to those who can pay a poll tax.

It also suggests a more general argument, which should be urged in the legislatures. The states now offer a wide variety of public services, ranging from police protection and public education to public health and zoning. Few citizens could afford these services independently, and a state that did not provide them for the majority would be thought derelict in its duties, and callous of the rights of its constituents. If so, then these state services constitute a practice of obligation, and form a sound basis for asserting the general duty of a state to provide its citizens the essentials of a decent and effective life.

It is inconsistent, and a breach of duty, to cut off the minority in the economic cellar, even if extending the practice to them would be vastly more expensive and troublesome, and therefore in contradiction to other policies of the majority.

As Ronnie went on to say, however, “[t]he force of this argument may be clear to some, but it is not generally accepted. Lawyers must try to document and support it, not abandon it.” In those and other comments on the rights of all citizens to be treated with respect and dignity by the state, we can see that Ronnie was outlining in his first article for us a jurisprudential and philosophical vision whose construction would continue for the rest of his life.

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<sup>3</sup> Ronald Dworkin, *There Oughta Be a Law*, N.Y. REV. BOOKS, Mar. 14, 1968, at 18.

<sup>4</sup> *Id.* at 21.

Since I knew the writer of the book in question, I sent him a copy of this extremely cutting and also eloquent review, and he wrote back saying that, in fact, he felt honored that his book had been the occasion of such an essay. After fifty years of editing, I can tell you, that is not the usual response.

It was in his next article that Ronnie showed how he could intervene directly in the most controversial issues of his time. In our June 6, 1968 issue, at the height of the Vietnam War and the draft, when groups of young men were burning their draft cards in Central Park, he posed in his first sentence the following question: “How should the government deal with those who disobey the draft laws out of conscience?”<sup>5</sup> And he disagreed with Erwin Griswold, the Solicitor General of the United States and former dean of Harvard Law School, who called for universal prosecution of all who carried out civil disobedience, saying, and I quote him, “that organized society cannot endure on any other basis.”

To the contrary, Ronnie argued, if the issue is one touching fundamental personal and constitutional rights, and it is seriously arguable that the view of the Supreme Court was mistaken, then a person may be within his rights in acting on that possibility. In reply, Erwin Griswold—himself greatly respected for, among many other accomplishments, his defense of Great Society legislation—wrote him to the effect that as a result of that article, published in a nonprofessional forum, Ronnie had lost the respect of his peers.

But in fact his essay aroused intense support from many well-known lawyers and professors and it soon was followed by a special supplement to the *Review* of some 10,000 words, called “Taking Rights Seriously,” in which he argued that the very institution of rights represents the majority’s promise to the minority that their dignity would be respected, and that if the law is to work, this promise should also apply to conscientious objectors.

There was much demand for this supplement and it became the title for his first book. And the reaction to these writings eventually showed, *pace* the Solicitor General, that Ronnie had, for a great many of his peers, come to be seen as a central thinker on American rights and responsibilities. And in the years that followed, as one great issue after another broke upon the country like a wave, whether the criminality of the Nixon administration or the rights of Alan Bakke against affirmative action or the nomination of Robert Bork or the healthcare bills of Hillary Clinton and Barack Obama or the decision in the

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<sup>5</sup> Ronald Dworkin, *On Not Prosecuting Civil Disobedience*, N.Y. REV. BOOKS, June 6, 1968, at 14.

*Citizens United* case, which he strongly deplored, Ronnie was willing to bring to bear his philosophical concerns with rights and dignity and fairness and justice on the central questions facing the courts and the country.

In each case, the articles he wrote, as I saw them, left behind them a lesson in how to identify and interpret the underlying values that he believed were at stake. And he did this not only for the issues facing our own country, but in his report from Argentina on the human rights trials there, and on the regime of Margaret Thatcher, to name only two.

His central ideas about the obligation of lawyers and judges and politicians to arrive at the best interpretation of moral and legal claims—an interpretation that, he argued, should be justified by morality based on rights—thus came to be embodied in the concrete arguments of the articles he wrote. And we can see these essays along with his books as guides to perplexing choices, chains of wonderfully clear prose that insisted on respect for each person's dignity, arguments that could actually change perceptions as one read them. They are teachings that will last.

## IN MEMORIAM: RONALD M. DWORKIN

THOMAS NAGEL\*

Ronald Dworkin and I were friends for many years, starting in the 1960s, when we belonged to a monthly discussion group that included many of the leading contributors to moral, political, and legal philosophy of the succeeding decades. After he began to spend half of every year at NYU in 1987, I had the immense pleasure of his brilliant companionship every week as we conducted the colloquium in law and philosophy, which gave scope to his talent for logically complex and morally imaginative argument over the next twenty-five years. Knowing and working with him has been not only an intellectual treat but a party that seemed never to end and never to run out of steam. His presence in any conversation turned it into a delicious entertainment.

I won't talk about the substance of his intellectual contributions here, but will say something about his style and his attitude to life.

Ronnie was a consummate performer, whatever he was doing, whether animating a dinner party as host or guest, giving a public lecture, teaching, or writing. He always wrote and spoke beautifully, with enviable command and clarity of organization. Above all he carried it off with an air of complete effortlessness—made possible, of course, only by ferociously hard work and a terrific memory. This inspired the wonderful entry for Ronnie in the *Philosophical Lexicon*, a creation of Daniel Dennett, in which definitions are given for the names of philosophers.<sup>1</sup> For example, “heidegger” is defined as “[a] ponderous device for boring through thick layers of substance,” as in, “It’s buried so deep we’ll have to use a heidegger.”<sup>2</sup>

Here is Ronnie’s entry:

dwork, v. (Perhaps a contraction of *hard work*?) To drawl through a well prepared talk, making it appear effortless and extemporaneous. “I bin dworkin on de lecture circuit” - old American folk song.

There was one aspect of Ronnie’s style that was important, though he was not altogether pleased to be reminded of it. In addition to being a creative philosophical thinker, Ronnie never ceased to be a lawyer. His intellectual style was marked by the determination to make a case for his client—the truth as he saw it—if possible, an overwhelming case, with concomitant demonstration that his opponent

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<sup>1</sup> THE PHILOSOPHICAL LEXICON (Daniel Dennett & Karel Lambert eds., 7th ed. 1987), available at <http://www.philosophicallexicon.com> (last visited Oct. 21, 2013).

<sup>2</sup> *Id.*

had no case. This take-no-prisoners style of intellectual combat is not unknown in philosophy, but I believe that in Ronnie's case it drew strength from his immersion in legal argument. It also fit well with his conviction that there is always a right answer to any difficult moral, political, or legal question.

But what made Ronnie unlike anyone else I have ever known, and gave him his distinctive charm, was his omnivorous appetite for life. There is a famous poem by William Butler Yeats that begins:

The intellect of man is forced to choose  
Perfection of the life, or of the work,  
And if it take the second must refuse  
A heavenly mansion, raging in the dark.<sup>3</sup>

That is a choice that Ronnie emphatically refused to make. You would never catch Ronnie "raging in the dark." And a heavenly mansion, or a reasonable facsimile thereof—in New York or London or Martha's Vineyard or Tuscany—always seemed the natural setting for his relentless pursuit of perfection in the work he undertook.

This was a manifestation in the way he lived his life of the conviction, so fully expressed in his big book *Justice for Hedgehogs*,<sup>4</sup> that there are no deep conflicts between values, and that what is good forms a coherent unity. Ronnie managed to combine creative intellectual achievement at the highest level, motivated by powerful moral and political convictions, with a life filled with pleasure, brilliant society, and aesthetic style, and he seemed to be able to give equal attention to them all. In a sense he never aged, but brought the same youthful enthusiasm to every new experience or new opportunity. He couldn't visit a beautiful part of the world without engaging in fantasies about acquiring some of the local real estate. He loved good food and drink, amusing company, interesting architecture, and he dressed beautifully, in a defiantly nonacademic style. In addition to teaching on both sides of the Atlantic, Ronnie maintained a herculean schedule of international speaking engagements, and seemed to fill every minute with activity and experience. Once we were talking about how much in advance of a flight one should arrive at the airport, and he said, "If you haven't missed a few planes, you've led a wasted life."

In his existence there was absolutely no opposition, but rather a complete congruence between the life of the mind, often at its most abstract, and life in the world at its most concrete and delectable. This *joie de vivre* was brutally interrupted by Betsy's illness and death, but

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<sup>3</sup> William Butler Yeats, *The Choice*, in THE OXFORD AUTHORS: W.B. YEATS 130 (Edward Larrissy ed., 1997).

<sup>4</sup> RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (2011).

he found it again with Reni, for the final years of his life, which were also among his most creative.

The brilliant life is now over, and the brilliant work remains. Fortunately for all of us, Yeats stands refuted.