London Review of Books

Consequences

Bernard Williams

A Matter of Principle by Ronald Dworkin
Harvard, 425 pp, £19.95, May 1985, ISBN 0 674 55460 4

When I took part – as it seems, many years ago – in a Committee to recommend reforms in the obscenity laws, we received evidence from an American constitutional lawyer who happened to be in England, was an expert on the subject, and agreed to come and talk to us about it. He explained the complex constraints exercised by the First Amendment to the US Constitution, which says that no law shall be made to abridge the freedom of speech. He rehearsed various devices that lawyers and legislators had used to try to get round these constraints in order to control pornography, including the argument that pornography was not, constitutionally speaking, 'speech'. When he had gone out, one of the lawyers on our committee, Brian Simpson, said: 'I think I should explain something to the Committee. Americans believe in rights.'

Ronald Dworkin is also an American lawyer; he is Professor of Jurisprudence at Oxford and much of the time resident in England. He assuredly believes in rights, and his first and now very well-known volume of papers has the title *Taking rights seriously*. He is, as well as a lawyer, a philosopher (in the technical or academic sense, not merely at the breakfast table), who addresses himself to questions of political and moral philosophy as well as to the nature of law. This spread of interest is well illustrated in the present collection of essays, which range from the political and moral basis of law to the ethics of reverse discrimination, questions of civil disobedience, and the rights, indeed, of free expression.

Some of the pieces are a bit slight, constrained by the occasions that gave rise to them, but there is no reason to regret the inclusion of any of them. It would be a pity to miss the 12 pages of forensic argument (originally presented at the Metropolitan Museum) from which Dworkin concludes that a liberal state can support the arts, consistently with egalitarian principle and without either 'paternalism' or 'élitism', so long at least as it does not support one kind of aesthetic endeavour as being more excellent than another. I am hoping that, for his next act, he will show how to administer this policy.

This and other pieces rest on Dworkin's egalitarian conception of social justice, and it is a pity

that his arguments for that conception are not more strongly represented here. He has written two very substantial articles favouring equality of resources as a political ideal rather than equality of welfare. The central idea, roughly speaking, is that equality should be determined in terms of what is distributed rather than in terms of the satisfaction of wants or preferences of the recipients. He favours this not only for philosophical reasons – the measurement of welfare or utility has always been a suspect activity – but also for more than one moral reason. The appeal to utility seems often to give the wrong answer, as when those with greedy or over-fastidious tastes come out with a right to more. A basis in resources, moreover, leaves more elbow-room for the recipients' freedom.

These articles, which have already started a controversy among economists, are for some reason not reprinted here, and these important interests are represented only by a brief piece against utilitarian supply-siders, and his review of Michael Walzer's book *Spheres of Justice*, in which Dworkin rather loftily denounces a theory which in fact has more to offer on these problems of equality than he allows – in particular, by allowing more room for the historical peculiarities of a given society than Dworkin's conceptions do. Dworkin looks to a timeless moral framework in matters of justice, and when he is talking about legal adjudication rather than political equality, and so is manifestly confronted with the special practices and institutions of a particular place, one of his major preoccupations is to explain how judgments which have to be determined by the traditions of a given body of law can nevertheless be regulated, as he supposes they should be, by the timeless moral framework.

The range of Dworkin's interests, the connections he naturally sees between the law, politics and general ethical principles, are not a purely individual matter, though he displays very great individual brilliance, ingenuity and intellectual power in discussing them. American lawyers tend generally to be interested and involved in more than the law: or rather, the law and lawyers turn up in more places than those reserved to the law in other countries. Everyone knows of Americans' legendary litigiousness, but besides lawyers who chase ambulances or take an action against the bus company when someone's grandmother has had a heart attack at the sound of a horn, there are others who, for instance, virtually run corporations, playing much the same role in making American business flourish as accountants do in ruining ours.

Then there are those that change their country's history. In 1954 the Supreme Court, deciding *Brown v. Board of Education*, ruled that racially-segregated schooling was unconstitutional, and thereby brought about very large changes in American society. Even those who wonder whether a constitutional court is in general the best engine of social change cannot fail to be moved by this extraordinary image of a nation under law, where a few men in black gowns can decide under the constraints of argument that an historically entrenched practice is illegal, and the power of the state is then deployed to stop it.

Dworkin does not say much here about the difficulties that are to be found in such a system, such as its sensitivity to the political and ideological composition of the Court. When he is considering the decision of particular cases, as in his discussion of the Bakke case (which

with questions of philosophy and morality rather than with political or sociological explanation. He powerfully criticises those who interpret the decisions of judges in terms of political or economic interests, and, equally, criticises those judgments that give colour to such interpretations; and he eloquently argues for an alternative and more principled account of what they should be doing. But there must be a question whether political and economic motives can be kept out of judicial decisions if judicial decisions are asked to do as much for the society as they are in the United States.

Dworkin's views, quite appropriately, tend to start within the theory of legal adjudication, and to be generalised from there to issues of political theory. In saying how legal judgment should go, and also more generally, Dworkin appeals to a basic distinction between 'principle' and 'policy', where – roughly speaking – principle appeals to rights, and policy appeals to consequences. As Brian Barry pointed out in a sceptical review of this book in the *Times Literary Supplement* (25 October 1985), this choice of terms is itself a bit tendentious, since it suggests that, unless an argument is couched in terms of rights, it must fall below the level of principle and be a matter of opportunistic politics. This suggestion makes it a bit easier than it should be to agree with Dworkin that the best way of thinking in a principled way about political issues is always to think about them in terms of rights.

Because he starts from the law, and because, as I have already said, he does not display much interest in the sociology of political institutions, Dworkin does tend to assume the American model of a constitutional court as the instrument that not only guards but advances people's rights. But even if we agree with him that judges should think in terms of rights rather than consequences, and also agree (with rather more hesitation, I hope) that thinking in terms of rights is always the best way of deciding matters of political principle, there is still room for discussion of what institutions will be best (in a given place, with a given history) for making those decisions. Are we bound to agree that the best way of getting such matters decided is to have them decided by judges? It is an important question, and for Britain a very real one. Many of us in recent years have come to think more favourably than we used to of a charter of rights, in the light of the unprincipled activities of the British executive. But we are bound to be doubtful of the consequence that large-scale issues of principle are to be decided by British judges. The most encouraging thought in that direction is that the institutions of a Supreme Court might themselves bring about an improvement in the clarity and imagination of legal and political thought on large issues.

What Dworkin wants of principled political argument is well brought out in his fair and carefully argued criticism, reprinted here, of the Report of that Committee on obscenity that I mentioned earlier. It is called, revealingly, 'Do we have a right to pornography?' The criticism is very detailed, but it has a central target, which Dworkin calls the 'Williams strategy' – that of considering primarily whether laws directed against pornography are likely to curb any harm which it is the business of the law to curb. Against this strategy, which thinks in terms

of consequences, Dworkin urges an argument in terms of rights.

In fact, the Report's argument is not entirely in terms of consequences. It claims that there is a strong presumption in favour of freedom of speech and publication, a presumption which comes to much the same as a right. What the Report does try to do is to give some reasons in favour of admitting that presumption, and those reasons are partly in terms of consequences. Dworkin should not really object to this, since his own rights are not simply plucked out of the sky: he gives a schematic account of how to derive them. However, there is something odd about that derivation. Dworkin shows the value of rights by pointing out how awful the consequences of unrestrained Utilitarianism would be. Indeed they would be, but why should anyone suppose that we have to start from there? It seems more reasonable to start, as the Report tried to start in this matter of freedom of expression, by considering how human beings might lead a worthwhile life under the conditions of ignorance and conflict that they actually face.

The Report recommended banning only a limited range of pornography, and a system of restriction for the rest. The basis of that system was the offence caused by pornography to the average citizen if it is publicly displayed. Dworkin is very suspicious of this argument. However, it should be said at once, he does not reject the practical conclusion that there should be a system of regulation, and thinks that he would recommend something very similar himself. It is the reason given for it that he does not like. His reason is that people's offence in face of the public display of pornography is likely to be 'morally freighted', dependent to an indeterminate extent on moral opinions; and it is unsound to restrict some people's activities simply because some other people morally disapprove of them.

But if those two things are both true, then Dworkin seems to have landed us with a clear and nasty choice: either there should be no legislation restricting pornography (and, equally, public sexual activity and so on), or else there may be such legislation, but it should not be based on people's objections to those things. Dworkin in fact escapes from this dilemma, because he does not think that people's moral opinions, and the reactions freighted with those opinions, should never figure in arguments for legislation. He thinks they may come into the argument, but only if the argument is conducted in terms of rights. He introduces a 'right of moral independence', and argues that just because people's reactions of offence are (to some indeterminate degree) morally freighted, there is a case for saying that their right to develop morally in their own autonomous way is infringed by the display of pornography. At the same time, of course, the right to moral development of those who want pornography will be violated by its suppression. So the scheme of regulation can be justified as a compromise between two conflicting applications of one and the same right.

I confess that I do not find this argument more convincing or more principled than that of the Report, but I shall not try to take it any further here: those with an interest in such matters should read Dworkin and see. What is more widely interesting is the style of his approach – in particular, that so much should be made to turn on a very refined discrimination of two styles of political argument. In one way, this is encouraging and

reassuring, as is the power of the Supreme Court: getting it intellectually right can make a difference. On the other hand, there is something perverse in the demand to force all principled political argument into this one mould, and to ignore the wider range of conceptions that certainly have power in our political discourse. Perverse, and perhaps dangerous: if all important matters of public morality have to turn on what is effectively very refined legal reasoning, all discussion of them may be met by something to which Dworkin's own passionate and impressive counter-arguments bear witness – the wide and deep public scepticism about legal reasoning.

Vol. 8 No. 7 · 17 April 1986 » Bernard Williams » Consequences
pages 7-8 | 2306 words