A Matter of Principle

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Introduction

THIS IS A BOOK about fundamental theoretical issues of political philosophy and jurisprudence: about what liberalism is and why we still need it; whether we should be skeptical about law and morality; how collective prosperity should be defined; what interpretation is and how far law is a matter of interpretation rather than invention. It is also a practical book about urgent political issues. Is it fair to give blacks priority for jobs and university places? Can it ever be right to break the law? Is it uncivilized to ban dirty films; unfair to censor books to protect national security? What rights do suspects have when crime rates are rising? Does social justice mean economic equality? Should judges make political decisions? It is, above all, a book about the interplay between these two levels of our political consciousness: practical problems and philosophical theory, matters of urgency and matters of principle.

The essays were written separately over the last several years. The controversies they join are old; but history has given them fresh shape and importance. The ancient argument whether judges should and do make law is of more practical importance than ever before, at least in the United States. It seems very likely that the man now President will appoint enough Justices to the Supreme Court to set the character of that commanding institution for a generation, and people can review his choices intelligently only if they have a clear view about what adjudication is and what the Supreme Court is for. The development and deployment of atomic missiles has had powerful impact on people's attitudes about civil disobedience, and more generally about the connection between conscience and political obligation, in Western Europe as well as the United States and Britain. Affirmative action programs, seeking better racial relations through preferences and quotas, continue to divide people of conscience and to set one minority against another; recession and high unemployment make these arguments newly bitter. Old wars over pornography and censorship have new armies in radical feminists and the Moral Majority. The perennial conflict between

a free press, on the one hand, and privacy and security, on the other, seems sharper and more perplexing than ever.

Cases at law figure in much of the argument, not as an exercise in legal history or doctrine, but rather because law gives a special and illuminating shape to political controversy. When political issues come to court—as they always do, sooner or later, in the United States at least—then they plead for decision that is at once discrete and principled. They must be decided at retail, in their full social complexity; but the decision must be defended as flowing from a coherent and uncompromised vision of fairness and justice, because that, in the last analysis, is what the rule of law really means. Legal analysis, in this broad sense, is more concrete than classical political philosophy, more principled than political craft. It provides the right theater for philosophy of government.

PART ONE of the book studies the role political convictions should play in the decisions various officials and citizens make about what the law is, and when it should be enforced and obeyed. It rejects the popular but unrealistic opinion that such convictions should play no role in these decisions at all, that law and politics belong to wholly different and independent worlds. But it also rejects the opposite view, that law and politics are exactly the same, that judges deciding difficult constitutional cases are simply voting their personal political convictions as much as if they were legislators or delegates to a new constitutional convention. It rejects that crude view on two grounds, each of which furnishes a major theme for the rest of the book.

First, the crude view ignores a crucial constraint on adjudication. Judges should enforce only political convictions that they believe, in good faith, can figure in a coherent general interpretation of the legal and political culture of the community. Of course lawyers may reasonably disagree about when that test is met, and very different, even contradictory, convictions might all pass the test. But some could not. A judge who accepts this constraint, and whose own convictions are Marxist or anarchist or taken from some eccentric religious tradition, cannot impose these convictions on the community under the title of law, however noble or enlightened he believes them to be, because they cannot provide the coherent general interpretation he needs.

Second, the crude view obscures a distinction of capital importance to legal theory, a distinction that is the most immediate reference of the book's title. Our political practice recognizes two different kinds of argument seeking to justify a political decision. Arguments of policy try to show that the community would be better off, on the whole, if a particular program were pursued. They are, in that special sense, goal-based arguments. Arguments of principle claim, on the contrary, that particular programs must be

carried out or abandoned because of their impact on particular people, even if the community as a whole is in some way worse off in consequence. Arguments of principle are right-based. Because the simple view that law and politics are one ignores this distinction, it fails to notice an important qualification to the proposition that judges must and do serve their own political convictions in deciding what the law is. Even in hard cases, though judges enforce their own convictions about matters of principle, they need not and characteristically do not enforce their own opinions about wise policy.

I have discussed this distinction elsewhere, and it has been challenged in various ways. Some critics object to the distinction itself; others object to the claim I just made, that adjudication is characteristically a matter of principle rather than policy. Their arguments, and my replies, are collected in a recent volume which also includes critical comments on other essays reprinted in this book.[1] This book does not return to the argument. Instead it tries to exhibit the practical value of the distinction in various contexts. Chapter 4 argues, for example, that the case for civil disobedience must be differently constructed, and that it is subject to different forms of qualification, when the law or other official decision being challenged is seen as a serious mistake of policy than when it is seen as a grave mistake of principle. If protests against the deployment of atomic weapons in Europe, for example, are ordinarily challenges to policy rather than to principle, then civil disobedience is a very different matter from that directed, in earlier decades, against unjust wars and racial discrimination.

Part Two defends the claim I just mentioned, that legal analysis is fundamentally interpretive, and offers a general account of interpretation to describe the sense in which this is so. It also considers how this claim bears on an important theoretical issue in jurisprudence. Anglo-American lawyers have on the whole been skeptical about the possibility of a "right answer" in any genuinely hard case. If lawyers and judges disagree about what the law is, and no one has a knockdown argument either way, then what sense does it make to insist that one opinion is right and others wrong? Surely, so the common view runs, there are only different answers to the question of law and no one right or best answer. Some lawyers who hold that skeptical view draw what they take to be conservative conclusions: judges should defer to decisions made by more representative institutions like legislatures, and in the case of constitutional law to the decisions made by the Founders of the constitutional settlement long ago. Others find in this skepticism a kind of license: if there is no right answer in some lawsuit of constitutional magnitude, no one has a right that the courts decide in any particular way, and judges should therefore decide in whatever way seems to them best for the future of the nation. Part Two argues that this skeptical challenge is altered, and defused, once it is understood that legal argument and analysis is

interpretive in character. For the ways in which interpretive arguments may be said to admit of right answers are sufficiently special, and complex, as to call into question the familiar arguments for skepticism. Indeed, once law is seen in this way, there is little point in either asserting *or* denying an "objective" truth for legal claims.

Part Three turns from argument directly about law to issues of political theory that lie in the background. It explores the present state of liberal theory. Liberalism was once, not very long ago, almost a consensus political theory in Britain and the United States, at least among political and legal philosophers. They disagreed about a great deal, but they all seemed to accept, as close to axiomatic, a kind of egalitarian individualism. They believed, that is, that politics should have two general ambitions: first to improve the power of citizens, judged one by one, to lead the lives each thinks best for himself or herself; and second to reduce the great inequality in the resources different people and groups within the community have available for that purpose. But liberalism, so conceived, is no longer so popular; politicians now compete to disown various aspects of this ideal. It is said to have failed. It has proved, according to some critics, too generous and expensive, and, according to others, too divisive and mean-spirited. Part Three argues that the new consensus against liberalism is founded on muddled arguments, which have been encouraged by the failure of liberal political theorists to identify the constitutive principles of liberalism and to make plain the form of egalitarianism on which liberal ideals, properly understood, are based.

Part Four joins political and legal theory again. It considers a presently influential thesis about how judges should decide cases. This denies that judges should be concerned with moral standards, in the familiar sense, at all. Their decisions should be economic rather than moral; they should aim to make the community as a whole richer rather than in some different sense fairer. This attitude, often called the "economic" approach to law, has colonized a large part of American legal education and placed ambassadors in Britain and elsewhere. It is associated with conservative political positions and sometimes seems a cover for the renascent politics of self-interest that threatens to occupy the ground abandoned by liberalism. But it has intellectual appeal even for legal scholars and judges who are not committed to defending inequality, and law journals are now choked with its products. Part Four argues that the economic approach nevertheless lacks any defensible philosophical foundation.

Parts Five and Six are devoted to two complex and topical controversies. Each illustrates the practical value and importance of the distinction between arguments of principle and of policy. Part Five takes up the raging dispute about programs of positive discrimination in employment and admission to university and professional schools, programs designed to im-

prove the overall position of blacks and other minority groups. It argues that such programs are best justified not through arguments of principle, about the rights of the particular people they benefit, but rather on arguments of policy, about the general benefit they secure for the community as a whole. Then the crucial question is whether any argument of principle lies *against* a policy that seeks to benefit the community in that way. Chapter 13 inspects a variety of principles that might be thought to provide an argument of that character; it concludes that none does. If so, then the genuinely important issues in the debate about positive discrimination are entirely issues of policy. We must judge various programs of quota and preference one by one, by weighing practical costs and benefits, not altogether in some scale of principle.

Part Six is about censorship. It considers, first, the charged issue of sexually explicit books, films, and photographs. A case against censoring such material might be made out in two different ways. The first relies on an argument of policy; an excellent example is provided in the goal-based argument of the recent Williams Report, which claims that liberty of expression must be protected, at least to some degree, in order to promote the conditions of human flourishing. I describe that Report in Chapter 17; I argue that no justification of that kind will prove adequate to the degree of freedom the Report itself recommends. The second defense of liberty of expression relies instead on arguments of principle. I describe a defense of that kind, which appeals to a right people have to freedom of sexual choice, and more generally to moral independence, even if their choices will not make the community better as a whole even in the long run.

The last two essays take up freedom of the press. Much of the recent debate has been corrupted because those who support special privileges for the press offer, as arguments of principle, what are really arguments of policy. Chapter 18 discusses, for example, whether a reporter should be permitted to withhold information about his sources even when this information is needed by the defense in a criminal trial. Many reporters believe that if they are forced to reveal confidential sources, then such sources will "dry up" because informers will be reluctant to risk exposure. They claim that the question of requiring disclosure therefore presents a conflict of principle between two supposed rights: the right of someone accused of a crime to any information helpful to his defense, and the competing public "right to know" that the press will be unable to satisfy as fully if sources are revealed. I argue that this picture is mistaken, because the public's alleged right to know is not, properly speaking, a right at all. The argument for a free flow of information is an argument of policy: that the community will be improved in various ways if it is better informed. If this is correct, then the conflict between a fair trial and freedom of the press is not, in this instance, a conflict of principle, but rather a contest between a principle and policy.

They are both important, but except in extraordinary circumstances the contest must be settled in favor of principle, which means in favor of a fair trial for the accused.

The book's final essay expands this discussion into a warning. Though some defenders of the press blend policy into principle in order to expand freedom of speech, the confusion they create does disservice to their aim. It jeopardizes the central core of principle in the First Amendment, the genuine and fragile right of free speech. We stand in greater danger of compromising that right than of losing the most obvious policy benefits of powerful investigative reporting and should therefore beware the danger to liberty of confusing the two. The caution is general. If we care so little for principle that we dress policy in its colors when this suits our purpose, we cheapen principle and diminish its authority.

I HAVE REVISED the original essays, for this book, in minor ways; chiefly to eliminate temporal expressions no longer appropriate. I have not, however, made substantive changes or new arguments, because some of the original essays have been discussed and criticized by other writers, and it would be unfair to change my arguments in reprinting those essays in this collection. I leave these changes and further arguments, so far as they are about law, to a new book I am now writing about legal theory.

PART ONE

The Political Basis of Law

ONE

Political Judges and the Rule of Law

TWO QUESTIONS AND TWO IDEALS

This essay is about two questions, and the connections between them. The first is a practical question about how judges do and should decide hard cases. Do judges in the United States and Great Britain make political decisions? Should their decisions be political? Of course the decisions that judges make *must* be political in one sense. In many cases a judge's decision will be approved by one political group and disliked by others, because these cases have consequences for political controversies. In the United States, for example, the Supreme Court must decide important constitutional issues that are also political issues, like the issue whether accused criminals have procedural rights that make law enforcement more difficult. In Britain the courts must decide cases that demand an interpretation of labor legislation, like cases about the legality of secondary picketing, when the Trades Union Congress favors one interpretation and the Confederation of British Industries another. I want to ask, however, whether judges should decide cases on political *grounds*, so that the decision is not only the decision that certain political groups would wish, but is taken on the ground that certain principles of political morality are right. A judge who decides on political grounds is not deciding on grounds of party politics. He does not decide in favor of the interpretation sought by the unions because he is (or was) a member of the Labour party, for example. But the political principles in which he believes, like, for example, the belief that equality is an important political aim, may be more characteristic of some political parties than others.

There is a conventional answer to my question, at least in Britain. Judges should not reach their decisions on political grounds. That is the view of almost all judges and barristers and solicitors and academic lawyers. Some academic lawyers, however, who count themselves critics of British judicial practice, say that British judges actually do make political decisions, in spite of the established view that they should not. J. A. G. Griffiths of the

London School of Economics, for example, in a polemical book called *The Politics of the Judiciary*, argued that several recent decisions of the House of Lords were political decisions, even though that court was at pains to make it appear that the decisions were reached on technical legal rather than political grounds.[1] It will be helpful briefly to describe some of these decisions.

In *Charter*[2] and *Dockers*[3] the House of Lords interpreted the Race Relations Act so that political clubs, like the West Ham Conservative Club, were not obliged by the Act not to discriminate against coloured people. In *Tameside* the House overruled a Labour minister's order reversing a local Conservative council's decision not to change its school system to the comprehensive plan favored by the Labour government.[4] In the notorious *Shaw's Case*, the House of Lords sustained the conviction of the publisher of a directory of prostitutes.[5] It held that he was guilty of what it called the common law crime of "conspiracy to corrupt public morals," even though it conceded that no statute declared such a conspiracy to be a crime. In an older case, *Liversidge v. Anderson*, the House upheld the decision of a minister who, in the Second World War, ordered someone detained without trial.[6] Griffiths believes that in each of these cases (and in a great many other cases he discusses) the House acted out of a particular political attitude, which is defensive of established values or social structures and opposed to reform. He does not say that the judges who took these decisions were aware that, contrary to the official view of their function, they were enforcing a political position. But he believes that that was nevertheless what they were doing.

So there are those who think that British judges do make political decisions. But that is not to say that they should. Griffiths thinks it inevitable, as I understand him, that the judiciary will play a political role in a capitalist or semi-capitalist state. But he does not count this as a virtue of capitalism; on the contrary, he treats the political role of judges as deplorable. It may be that some few judges and academics—including perhaps Lord Justice Denning—do think that judges ought to be more political than the conventional view recommends. But that remains very much an eccentric—some would say dangerous—minority view.

Professional opinion about the political role of judges is more divided in the United States. A great party of academic lawyers and law students, and even some of the judges in the prestigious courts, hold that judicial decisions are inescapably and rightly political. They have in mind not only the grand constitutional decisions of the Supreme Court but also the more ordinary civil decisions of state courts developing the common law of contracts and tort and commercial law. They think that judges do and should act like legislators, though only within what they call the "interstices" of decisions already made by the legislature. That is not a unanimous view even among sophisticated American lawyers, nor is it a view that the public at large has

fully accepted. On the contrary, politicians sometimes campaign for office promising to curb judges who have wrongly seized political power. But a much greater part of the public accepts political jurisprudence now than did, say, twenty-five years ago.

My own view is that the vocabulary of this debate about judicial politics is too crude, and that both the official British view and the "progressive" American view are mistaken. The debate neglects an important distinction between two kinds of political arguments on which judges might rely in reaching their decisions. This is the distinction (which I have tried to explain and defend elsewhere) between arguments of political principle that appeal to the political rights of individual citizens, and arguments of political policy that claim that a particular decision will work to promote some conception of the general welfare or public interest.[7] The correct view, I believe, is that judges do and should rest their judgments on controversial cases on arguments of political principle, but not in arguments of political policy. My view is therefore more restrictive than the progressive American view but less restrictive than the official British one.

The second question I put in this essay is, at least at first sight, less practical. What is the rule of law? Lawyers (and almost everyone else) think that there is a distinct and important political ideal called the rule of law. But they disagree about what that ideal is. There are, in fact, two very different conceptions of the rule of law, each of which has its partisans. The first I shall call the "rule-book" conception. It insists that, so far as is possible, the power of the state should never be exercised against individual citizens except in accordance with rules explicitly set out in a public rule book available to all. The government as well as ordinary citizens must play by these public rules until they are changed, in accordance with further rules about how they are to be changed, which are also set out in the rule book. The rule-book conception is, in one sense, very narrow, because it does not stipulate anything about the content of the rules that may be put in the rule book. It insists only that whatever rules are put in the book must be followed until changed. Those who have this conception of the rule of law do care about the content of the rules in the rule book, but they say that this is a matter of substantive justice, and that substantive justice is an independent ideal, in no sense part of the ideal of the rule of law.

I shall call the second conception of the rule of law the "rights" conception. It is in several ways more ambitious than the rule-book conception. It assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced *upon the demand of individual citizens* through courts or other judicial institutions of the familiar type, so far as this is practicable. The rule of law on this conception is the ideal of rule by an accurate public concep-

tion of individual rights. It does not distinguish, as the rule-book conception does, between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the rule book capture and enforce moral rights.

That is a complex ideal. The rule-book conception of the rule of law has only one dimension along which a political community might fall short. It might use its police power over individual citizens otherwise than as the rule book specifies. But the rights conception has at least three dimensions of failure. A state might fail in the *scope* of the individual rights it purports to enforce. It might decline to enforce rights against itself, for example, though it concedes citizens have such rights. It might fail in the *accuracy* of the rights it recognizes: it might provide for rights against the state, but through official mistake fail to recognize important rights. Or it might fail in the *fairness* of its enforcement of rights: it might adopt rules that put the poor or some disfavored race at a disadvantage in securing the rights the state acknowledges they have.

The rights conception is therefore more complex than the rule-book conception. There are other important contrasts between the two conceptions; some of these can be identified by considering the different places they occupy in a general theory of justice. Though the two conceptions compete as ideals of the legal process (because, as we shall see, they recommend different theories of adjudication), they are nevertheless compatible as more general ideals for a just society. Any political community is better, all else equal, if its courts take no action other than is specified in rules published in advance, and also better, all else equal, if its legal institutions enforce whatever rights individual citizens have. Even as general political ideals, however, the two conceptions differ in the following way. Some high degree of compliance with the rule-book conception seems necessary to a just society. Any government that acts contrary to its own rule book very often—at least in matters important to particular citizens—cannot be just, no matter how wise or fair its institutions otherwise are. But compliance with the rule book is plainly not sufficient for justice; full compliance will achieve very great injustice if the rules are unjust. The opposite holds for the rights conception. A society that achieves a high rating on each of the dimensions of the rights conception is almost certainly a just society, even though it may be mismanaged or lack other qualities of a desirable society. But it is widely thought, at least, that the rights conception is not necessary to a just society, because it is not necessary, in order that the rights of citizens be protected, that citizens be able to demand adjudication and enforcement of these rights as individuals. A government of wise and just officers will protect rights (so the argument runs) on its own initiative, without procedure whereby citizens can dispute, as individuals, what these rights are. Indeed, the rights conception of the rule of law, which insists on the importance of