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DWORKIN, POLEMICS, AND THE CLINTON IMPEACHMENT CONTROVERSY

Richard A. Posner*

Ronald Dworkin is well known for believing that the law in general, and constitutional law in particular, should be recast as a branch of normative moral philosophy,¹ and less well known for having participated actively in the campaign against the impeachment of President Clinton. Last year, I published two books that criticize both of Dworkin's projects. The first of these books, *The Problematics of Moral and Legal Theory* argues, with many critical references to Dworkin, that normative moral philosophy—or, as I term it, “academic moralism”—is a weak field in its own right and has nothing to offer law.² The second book, *An Affair of State: The Investigation, Impeachment, and Trial of President Clinton*, though of course not centrally concerned with Dworkin's intervention in the Clinton-Lewinsky scandal and its aftermath, is critical of that intervention.³

Professor Dworkin has now responded with a highly critical “review” (it is not really a review, hence the scare quotes) of both books,⁴ garnished with two postings on the Internet. One of these postings, entitled “The Mistakes Were Posner's, Not the Scholars',” responds to my criticisms in *An Affair of State* of the interventions of Dworkin and other “public intellectuals” in the impeachment controversy.⁵ The other, entitled “Posner's

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¹ See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* (1986); Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353 (1997) [hereinafter Dworkin, *Praise*].

² See RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999) [hereinafter POSNER, *PROBLEMATICS*]. This book is based in part on the 1997 Oliver Wendell Holmes Lectures, which were published in the *Harvard Law Review*. See Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998) [hereinafter Posner, *Holmes Lectures*].

³ See RICHARD A. POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON* (1999) [hereinafter POSNER, *AFFAIR OF STATE*].

⁴ Ronald Dworkin, *Philosophy & Monica Lewinsky*, N.Y. REV. OF BOOKS, March 9, 2000, at 48 [hereinafter Dworkin, *Philosophy*].

⁵ See Ronald Dworkin, *The Mistakes Were Posner's, Not the Scholars'* (visited February 26, 2000) <<http://www.nybooks.com/nyrev>> [hereinafter Dworkin, *Mistakes*]. The date of my visit is important to note, because the contents of an Internet posting can be changed at any time without indication that a change has been made.

Charges: What I Actually Said,” responds to what Dworkin claims are mischaracterizations of his views in *Problematics*.⁶ My response to Dworkin’s review provoked a long reply by him.⁷ That makes four pieces by him criticizing my two books, and I reply to all four here. I have tried to make my reply as self-contained as possible, at the risk of boring those who are thoroughly familiar both with my two books and with my long series of exchanges with Dworkin.

Our disagreements may seem parochial, of interest to the two of us but to few others. But I think they hold a broader interest, not only because of the political and intellectual significance of the Clinton impeachment, and of the issue of pragmatism versus moral philosophy as guides to legal decisionmaking, but also because of what our spats reveal about the level of scholarship in unfiltered media, such as general-interest magazines and the Internet, to which prominent “public intellectuals” such as Dworkin are increasingly resorting for the airing of their views. “Dworkin’s relentless ‘spin’ and partisanship” and his “reluctance . . . to make and confront the best arguments against [his] own views”⁸ have not been confined to the unfiltered media, but these characteristics of his writing have rarely been so conspicuous as in the pieces to which I shall be responding.

I. “PHILOSOPHY & LEWINSKY,” “RONALD DWORKIN REPLIES,” AND “THE MISTAKES WERE POSNER’S”

Given the emphasis in his published work on the controversial claim that law should be reconceived as a branch of moral philosophy, one might have expected Dworkin to devote the bulk of his review of my two books to my extended criticisms of that claim. Instead, it is the Clinton book that he places front and center, and the Clinton book that he attacks in a manner that I shall try to show is irresponsible. The recklessness of his attack may be a reaction to the criticisms that I leveled at his participation in the Clinton imbroglio,⁹ so let me begin with them.

I noted first of all that Dworkin had been one of the signers of a full-page advertisement in the *New York Times* urging that President Clinton not be impeached.¹⁰ The advertisement described impeachment of the Presi-

⁶ See Ronald Dworkin, *Posner’s Charges: What I Actually Said* <<http://www.nyu.edu/gsas/dept/philo/faculty/dworkin>> [hereinafter Dworkin, *Posner’s Charges*]. I have not visited this website; Professor Dworkin faxed me a copy of this posting on February 22, 2000, and if he has made any subsequent changes in the posting, I am not aware of them.

⁷ See “*An Affair of State*”: *An Exchange*, N.Y. REV. OF BOOKS, April 27, 2000, at 60. Dworkin’s response, published in the same issue, will be referred to hereinafter as *Dworkin Replies*. A revised version of my half of this exchange has been incorporated into this Article.

⁸ Maimon Schwarzschild, Book Review, 108 ETHICS 597, 599 (1998) (reviewing RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE CONSTITUTION* (1996)).

⁹ See POSNER, *AFFAIR OF STATE*, *supra* note 3, at 233-41.

¹⁰ See Floyd Abrams, et al., *An Appeal to the U.S. Congress and the Public*, N.Y. TIMES, Oct. 7, 1998, at A21 [hereinafter *An Appeal*].

dent as a “constitutional nuclear weapon” that “should not be used unless it is absolutely necessary to save the Constitution from an even graver injury.” I said that this was fair enough, but I asked whether the impeachment of Nixon would have been warranted by this high standard. (That Nixon committed impeachable offenses was a premise of Clinton’s defenders.) The signers of the advertisement thought so, because Nixon “had unconstitutionally used the pretext of national security to try to cover up criminal acts against political opponents.” Clinton, in contrast, had “lied in order to hide private consensual sexual acts.” I pointed out that Clinton had lied under oath and engaged in related acts of obstruction of justice; that these actions were in violation of his constitutional duty to take care that the laws be faithfully executed; and that once Nixon’s wrongdoing was exposed and his associates packed off to jail, it was no longer necessary to remove Nixon (who, like Clinton, had two years of his second term left) in order to save the Constitution. Nixon was forced out of office because people were outraged by his conduct (and he had not been very popular to begin with, and the economy was in trouble), not because he posed any further danger to constitutional government.

The *Times* advertisement went on to argue that the nation could not afford to allow “the American presidency to twist in the wind, injured and humiliated.”¹¹ Yet it recommended that Clinton be censured by Congress “for his actions,” and it remarked approvingly on his having “now apologized on several occasions.”¹² But apologized for what? Not for obstructing justice. And so for what “actions” would Congress be censuring him? With Clinton adamantly against admitting to any wrongdoing beyond “inappropriate” sexual contact and misleading people—and these were implicitly *gullible* people who didn’t know him well enough to disbelieve his denials—Congress would have had either to conduct an investigation, to accept the Starr Report in toto, or to censure Clinton for actions not grave enough to warrant censure. An apology as grudging as the one Clinton was willing to make could have been extracted from Nixon, who was left twisting in the wind for a year as the impeachment inquiry proceeded.

The *Times* advertisement said that censure would be “a historic act of punishment.”¹³ If so, Clinton would be injured and humiliated, which earlier the ad said must not be allowed. So here was another contradiction, and another mistake: censure of President Clinton would not have been an historic act of punishment—Andrew Jackson had been censured by Congress as well, and yet the censure was rescinded a few years later, when his party took control of Congress, and was soon forgotten. The *Times* advertisement did not mention the possibility that legislative censure of the President would be a bill of attainder, and therefore unconstitutional.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

After the House of Representatives impeached Clinton, Dworkin published a short article with the alarming title "A Kind of Coup."¹⁴ In it, he said, "We must cultivate a long memory." He meant that we must be sure to remember in the election year 2000 the awful thing the House had done, at which time

we must encourage and support opponents who denounce them [the Congressmen who voted to impeach the President] for what they have done, in any way we can, including financially. The zealots will have stained the Constitution [if they succeed in forcing Clinton from office], and we must do everything in our power to make the shame theirs and not the nation's.¹⁵

In support of this flamboyant conclusion, Dworkin argued that the impeachment showed that "[a] partisan group in the House, on a party-line vote, can annihilate the separation of powers."¹⁶ But the power to impeach, a power that can indeed be wielded by the party that controls the House, is part of the separation (or, more precisely, the balance) of powers ordained by the Constitution. Dworkin failed to note that a partisan group, namely the House Democrats, could force the impeachment decision to be made on a party-line basis simply by deciding to vote against impeachment en bloc regardless of the merits.

Dworkin also said that the House had ignored "the most fundamental provisions of due process and fair procedure,"¹⁷ but he did not explain what additional process the House could have provided that would have altered the outcome without unduly protracting the impeachment inquiry, something the Democrats claimed not to want. He warned that an impeachment trial in the Senate "would frighten markets."¹⁸ It was surprising to see so well known an egalitarian liberal worrying about stock market fluctuations and defending, as he also did in the article, the cruise-missile attack on Iraq without so much as alluding to the possibility that the timing might have been influenced by the President's desperate desire to head off impeachment.¹⁹

Recurring to the theme of the *Times* advertisement, Dworkin argued that because an impeachment trial "is a seismic shock to the separation of powers," it must be reserved for cases in which "there is a constitutional or public danger in leaving a President in office."²⁰ This principle, consis-

¹⁴ Ronald Dworkin, *A Kind of Coup*, N.Y. REV. OF BOOKS, Jan. 14, 1999, at 61 [hereinafter Dworkin, *A Kind of Coup*].

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See Dworkin, *A Kind of Coup*, *supra* note 14, at 61. Dworkin's anxiety about the markets was needless, for on the day on which the effort to finesse the trial collapsed (January 6, 1999), the stock market reached its all-time high. It remained at or near that level throughout the trial.

²⁰ *Id.*

tently applied, would have let Nixon off the hook, since the exposure of his criminal activities and the prosecution of his principal henchmen eliminated any danger that he would continue these activities in the rump of his term. Dworkin added that the place to deal with Clinton's crimes is in a regular court of law after Clinton leaves office, but he did not discuss the feasibility of such a prosecution or the cloud that the pardon power places over it.

Dworkin made the familiar concession that a President who committed murder could not be allowed to remain in office, but added that "a congressman who thinks that lying to hide a sexual embarrassment, even under oath, is on the same moral scale as murder—that it shows comparable wickedness or depravity—has no moral capacity himself."²¹ No one, however, had ever argued that the President's crimes were as serious as murder. The fact that murder would be sufficient grounds for impeachment and conviction does not imply that no lesser crime would be. I asked in *An Affair of State* whether Dworkin believed that a President who raped women or molested children should be permitted to remain in office.²² If not, how could he rule out obstruction of justice as a possible ground for removal without examining and assessing the full extent of Clinton's criminal conduct, something Dworkin has not done?

Dworkin called the impeachment of Clinton a "kind of coup" because the conviction of the President would remove from office "the only official in the nation who has been elected by all the people."²³ That was an illuminating error, as well as a good illustration of the hyperbole that permeated the public debate over the impeachment.²⁴ The Vice President is also elected by all the people. And this means that a President who is removed from office is succeeded not by any of the putschists, but by a nationally elected member of his own party, indeed, his designated (and in this case handpicked) successor, his ostentatiously loyal paladin. Dworkin's point would have greater force if the office of the Vice President were vacant (in which event the Republican Speaker of the House would have become President if Clinton had been removed from office), if the Vice President had been appointed rather than elected (like Vice Presidents Ford and Rockefeller), or if the Vice President belonged to a different faction of the Democratic Party or, as is not impossible, belonged to a different party.²⁵

²¹ *Id.*

²² See POSNER, *AFFAIR OF STATE*, *supra* note 3, at 238.

²³ Dworkin, *A Kind of Coup*, *supra* note 14, at 61.

²⁴ There is further hyperbole in the expression "elected by all the people." President Clinton was elected by a minority of the minority of American adults who bothered to vote in the two elections in which he ran for President. Of course one knows what Dworkin means. But one might have expected more precision and less polemic from a legal academic.

²⁵ Andrew Johnson was a Democrat, running with Republican Abraham Lincoln in 1864 on the "Unionist" ticket.

Dworkin returned to the fray after the President's acquittal, with another short article.²⁶ In it, he rejected the House managers' argument that the similarity in penalties under many statutes and sentencing guidelines justified equating perjury, which is not mentioned in the Constitution, with bribery, which is mentioned as one of the grounds for impeachment.²⁷ In Dworkin's view, the Constitution makes "bribery" an explicit ground for impeachment, because "a bribe [unlike Clinton's allegedly perjurious conduct] induces an official to act against the national interest,"²⁸ but actually this depends on whether the bribe is to do an official or a purely private act. He said that Clinton "can still be indicted and prosecuted when he leaves office," but again ignored the significance of the presidential pardon power.²⁹ Dworkin also said that "Starr's behavior in this case would presumably have led to charges being dismissed in an ordinary criminal case," which is wrong,³⁰ and that Judge Susan Webber Wright "had ruled the [President's] deposition [in the Paula Jones case] immaterial," which is also wrong.³¹

Summarizing my criticisms of Dworkin and other academic lawyers and "public intellectuals" who had weighed in on the Clinton imbroglio, I expressed regret in *An Affair of State* that academics, who should be models of sober, disinterested judgment, had allowed themselves to be whipped into a frenzy of partisanship. I also expressed surprise that moral and legal theorists who are constantly urging the injection of this or that moral principle into our public policy, and who think there is too much pragmatism and too little moral principle in our law, had nothing to say about the lack of moral principle demonstrated by President Clinton in his struggle to escape from the legal flypaper on which he had landed. I noted that Dworkin, who is just such a moral and legal theorist as I had described—whose academic writings are all about principle and integrity—limited himself, in a January 14, 1999 article about Clinton's conduct, to commenting that the President was guilty of "lying to hide a sexual embarrassment."³² That there was also subornation of perjury and witness tampering, and that much of the lying was under oath and continued after the sexual embarrassment

²⁶ Ronald Dworkin, *The Wounded Constitution*, N.Y. REV. OF BOOKS, March 18, 1999, at 8 [hereinafter Dworkin, *Wounded Constitution*].

²⁷ See U.S. CONST., art. 2, § 4 ("The President, Vice President and all civil officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.")

²⁸ Dworkin, *Wounded Constitution*, *supra* note 26, at 8-9.

²⁹ *Id.* at 9. Whether the President can pardon himself has never been determined, but I argue in *An Affair of State* that he probably can. See POSNER, *AFFAIR OF STATE*, *supra* note 3, at 107-08.

³⁰ Dworkin, *Wounded Constitution*, *supra* note 26, at 9. I discuss this point at length; see POSNER, *AFFAIR OF STATE*, *supra* note 3, at 59-94.

³¹ Dworkin, *Wounded Constitution*, *supra* note 26, at 9. See POSNER, *AFFAIR OF STATE*, *supra* note 3, at 50-51.

³² Dworkin, *A Kind of Coup*, *supra* note 14, at 61 (quoted in POSNER, *AFFAIR OF STATE*, *supra* note 3, at 237).

could no longer be concealed, went unmentioned. Clinton announced the affair with Lewinsky to the nation on August 17, 1998; he continued lying, both about the affair (not denying that it had taken place, but denying that he had fondled Lewinsky) and about his efforts to conceal it, for months afterward. He never retracted the lies.

It was surprising to find House Democrats more forthright about Clinton's misconduct than leading academics such as Ronald Dworkin. The censure resolution that they introduced in the House Judiciary Committee as an alternative to impeachment acknowledged that the President had "egregiously failed in th[e] obligation" to "set an example of high moral standards and conduct himself in a manner that fosters respect for the truth"; had "violated the trust of the American people, lessened their esteem for the office of President, and dishonored the office which they ha[d] entrusted to him"; had "made false statements concerning his reprehensible conduct with a subordinate"; and had taken "steps to delay discovery of the truth."³³ No similar acknowledgment has ever been forthcoming from Professor Dworkin.

One might have thought that eminent public intellectuals such as Dworkin, especially those who are law professors, would have recognized the complexity of the issues raised by the President's conduct and by the investigation and eventual impeachment and trial to which it led, and would have sought to exert a calming influence on the public debate. One might have expected them to avoid whitewashing *or* demonizing either the President or the investigators, to forswear exaggeration and bombast, to maintain detachment, and to expose shabby and stupid arguments no matter which side made them. One might have expected them to take pride in being independent thinkers, in being above the fray, and in lacking party identification. One might have expected discretion and reserve; one got instead a rage for irresponsible engagement.

These criticisms of Dworkin in *An Affair of State* provide the background to his attack on the book, which accuses me among other things of a breach of judicial ethics in having commented publicly on an "impending" case, namely a possible prosecution of President Clinton for perjury and related offenses growing out of his affair with Monica Lewinsky and the ensuing investigation.³⁴ But before taking up these and other charges, I should note Dworkin's effort, in the Internet posting entitled "The Mistakes Were Posner's, Not the Scholars'," to rebut the criticisms of him made in *An Affair of State*. "Mistakes" replies to only a few of the criticisms and to none of them persuasively.

To my criticism that impeachment is a component of the separation of powers, Dworkin ripostes that I myself acknowledged in my book that a practice of impeachment on purely political grounds would push the na-

³³ H.R. Rep. No. 105-830, at 135 (1998).

³⁴ See Dworkin, *Philosophy*, *supra* note 4, at 49.

tion toward a parliamentary form of government, which is one of concentrated rather than separated powers. He ignores the difference between impeachment on purely political grounds and impeachment by a party-line vote. As I have noted already,³⁵ the vote of a House controlled by one party to impeach a President from the other party on *nonpolitical* grounds might be made along party lines simply because all the members of the President's party had decided *for purely political reasons* to vote against impeachment.

Dworkin considers my correction of his oversight to mention that the Vice President is an elected official "pedantic," since the Vice President is not elected separately and has little power, and people are not indifferent to whether the person they elected as President or the person they elected as Vice President becomes President.³⁶ All this is true. But to make the analogy of impeachment to a *coup d'état* more plausible, Dworkin had depicted the Vice President as a nonelected official, since it is the rare coup that installs the duly elected successor to the leader deposed in the coup.

Dworkin asserts without elaboration that "congressional censure is not a bill of attainder if Congress imposes no fine or other punishment beyond a statement of its opinion."³⁷ His only support for this flat statement is my description of the question as an open one.³⁸ Incidentally, his support for censure appears to have been opportunistic, an attempt to ward off a greater evil with a lesser one. For like his suggestion that a court of law is the proper forum for evaluating the President's conduct, he has not repeated his proposal of censure since the President's acquittal by the Senate.

He devotes the largest amount of space in "Mistakes" to the question whether prosecutorial leaks of matters before a grand jury might prevent a person indicted by the grand jury from being convicted.³⁹ He seems to acknowledge that the only possible basis for such a result would be if the leaks made it impossible to impanel an impartial trial jury. He overlooks the fundamental point that when a person commits perjury in testifying before the grand jury itself, the secrecy of the grand jury proceedings is necessarily compromised. The transcript of the perjurer's testimony before the grand jury will be the principal evidence at his trial, and, with immaterial exceptions, trials are public.

Dworkin must subscribe to the view that a good offense is the best defense, and so I return to his "review" of my books, and to his claim, made there and in his exchange with me in the *New York Review of Books*, that in writing *An Affair of State*, I violated judicial ethics.⁴⁰ Dworkin is correct

³⁵ See *supra* text following note 16.

³⁶ Dworkin, *Mistakes*, *supra* note 5.

³⁷ *Id.*

³⁸ *Id.* (citing POSNER, *AFFAIR OF STATE*, *supra* note 3, at 191-93).

³⁹ *Id.*

⁴⁰ See Dworkin, *Dworkin Replies*, *supra* note 7, at 49.

that a judge is not supposed to comment publicly on an “impending” case as well as a “pending” one, though he is incorrect to accuse me of having “misquoted” the rule that forbids this, since I did not quote it.⁴¹ But the dictionary defines “impending” as “about to happen” or “imminent.”⁴² A prosecution of President Clinton, while conceivable as a theoretical possibility, is not imminent and in fact will almost certainly never happen, despite the recent rumblings in the press, and would in any event not be reviewable in my court.⁴³ Alluding to the remote possibility that Clinton might some day be prosecuted, I said that should this happen, his guilt or innocence would be decided on the basis of the evidence presented at his trial, not the evidence compiled by the Independent Counsel and discussed in my book, and therefore “nothing in the book should be taken to pre-judge any future criminal or civil proceeding arising out of the matters discussed in it.”⁴⁴

If Dworkin wishes to call me “injudicious” in writing about a controversial episode so soon after its conclusion, that is a matter of opinion, to which my only reply is that I had hoped that my treatment of the controversy was sufficiently judicious to deflect such a criticism. But to suggest that I am unethical exceeds the bounds of fair comment. Dworkin himself asserts that my motive in writing the book was not political, but academic. The book was published by an academic press and is continuous with my academic writings. Judges, I need hardly add, are permitted by the very Code he quotes against me to write academic books and articles. The list of academic writings by judges is long and honorable and includes a book by Chief Justice Rehnquist—on impeachment, including presidential impeachment. And unlike all other American judges, the Chief Justice of the

⁴¹ See Dworkin, *Dworkin Replies*, *supra* note 7, at 62.

⁴² That is the definition in *Webster's Third International Dictionary*. The difference between “impending” and “imminent,” as is apparent from Dworkin’s discussion of other dictionaries’ definitions of “impending,” see Dworkin, *Dworkin Replies*, *supra* note 7, at 62 n.1), is not proximity in time, but that the first has an overtone of menace that the second lacks. I am happy to accept the *Oxford English Dictionary* as “authoritative,” though it is, of course, authoritative for English rather than American usage. It defines “impending” as “about to fall or happen; ‘hanging over one’s head’; imminent; near at hand.” When I wrote *An Affair of State*, the prosecution of President Clinton was not near at hand; it still isn’t. Dworkin cites the *Merriam-Webster Dictionary* as distinguishing “impending” from “imminent”; my edition, the *Merriam-Webster's Collegiate Dictionary*, does not define “impending” at all. Dworkin says that the *American Heritage Dictionary* gives as one meaning of “impending” “to menace,” and this is correct, but he neglects to add that the *first* definition it gives is “to be about to take place.”

⁴³ Recall that when President Clinton was impeached, Dworkin regarded the prospect that he might be prosecuted in the ordinary way with equanimity, arguing that a regular criminal court was the proper forum for appraising the charges against the President. Now that Clinton has been acquitted by the Senate, Dworkin expresses horror at the prospect that he might be prosecuted in the ordinary way—while at the same time comparing the President to “a suspected gangster” and implicitly denying the existence of any exculpatory evidence that the Starr Report might have overlooked. See Dworkin, *Dworkin Replies*, *supra* note 7, at 62 and n.4.

⁴⁴ POSNER, *AFFAIR OF STATE*, *supra* note 3, at 7 n.13.

United States, as all the world now knows, has an official role in Presidential impeachments.

It is ironic that Dworkin should invoke a speech-restrictive rule of judicial conduct (the rule against a judge's commenting publicly about a pending or impending case) against a critic of his. He knows that violations of the Code of Conduct for United States Judges are punishable by official reprimand and worse, and therefore that accusing a judge of violating the ethical limits on public comment is likely to discourage judicial free speech. He plumes himself on his devotion to the free-speech clause of the First Amendment, which he has interpreted so broadly as to have incurred the wrath of feminist critics of pornography. It is surprising that he of all people would distort the literal meaning of "impending" out of shape in order to prevent judges from writing on contemporaneous public affairs, no matter how remote from their judicial responsibilities they might be, and that he would offer no more explanation than the conclusion that "the First Amendment is not in point."⁴⁵

Another ethical issue lurks about the review—whether a journal should commission a book review by a person who is a target of criticism in the book (in this case both books) that he or she is asked to review. I have for many years now in books and articles been challenging Dworkin's pretensions as a constitutional scholar and public intellectual, though I have been respectful of his contributions to jurisprudence. He cannot help regarding me as an intellectual enemy and treating me accordingly. Most journals don't give books to the authors' enemies to review,⁴⁶ especially if the "enemy" is a principal target of criticism in the very book that he is being asked to review. If scrupulous, a person asked to review an enemy's book turns down the invitation or, at the very least, is "up front" about his relationship with the author. Dworkin's review acknowledges that *Problematics* criticizes him,⁴⁷ but it does so in a flippant way that conceals the twenty years of mutual intellectual enmity, punctuated by increasingly acrimonious exchanges, that has defined our relationship. The review does not acknowledge that, as we have seen, Dworkin is pointedly criticized in *An Affair of State* as well, the book of mine at which he aims his sharpest barbs. By acknowledging only the criticisms of him in *Problematics*, the review allows readers to infer that *An Affair of State* does not criticize Dworkin at all, perhaps doesn't even mention him, and this enables him to pose as a disinterested critic of the book that he savages.

⁴⁵ Dworkin, *Dworkin Replies*, *supra* note 7, at 62 n.6. For a contrasting view by a constitutional scholar on the bearing of the First Amendment on judicial speech, see Erwin Chemerinsky, *Is It the Siren's Call? Judges and Free Speech While Cases Are Pending*, 28 LOY. L.A. L. REV. 831 (1995).

⁴⁶ Or, for that matter, their friends. The *New York Times Book Review*, for example, asks prospective reviewers whether they are friends or enemies of the author of the book to be reviewed.

⁴⁷ See Dworkin, *Philosophy*, *supra* note 4, at 51 n.20.

I am not trying to silence a critic and thus merely turn the tables on Dworkin. He has every right to criticize me as vehemently as he wants. The question is whether he should do so in the guise of a book review. Readers bring different expectations to a book review from those they bring to a critical essay. They assume that the reviewer is neither the close friend nor the archenemy of the author. Readers are deceived when the review form is used to disguise academic warfare. Dworkin's previous attack essays in the *New York Review of Books*, such as his essay on Robert Bork,⁴⁸ to which I will return, at least did not parade as book reviews.

Dworkin's review is pervasively inaccurate and misleading, and his reply compounds his errors. Some of them, such as the confusion of a mediator with an arbitrator (very different animals in the law), may be a product merely of carelessness and haste. Others betray a lack of familiarity with the voluminous record compiled by the Independent Counsel, which Dworkin does not claim to have read, and with the intricacies of federal criminal law and procedure; he has no experience in the administration of criminal justice. Other errors in the review are perhaps best regarded as simple exaggerations; one example is his statement that the Whitewater investigation, which led to several convictions, produced "no results."⁴⁹

But Dworkin is too smart to make as many false and misleading statements as he does in this review. One is reminded of his attack on Robert Bork when Bork was nominated for the Supreme Court,⁵⁰ an attack Dworkin thought well enough of to republish many years after the threat of Bork's becoming a Supreme Court Justice had passed.⁵¹ One can only speculate on why he singled out *An Affair of State* for similar treatment. Despite appearances, we have no *fundamental* disagreement over the Clinton scandal/impeachment saga. The picture of Clinton that emerges from Dworkin's review is not a flattering one, while the picture of Clinton's tormenters that emerges from my book is not a flattering one either. And while Dworkin is emphatic that Clinton should not have been impeached and convicted, my book registers no disagreement with that conclusion, only with the arguments that Dworkin makes en route to it.

⁴⁸ See Ronald Dworkin, *The Bork Nomination*, N.Y. REV. OF BOOKS, Aug. 13, 1987, at 3.

⁴⁹ See Dworkin, *Philosophy*, *supra* note 4, at 50.

⁵⁰ Ronald Dworkin, *The Bork Nomination*, N.Y. REV. OF BOOKS, Aug. 13, 1987, at 3.

⁵¹ See Ronald Dworkin, *Bork: The Senate's Responsibility*, in FREEDOM'S LAW, *supra* note 8, 265. Dworkin accused Bork of having "no constitutional philosophy at all," *id.* at 267, well knowing that Bork had a fully articulated philosophy, but one antipathetic to Dworkin's. Dworkin said that "Bork's views do not lie within the scope of the longstanding debate between liberals and conservatives about the proper role of the Supreme Court. Bork is a constitutional radical who rejects a requirement of the rule of law that all sides in that debate had previously accepted." *Id.* at 265. Bork wishes to replace the constitutional tradition with "some radical political vision that legal argument can never touch." *Id.* "His principles adjust themselves to the prejudices of the right." *Id.* at 275. Dworkin ended the piece with the following rhetorical question: "Will the Senate allow the Supreme Court to become the fortress of a reactionary antilegal ideology with so meager and shabby an intellectual base?" *Id.*

By now the reader will be impatient for my bill of particulars, and here it is:

1. The review attributes to me the view that “mothers should be permitted to auction off their newborn babies.”⁵² In support of this attribution—the polemical function of which, as a lead-in to an attack on a book on Presidential impeachment, is apparent—the review cites my textbook discussion of adoption.⁵³ I point out there the adverse economic consequences of the present system of regulated adoption, under which a pregnant woman is forbidden to accept a fee for giving up her parental rights to adoptive parents. I do not argue that the economic consequences of this prohibition—though they are indeed serious and adverse, just as with other forms of price control—outweigh whatever ethical or other objections might be raised to changing it. Such a judgment would be out of place in a book on the *economic* analysis of law. The furthest I have gone in the direction indicated by Dworkin’s characterization of my view is to suggest, as an experiment, that an adoption agency be permitted to pay a pregnant woman contemplating abortion to carry the child to term and give it up for adoption rather than aborting it.⁵⁴

His reply claims that I do reject the ethical objections to the sale of parental rights, for example, the objection that the rich would end up with all the babies. He is incorrect. To reject the ethical objection would be to say that it is not a good objection to the sale of parental rights that the rich would end up with all the babies. I have never said that. I have said only that the premise is incorrect as a matter of economics: the rich would *not* end up with all (or most) of the babies.⁵⁵

2. I have never taken the position that infanticide, Nazism, and the other enormities listed by Dworkin are not “immoral.”⁵⁶ That would be as absurd as it would be offensive. The argument of *The Problematics of Moral and Legal Theory* is that when we call practices “immoral,” we do so in reference to our own values. The people who make this argument, people like Richard Rorty and me, are not immoralists; we are pragmatists; we simply believe that there is no reliable *external* perspective from which to evaluate competing moralities, as Dworkin believes. Societies that practice infanticide do not regard it as immoral, and we civilized Americans cannot

⁵² See Dworkin, *Philosophy*, *supra* note 4, at 48.

⁵³ Dworkin, *Philosophy*, *supra* note 4, at 48, n.2. He cites the third edition, though the fifth was published two years ago. But there are no relevant changes. Compare RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 167-70 (5th ed. 1998), with *id.* at 139-43 (3d ed. 1986) (he incorrectly cites pp. 139-44).

⁵⁴ Elisabeth M. Landes and Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEG. STUD. 323 (1978).

⁵⁵ See POSNER, *supra* note 53, at 170.

⁵⁶ Dworkin, *Philosophy*, *supra* note 4, at 48 (quoting POSNER, *PROBLEMATICS*, *supra* note 2, at 21).

say they are “wrong” to do so unless we add that this assessment is by our own lights. Dworkin and I inhabit the same moral universe and hold the same moral views, except possibly about the ethical limits of polemic. Our disagreement is over the possibility of grounding our moral opinions in objective, universal truths. He believes in natural law; I do not. Ours is a philosophical disagreement, the sort of thing he discusses in the last part of his review.

3. Far from being “drenched in moral indignation,”⁵⁷ *An Affair of State* has struck the Clinton haters as tepid and equivocal. And while the book indeed “chastises academics and intellectuals who opposed impeachment,”⁵⁸ it also chastises the academics and intellectuals (such as William Bennett, Robert Bork, and David Frum) who supported impeachment.⁵⁹ The only two negative reviews of my book that I had seen before I read Dworkin’s review were written by rightwingers who consider me too easy on President Clinton and too hard on his tormenters.⁶⁰ Tell those reviewers that I am writing for my “conservative clique” and that I “back . . . the Republican leadership on several key issues,”⁶¹ and watch their jaws drop. Only toward the end of his review does Dworkin acknowledge that nowhere in the book do I suggest that President Clinton should in fact have been impeached or convicted.

4. I stand by the indented quotation on the first page of Dworkin’s review, the litany of the President’s misdeeds:

[Clinton] committed repeated and various felonious obstructions of justice over a period of almost a year, which he garnished with gaudy public and private lies, vicious slanders, tactical blunders, gross errors of judgment, hypocritical displays of contrition, affronts to conventional morality and parental authority, and desecrations of revered national symbols. And all this occurred against a background of persistent and troubling questions concerning the ethical tone of the Clinton Administration and Clinton’s personal and political ethics.⁶²

The passage is not a partisan summary.⁶³ It is also not my complete view of the President’s conduct. Dworkin cropped the passage by omitting its introductory words, “On the one hand,” and the sentence that follows and

⁵⁷ *Id.* at 48.

⁵⁸ *Id.*

⁵⁹ See POSNER, *AFFAIR OF STATE*, *supra* note 3, at 36, 200-07.

⁶⁰ David Tell, *Judging Clinton*, *WEEKLY STANDARD*, Sept. 20, 1999, at 34; Gary L. McDowell, *Lacking Conviction*, *TIMES LIT. SUPP.*, Nov. 19, 1999, at 28.

⁶¹ Dworkin, *Philosophy*, *supra* note 4, at 51.

⁶² POSNER, *AFFAIR OF STATE*, *supra* note 3, at 173 (quoted in Dworkin, *Philosophy*, *supra* note 4, at 48).

⁶³ To call it “extreme even by partisan standards,” as Dworkin does, see Dworkin, *Philosophy*, *supra* note 4, at 48 (emphasis added), will strike anyone who followed the controversy as absurdly hyperbolic.

qualifies the words he quoted: "On the other hand, Clinton acted under considerable provocation—perhaps provocation so considerable that few people in comparable circumstances would not succumb—in stepping over the line that separates the concealment of embarrassing private conduct from obstruction of legal justice."⁶⁴

It is inaccurate to say, as Dworkin does,⁶⁵ that my book hints at agreement with the charge that the President ordered the bombing of Iraq to divert attention from his own misconduct (the "Wag the Dog" charge). I said only that in the nature of things, such a charge can neither be proved nor disproved. The review fails to mention that I pointed out that the defense establishment thought the bombing justifiable; they had wanted to do it for a long time.⁶⁶ But in the past, the President had often rejected the recommendations of his military advisers. Dworkin says that the raid had been planned, and scheduled for the very day on which it took place, months before it occurred. So the Secretary of Defense said, and that's good enough for Dworkin. As a matter of fact, that is not what the Secretary of Defense said; at his joint news briefing with General Shelton, the Chairman of the Joint Chiefs of Staff, on December 16 (the transcript of which was published on-line by the Associated Press), he (and Shelton) said that the raid had been planned a month earlier, not months earlier, and neither of them suggested that it had been planned for the very day it took place. And Dworkin neglects to mention the most important point, which is that the raid could not be carried out until the President gave it the go-ahead, which he might not have done but for the impeachment crisis—though, to repeat, this is a matter of speculation.

My summation of Clinton's misdeeds contains the phrase "revered national symbols,"⁶⁷ by which I meant such symbols as the Presidency, the White House, and the Oval Office. Dworkin suggests that I meant by this term the "anterooms of the Oval Office."⁶⁸ The paragraph from which the quotation comes refutes any such absurd idea.⁶⁹ Not absurd, but still erroneous, is the impression the review creates that I consider defiling revered national symbols, such as the Oval Office itself, a proper ground for impeachment and removal from office. The chapter from which Dworkin is quoting points out that the nation is moving away from a concept of a "charismatic" Presidency—according to which symbolic affronts might be thought an appropriate basis for impeachment and removal from office⁷⁰—and I make no criticism of that movement.

⁶⁴ POSNER, *AFFAIR OF STATE*, *supra* note 3, at 174.

⁶⁵ See Dworkin, *Philosophy*, *supra* note 4, at 48 n.7.

⁶⁶ See POSNER, *AFFAIR OF STATE*, *supra* note 3, at 30.

⁶⁷ See *supra* text accompanying note 62.

⁶⁸ See Dworkin, *Philosophy*, *supra* note 4, at 48 n.6.

⁶⁹ See POSNER, *AFFAIR OF STATE*, *supra* note 3, at 157.

⁷⁰ See *id.* at 167-69.

I stand by my summation, but it does not give a complete view of my position on the scandal/impeachment saga. It would have been a service to readers (honest book reviewers try to give readers an accurate sense of the book) had Dworkin quoted the following passage as well:

One begins to see why the whole Clinton-Lewinsky-Starr-impeachment business is so baffling. Even after unsubstantiated conjectures (such as Starr's being obsessed with sex, or Clinton's having tried to get Lewinsky a job so that she wouldn't tell the truth in the Paula Jones case) are put to one side, there are two diametrically opposed narratives to choose between. In one, a reckless, lawless, immoral President commits a series of crimes in order to conceal a tawdry and shameful affair, crimes compounded by a campaign of public lying and slanders. A prosecutor could easily draw up a thirty-count indictment against the President. In the other narrative, the confluence of a stupid law (the independent counsel law), a marginal lawsuit begotten and nursed by political partisanship, a naive and imprudent judicial decision by the Supreme Court in that suit, and the irresistible human impulse to conceal one's sexual improprieties, allows a trivial sexual escapade (what Clinton and Lewinsky called "fooling around" or "messing around") to balloon into a grotesque and gratuitous constitutional drama. *The problem is that both narratives are correct.*⁷¹

5. Dworkin's quotation of my characterization of Clinton's health plan as "socialistic" is taken out of context,⁷² creating the impression that I am a partisan critic of the plan. I am nothing of the sort. The quotation is from a passage in which I am describing the view that libertarian conservatives hold of President Clinton and explaining why they are inclined to approve of Clinton's Presidency on balance, though with reservations about some of his proposals, such as the health-care plan, which obviously a libertarian conservative would describe as socialistic.

6. Dworkin is mistaken to doubt the materiality of the questions about Lewinsky that President Clinton was asked when he was deposed in the Paula Jones case. A deposition is a search for evidence that might be usable at trial. If the Jones case had been tried, and if at trial Clinton had denied ever having propositioned or had a sexual encounter with a subordinate, the transcript of *truthful* answers to the questions about Lewinsky at his deposition would have been usable on cross-examination to undermine his trial testimony and thus sway the jury against him. It is true that the judge presiding at a trial of Paula Jones's case *might* forbid Jones's lawyers to cross-examine the President about other sexual incidents. But then again, the judge might not forbid this. And even if she did forbid it, the President's own lawyers might on direct examination elicit a denial of any other sexual

⁷¹ POSNER, *AFFAIR OF STATE*, *supra* note 3, at 91-92 (emphasis added, footnote omitted).

⁷² Dworkin, *Philosophy*, *supra* note 4, at 48 (quoting POSNER, *AFFAIR OF STATE*, *supra* note 3, at 202).

incidents involving subordinates in order to bolster the credibility of his denial of Jones's charges. Against this possibility, Jones's lawyers were entitled to question him about such incidents at his deposition. No more is required to show the materiality of his untruthful answers.⁷³

Dworkin says that lying about an extramarital affair would "not become material just because [the liar] would rather have settled the case than risked his marriage by telling the truth."⁷⁴ This is true, but irrelevant, and not only because Clinton did not want to settle the case.⁷⁵ In addition, a lie that intentionally derails or delays a legal proceeding by sending the other participants on a wild-goose chase is an obstruction of justice even if it is not material to any issue in the case. Dworkin's depreciation of the gravity of the President's lies should be compared with the indignation he expressed during Clarence Thomas's confirmation hearings with regard to attempts to depreciate the gravity of Thomas's alleged perjury.⁷⁶

Dworkin says that the President's denials could not have derailed or delayed the Jones trial, "because her lawyers already knew the truth from Linda Tripp."⁷⁷ But the President and his defenders were calling Tripp and Lewinsky liars. Given those denials, the lawyers could not have invoked the Lewinsky affair in the Jones litigation without further investigation, which would have taken time.

The President's denial in his deposition in the Jones case of sexual relations with Lewinsky was not so serious as some of his other lies (which Dworkin does not discuss), but there is no doubt about its materiality. Otherwise, Judge Wright would have sustained his objection to being asked about them. To repeat: she might or might not have permitted Jones's lawyers to inquire at trial into Clinton's sexual relations with other subordinates, but the lawyers were entitled to depose him concerning the matter in order to be equipped in the event that the President, to make his denial of Jones's charges more emphatic, denied at trial that he had *ever* had improper relations with a subordinate.⁷⁸ If lies in depositions are privileged unless the prosecution can show that the deponent would definitely have

⁷³ See, for example, *United States v. Kross*, 14 F.3d 751, 755 (2d Cir. 1994), one of the cases cited by Dworkin. See Dworkin, *Philosophy*, *supra* note 4, at n.14. Although the cases formulate the test for materiality in slightly different ways, even the formulation in the only case he cites that found against the government on the issue of materiality is broad enough to encompass the President's false denial of sexual relations with Lewinsky. It is "whether a truthful statement might have assisted or influenced the tribunal in its inquiry." *United States v. Adams*, 870 F.2d 1140, 1147 (6th Cir. 1989).

⁷⁴ Dworkin, *Philosophy*, *supra* note 4, at 49.

⁷⁵ Up until the scandal broke, Clinton had refused to settle. Settling would have made it unnecessary to lie, but Clinton wanted the case dismissed and no doubt thought that telling the truth would reduce the likelihood of a dismissal.

⁷⁶ See Ronald Dworkin, *Anita Hill and Clarence Thomas*, in *FREEDOM'S LAW*, *supra* note 8, 321, 327-28.

⁷⁷ Dworkin, *Dworkin Replies*, *supra* note 7, at 64.

⁷⁸ Dworkin continues to ignore this point. See *id.* at 64 n.13.

been asked the same questions at trial, the utility of depositions will be greatly impaired.

Dworkin confuses the gravity of an offense with whether guilt of the offense is provable beyond a reasonable doubt. If a person is charged with two felonious acts, and the first is less serious than the second, it doesn't follow that the prosecution would have more difficulty proving his guilt of the first one beyond a reasonable doubt.

7. Clinton gave Lewinsky more gifts on the same day on which he is alleged to have asked his secretary Betty Currie to recover all his gifts to Lewinsky. For Dworkin this fact "alone" is enough to refute the allegation.⁷⁹ But the President gave Lewinsky the additional gifts in the morning and Currie retrieved them in the afternoon, and, as I explained,⁸⁰ he may have wanted to keep Lewinsky "on board" by a demonstration of his generosity and good will toward her and only later that day thought better of his impulse and instructed Currie to retrieve, presumably only temporarily, all the gifts that he had given Lewinsky on that day and earlier.

8. The President's lie regarding Kathleen Willey was not, as Dworkin suggests, denying that he had assaulted her, an unsubstantiated charge. The lie was denying that there had been an erotic encounter between them at all. The only thing that remains in doubt is who initiated it. The encounter, whoever initiated it—a sexual encounter with a subordinate—was material for the same reason that the questions about Lewinsky that Clinton was asked in the Paula Jones case were material. Had the Jones case gone to trial and Clinton denied any hanky-panky with subordinates, a truthful answer to the deposition question about Willey could have been used on cross-examination to challenge his credibility and so make it likelier that a jury would believe Paula Jones's version of what happened between her and Clinton in the Excelsior Hotel back in 1991.

9. Dworkin fails to note the many instances in which *An Affair of State* argues that the record compiled by the Independent Counsel falls short of proving the President guilty of criminal activity (such as the Jordan job search for Lewinsky),⁸¹ though many critics of the President believe otherwise and fault me for disagreeing with them. By omitting these instances Dworkin makes my treatment of the evidence look partisan and one-sided, while by failing to discuss the full range of perjurious and otherwise obstructive criminal activity for which there *is* considerable evidence in the Starr Report and elsewhere, Dworkin depreciates the scope and gravity of

⁷⁹ See Dworkin, *Philosophy*, *supra* note 4, at 50.

⁸⁰ See POSNER, *AFFAIR OF STATE*, *supra* note 3, at 33-34.

⁸¹ See *id.* at 39-40.

the President's misconduct and thereby sets the stage for asserting the moral equivalence of that misconduct to the pratfalls and excesses of the President's attackers. (He equivocates by calling their misconduct a "moral crime."⁸²) He implies, for example, that the only possible lie the President told the grand jury concerned his sexual relations with Lewinsky; he ignores Clinton's many other lies to the grand jury, which I list in my book.⁸³ He goes so far in his campaign of apologetics for the President as to express doubt that asking someone to lie under oath is a crime unless coercion or deception is used. Asking someone to lie under oath *is* the crime of subornation of perjury, which, as *An Affair of State* explains,⁸⁴ is one of the crimes embraced by the umbrella term "obstruction of justice." The review doesn't mention the statute that criminalizes subornation of perjury in federal judicial proceedings.⁸⁵

Dworkin's handling of this question in his reply to my letter to the *New York Review of Books* is slippery. He says that his review "discussed the question whether Clinton was guilty of suborning perjury under section 1622,"⁸⁶ the federal suborning-perjury statute, but there is no reference to section 1622 in the review. Instead there is the statement, which only ignorance of the existence of that statute could explain, that "it is not clear that Clinton would have been guilty of a crime even if Lewinsky's testimony was material and he had explicitly asked her to lie."⁸⁷ In the posited circumstances he would clearly be guilty of a violation of section 1622.

10. Dworkin refers to an open letter in which several hundred law professors asked Congress not to impeach the President. He dates the letter to October 1998⁸⁸ and says it "expressed no opinion about perjury."⁸⁹ Indeed, it did not—that was my point. The letter evades the plain fact that by November 1998, it was no longer possible for anyone informed about the matter to sit on the fence, saying as the letter does, "If the President committed perjury regarding his sexual conduct, this perjury involved no exer-

⁸² Dworkin, *Philosophy*, *supra* note 4, at 50.

⁸³ See POSNER, *AFFAIR OF STATE*, *supra* note 3, at 46-47.

⁸⁴ See *id.* at 36-55.

⁸⁵ 18 U.S.C. § 1622 (cited in POSNER, *AFFAIR OF STATE*, *supra* note 3, at 43 n.46). Dworkin's review argues that another statute, 18 U.S.C. § 1512, does not forbid subornation of perjury. That is irrelevant, given the express subornation statute, § 1622. It is also wrong, because § 1512, too, forbids suborning perjury. See 18 U.S.C. § 1512(b); *United States v. Morrison*, 98 F.3d 619, 629-630 (D.C. Cir. 1996); *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996). Some earlier cases hold the contrary, but they predate a 1988 amendment that dispelled any doubt on this score.

⁸⁶ Dworkin, *Dworkin Replies*, *supra* note 7, at 64.

⁸⁷ Dworkin, *Philosophy*, *supra* note 4, at 50.

⁸⁸ He must be referring to the November 6, 1998 letter that I discuss; see POSNER, *AFFAIR OF STATE*, *supra* note 3, at 241. He doesn't mention that he was one of the signers.

⁸⁹ Dworkin, *Philosophy*, *supra* note 4, at 51.

cise of Presidential power as such.”⁹⁰ There was no “if” about it to anyone who had followed the investigation carefully; and those who had not had no business signing a letter in their capacity as law professors, thus representing themselves to have a professionally responsible opinion.

There is much that I disagree with in the rest of Dworkin’s review as well, where he criticizes *The Problematics of Moral and Legal Theory* and then comes back to *An Affair of State* and whacks my view of the proper approach to deciding whether a President should be impeached.⁹¹ But what Dworkin says about these things are for the most part matters of fair comment. Anyone who cares to read *The Problematics of Moral and Legal Theory* will find in it my responses to Dworkin’s criticisms—for there is nothing of substance in the review about our philosophical disagreements that he has not published before and I have not replied to before. I shall merely record my incredulity at his claim that his brand of moral philosophy, what I call “academic moralism,” is of “growing importance . . . in American legal education,”⁹² and at his charge that I think philosophy has nothing to say about issues of fault, intent, causation, meaning, and responsibility in the law. He must know that I have used philosophy both in my academic writings and in my judicial opinions to illuminate those issues. But the branches of philosophy on which I have drawn are epistemology, philosophy of science, and philosophy of action, rather than normative moral or political philosophy, concerning which I indeed have profound reservations.

II. “POSNER’S CHARGES: WHAT I ACTUALLY SAID”

What does require further comment is this Internet posting, in which Dworkin quotes fifteen statements that I made about him in *Problematics* and argues that all of them misstate his position.⁹³ Let us see.

1. I am accurately quoted as attributing to Dworkin the position that his views concerning the rightness or wrongness of legal doctrines and decisions are generated not by his “personal ideology,” which is left-liberal, but by impartial reflection on legal principles.⁹⁴ He now claims to have “steadily insisted on the opposite.”⁹⁵ I am both surprised and gratified at his acknowledging that his legal views are indeed driven by his personal ideology rather than by neutral principles. The acknowledgment strikes at the

⁹⁰ POSNER, *AFFAIR OF STATE*, *supra* note 3, at 241 (quoting letter) (emphasis in original).

⁹¹ See Dworkin, *Philosophy*, *supra* note 4, at 52.

⁹² *Id.*

⁹³ He has taken me to task for not replying to the Internet posting in my letter to the *New York Review of Books*, and has expressed the “hope [that I] will find another occasion to do so.” Dworkin, *Dworkin Replies*, *supra* note 7, at 65).

⁹⁴ Dworkin, *Posner’s Charges*, *supra* note 6 (quoting POSNER, *PROBLEMATICS*, *supra* note 2, at 287).

⁹⁵ *Id.*

heart of his claim to be able to derive legal principles from moral philosophy. But the suggestion that he has *always* acknowledged the dependence of principles on politics is false. The quotations that he offers in support acknowledge something subtly but importantly different, that his legal opinions are influenced by his “convictions of political morality” and by “what [he] take[s] to be justice,” and that his is a “liberal view of the American Constitution.” Those don’t sound like synonyms for the left-liberal politics that one associates with the left wing of the Democratic Party or of the British Labour Party. Nowhere in Dworkin’s extensive *oeuvre*, so far as I am aware, does he suggest that his constitutional views are molded by his politics, as opposed to an egalitarian philosophy to which he claims any sound reasoner would adhere. He is famous for believing that even the most difficult legal cases have “right” answers, but how could they if legal views are legitimately shaped by political opinions? For that would mean that whether a decision on abortion, or the rights of criminal defendants, or euthanasia, or homosexual rights, or equality in the financing of public school education, or prayer in public schools was right or wrong would depend on the observer’s political stance.

Dworkin not infrequently mischaracterizes an opponent’s view and then attacks the mischaracterization. The position I ascribed to him was a denial not that his views are shaped by his ideas about justice or political morality but that they are shaped by politics in the much narrower, partisan sense that is on display when he writes about current political and legal controversies, such as the nomination of Bork or Thomas or the impeachment of Clinton.

2. I am quoted as saying that judges who hold a more modest conception of their function than Dworkin thinks they should are in his eyes the lawless ones; according to the view that I ascribe to Dworkin, Warren and Brennan are lawful judges, but not Scalia or Thomas. Dworkin says his view is the “exact contrary” of this; but that view, it turns out after he explains what it is, has nothing to do with lawless judges—has rather to do with theorists. It would be nonsense to call the formalists and pragmatists and other legal theorists who disagree with Dworkin “lawless,” and he does not do so and I didn’t say he did. The argument of his that I was describing is that in *his* theory of law a judge who does not deploy the principles that he believes should be used to resolve difficult cases, a judge who conceives of the judicial function more narrowly, an old-fashioned methodologically conservative judge, a “formalist,” is lawless. As I put it in an earlier book,

[S]uch is the malleability of “principles” and of the associated term “rights” that judges widely regarded as lawless become in Dworkin’s view paragons of lawfulness if the observer shares the judges’ political preferences, while conventionally lawful judges become exemplars of lawlessness because they disregard principles that, however political they may look, are actually part of

law. The timid judge, the judge who hesitates to innovate, the judge who thinks it the business of legislatures rather than of judges to legislate—to Dworkin *he* is the lawless judge.⁹⁶

This is the view I ascribe to Dworkin—not that he considers his *critics* lawless.

3. Dworkin denies that, as I claimed in *Problematics*, when he famously accused Bork of having no constitutional philosophy at all, what he meant was that Bork did not share Dworkin's philosophy of law.⁹⁷ Dworkin now says that what he meant was that Bork's "various statements about constitutional adjudication defy generality or abstraction, and are deeply inconsistent."⁹⁸ That of course is the common coin of debate among constitutional theorists—accusing an adversary of having a conception of constitutional law that is deficient in principle, ad hoc, inconsistent, "result oriented." Such charges have frequently been leveled against Dworkin, as against other constitutional theorists. They are not denials that the opponent *has* a theory. Bork is an originalist, and in a prefatory note to his republished attacks on Bork, Dworkin acknowledges that Bork has a constitutional philosophy,⁹⁹ only one that Dworkin opposes. But we recall that in the attack he launched against Bork between Bork's nomination and the confirmation hearings, Dworkin had described Bork as taking a "radical, antilegal position," one that sought to replace the constitutional tradition with "some radical political vision that legal argument can never touch." He had banished Bork from the debate.

4. I criticized Dworkin for suggesting that *Roe v. Wade* had "diminished the moral entitlement of the fetus by depriving it of its rights," whereas it seemed to me that the decision had left the *moral* issue exactly where it found it.¹⁰⁰ In the article I cited, he says that the Supreme Court in *Roe v. Wade* "adjudicated moral issues: the Court did not 'balance' moral costs, but rather, at least so far as was necessary to its decision, defined them"—and he makes clear that he shares the definition.¹⁰¹

5. I said that Dworkin conflated public opinion with moral opinion when he said that anyone who is convinced that slavery is wrong will think we've made moral progress because slavery was once widely practiced and

⁹⁶ RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 22 (1990).

⁹⁷ Dworkin, *Posner's Charges*, *supra* note 6 (quoting POSNER, *PROBLEMATICS*, *supra* note 2, at 116-17).

⁹⁸ *Id.*

⁹⁹ Dworkin, note 6 above, at 263.

¹⁰⁰ POSNER, *PROBLEMATICS*, *supra* note 2, at 136 (citing Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718, 1729 n.43 (1998)).

¹⁰¹ *Id.*

defended.¹⁰² I said that this style of argument would have enabled people in the 1950s to congratulate themselves on deprecating homosexuality, which had once (for example, in ancient Athens) been widely practiced and approved. He agrees.

6. He quotes me as saying that “over the course of his career, Dworkin has endorsed as the legally ‘right answer,’ not just *Brown* [v. *Board of Education*] without delay and racial quotas, but civil disobedience [and] nonprosecution of draft card burners.”¹⁰³ He neglects to note, however, that the language is not mine; I was quoting Duncan Kennedy. But Kennedy’s summary is correct, though not nuanced, and I have defended it against Dworkin’s criticisms of it elsewhere and need not repeat myself here.¹⁰⁴ The summary, incidentally, appears in a truncated form in Dworkin’s quotation. It is worth quoting in full, because it supports my point about the extent to which Dworkin’s politics have seeped into and shaped his conception of constitutional law:

Over the course of his career, Dworkin has endorsed as the legally “right answer” not just *Brown* without delay and racial quotas, but civil disobedience, nonprosecution of draft card burners, the explicit consideration of distributive consequences rather than reliance on efficiency, judicial review of apportionment decisions, extensive constitutional protection of criminals’ rights, the constitutional protection of the right of homosexuals to engage in legislatively prohibited practices, the right to produce and consume pornography, and abortion rights. Hercules [Dworkin’s model judge, who Dworkin claims decides cases on the basis of principle, not policy] is not just a liberal; he is a systematic defender of liberal judicial activism from *Brown* to the present. He is actually a left liberal, as close as you can get in terms of outcomes to a radical.¹⁰⁵

7. I teased Dworkin about his frequent statements that judges have no alternative but to confront philosophical issues—that they cannot avoid moral theory—by suggesting that we substitute “education” for “law” in these statements and thus say that teachers have no alternative but to confront issues of educational theory.¹⁰⁶ Dworkin acknowledges the possibility that “academic pedagogical theory is bad, and that [therefore] teachers

¹⁰² POSNER, *PROBLEMATICS*, *supra* note 2, at 24 n.26 (construing Ronald Dworkin, *Objectivity and Truth: You’d Better Believe It*, 25 PHIL. & PUB. AFF. 87, 120 (1996)).

¹⁰³ Dworkin, *Posner’s Charges*, *supra* note 6 (citing POSNER, *PROBLEMATICS*, *supra* note 2, at 76 n. 141).

¹⁰⁴ Richard A. Posner, *Reply to Critics of “The Problematics of Moral and Legal Theory”*, 111 HARV. L. REV. 1796, 1797-98 (1998).

¹⁰⁵ DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE)* 127-28 (1997) (footnotes, and paragraph break before “Hercules,” omitted). That closeness *commends* Dworkin to Kennedy, who says he would support Dworkin for the Supreme Court.

¹⁰⁶ POSNER, *PROBLEMATICS*, *supra* note 2, at 113 (citing Dworkin, *Praise*, *supra* note 1, at 375).

would do better to rely on their own experience and common sense.”¹⁰⁷ That was exactly my point about judges.

8. Dworkin takes issue with my humorous suggestion that he and his allies are “the Taliban of Western legal thought” because of his project of aligning law with morality. These words do not, however, appear in the book version of *Problematics*.¹⁰⁸ I deleted them when I came to write the book because they offended Dworkin, and so I am surprised to see him resuscitating them. Obviously, I did not intend them literally; nor have I ever attributed to Dworkin the view that *every* religious or moral obligation or responsibility should be enforced by law. I merely object to his project of making law a branch of applied moral philosophy.

9. I twitted Dworkin for confusing American Negro slavery, which was racial, with Greek slavery, which was not.¹⁰⁹ He says he knows this; yet it was immediately after referring to Greek slavery that he had remarked “the biological humanity of the races they enslaved”; he adds that Greek slavery *was* racial, after all, citing Aristotle’s statement in the *Politics* that “the slave has no deliberative faculty at all.”¹¹⁰ Dworkin misunderstands Aristotle’s conception of the slave.¹¹¹ Aristotle distinguishes between slaves by convention and slaves by nature. The first are people taken in war and enslaved; they might just be unlucky. The second are people of servile nature, natural slaves, and these are the ones who lack a deliberative faculty. But whether one is a natural slave is an individual matter, like whether one is handsome or has a good character; it is not a racial trait. It is not a matter of all Nubians, say, being natural slaves, and no Greeks.

10. I said that Dworkin continues to insist that cases in which facts or consequences matter to constitutional decisionmaking are rare.¹¹² He claims that no sane lawyer could believe such a thing—a surprising concession.¹¹³ He says that all he meant was that constitutional cases can rarely be resolved simply by pointing out a fact that one side to the controversy had failed to point out; but the quotation that he offers to support this characterization supports my characterization instead. It says nothing about an

¹⁰⁷ Dworkin, *Posner’s Charges*, *supra* note 6.

¹⁰⁸ The phrase appears in the article version of the Holmes Lectures. See Posner, *Holmes Lectures*, *supra* note 2, at 1695.

¹⁰⁹ See POSNER, *PROBLEMATICS*, *supra* note 2, at 19 (quoting Dworkin, *supra* note 101, at 121).

¹¹⁰ Dworkin, *Posner’s Charges*, *supra* note 6.

¹¹¹ On which see Aristotle, *Politics*, in *The Complete Works of Aristotle*, vol. 2, pp. 1986, 1989–1992 (Jonathan Barnes ed. 1984) (B. Jowett trans.) (p. 1253, col. b, l. 1, to p. 1255, col. b, l. 39, in the standard Greek translation of Aristotle’s works).

¹¹² See Posner, *Holmes Lectures*, *supra* note 2, at 1700 (citing Ronald Dworkin, *Reply*, 29 *Ariz. St. L. J.* 432, 433 (1977) [hereinafter Dworkin, *Reply*]).

¹¹³ See Dworkin, *Posner’s Charges*, *supra* note 6.

oversight by one side to the controversy; it says rather that it is the rare case in which pointing out that a particular outcome will have undesirable consequences will make a difference to the result: "Most often controversy is not about what means will in fact achieve an agreed end, but about what end should be agreed."¹¹⁴

11. I construed his statement that "[t]he American conception of democracy is whatever form of government the Constitution, according to the best interpretation of that document, establishes" to authorize a judicial activist to justify any constitutional decision in the name of democracy, even though most such decisions curtail the operation of the democratic process as ordinarily understood.¹¹⁵ Dworkin replies that he didn't mean that *any* conception of democracy is as good as any other.¹¹⁶ That is true, but is not the view I attributed to him. The view I attributed to him on the basis of the statement I have quoted is that whatever constitutional decision flows from "the best interpretation of that doctrine" is *ipso facto* democratic, even though it will often be a decision invalidating the action of elected officials.

12. I attributed to him the view that costs should not influence the definition of rights,¹¹⁷ citing a page of his book *Taking Rights Seriously*.¹¹⁸ Dworkin says that "it is not easy to see what I said, on the page Posner cites, that prompted him to that report."¹¹⁹ This is what he said: "When the Government, or any of its branches, defines a right, it must bear in mind, according to the first model [which 'recommends striking a balance between the rights of the individual and the demands of society at large'¹²⁰], the social cost of different proposals and make the necessary adjustments The first model is a false one, certainly in the case of rights generally regarded as important."¹²¹ That is, social costs should *not* influence the definition of important rights, which is just what I said he said.

13. I called Dworkin "a high rationalist with a weak sense of fact,"¹²² and made related criticisms of his capacity or motivation to deal competently with empirical and technical legal questions—an incapacity or lack of interest well demonstrated, as we have seen, by his review of *An Affair of*

¹¹⁴ *Id.*

¹¹⁵ POSNER, *PROBLEMATICS*, *supra* note 2, at 150 (quoting DWORKIN, *FREEDOM'S LAW*, *supra* note 8, at 75).

¹¹⁶ See Dworkin, *Posner's Charges*, *supra* note 6.

¹¹⁷ Dworkin does not give a citation for this attribution. It is *PROBLEMATICS*, *supra* note 2, 158 n.137.

¹¹⁸ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 198 (1977).

¹¹⁹ Dworkin, *Posner's Charges*, *supra* note 6.

¹²⁰ DWORKIN, *supra* note 117, at 197-98.

¹²¹ *Id.* at 198.

¹²² POSNER, *PROBLEMATICS*, *supra* note 2, at 253.

State. These criticisms he claims *already* to have shown to be “contemptuously inadequate.”¹²³ This is a strange characterization of his labored effort, in the reply to the original statement of these criticisms, to refute them.¹²⁴ He *still* does not know what statistical discrimination is. He said I had accused him of seeming “ignorant of a theory to the effect that ‘people discriminate on grounds of race or sex or IQ simply because these are convenient proxies for the underlying personal characteristics they are interested in.’ I [Dworkin] would have thought that race and sex were the ‘underlying personal characteristics’ in play.”¹²⁵ Wrong. Statistical discrimination means using a readily observable proxy for a characteristic that the observer is interested in but cannot observe as readily. For example, age is more easily determinable than certain types of skill or attitude; so, unless forbidden by law, an employer might discriminate against elderly workers because in his experience such workers were *on average* less productive than younger ones. This type of “rational” discrimination differs from “animus” discrimination in not implying that the discrimination is motivated by contempt for or hostility toward the group discriminated against.¹²⁶ The distinction should be important to anyone writing about discrimination law, as Dworkin has been doing for many years.

14. I had said that Dworkin runs moral relativism, moral subjectivism, and moral skepticism together, treating all three as different names for what he calls external moral skepticism.¹²⁷ This is another mischaracterization that he claims to have refuted already. He is correct, so far as my classifying them under his rubric of external moral skepticism is concerned. That is why the characterization was deleted from the book version of *Problematics*.¹²⁸

15. I confess my error in inferring that Dworkin doesn't like dogs.¹²⁹ As a cat person, I am disappointed. I hope I will be forgiven for having thought him distinctly feline.

¹²³ Dworkin, *Posner's Charges*, *supra* note 6 (citing Dworkin, *Reply*, *supra* note 111, at 431).

¹²⁴ See Dworkin, *Reply*, *supra* note 111, at 435-36, 442.

¹²⁵ *Id.* at 442 n.33.

¹²⁶ For a fuller discussion, see RICHARD A. POSNER, AGING AND OLD AGE 322-28 (1995).

¹²⁷ See Posner, *Holmes Lectures*, *supra* note 2, at 1643.

¹²⁸ See POSNER, *PROBLEMATICS*, *supra* note 2, at 8 n.7.

¹²⁹ *Id.* at 240.

