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## Illiberal Liberalism

IS DEMOCRACY POSSIBLE HERE?  
PRINCIPLES FOR A NEW POLITICAL  
DEBATE

by RONALD DWORKIN  
*Princeton University Press,*  
192 pages, \$19.95

Reviewed by Peter Berkowitz

IN NOVEMBER 1996, *FIRST THINGS* ran a symposium called "The End of Democracy?" asking at what point, if left unchecked, would the judicial usurpation of politics launched by *Roe v. Wade* and ratified in the Supreme Court's 1992 *Casey* decision render the American regime illegitimate. The symposium immediately provoked a storm of protest, not least among conservatives, some of whom decried the very idea of questioning the legitimacy of democracy in America. Despite some painful ruptures, conservatism in America was strengthened, all in all, by the fierce debate the symposium generated.

Ten years later, Ronald Dworkin, a professor at the New York University School of Law and one of the nation's leading left-liberal legal philosophers, has written a book, published by one of our leading university presses, claiming not only that "our laws do not show equal concern for our poor" but that "our failure is so manifest that it compromises our claim to democratic legitimacy." Originally delivered in 2005 as the Scribner Lectures, and appearing in book form late last summer, Dworkin's grave accusation, to date, has passed with barely a whisper of comment, particularly on the left.

The silence of Dworkin's fellow left-leaning thinkers, of course, is easily explained: Few find his accusation hyperbolic and many agree with him.

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Moreover, in many cases, they, like Dworkin, have not been shy about expressing the opinion that, after *Bush v. Gore*, the Bush tax cuts, the PATRIOT act, the detention of enemy combatants at Guantánamo Bay, the use of coercive interrogation techniques on enemy combatants, the invasion of Iraq, the prisoner-abuse scandal at Abu Ghraib, and the use of warrantless surveillance to monitor international telephone calls involving suspected terrorists and American phones, the American regime, led catastrophically astray by the Bush administration, is in fact teetering on the brink of illegitimacy.

With the exception of the Abu Ghraib abuses, which involved incontestably disgraceful and unlawful conduct, one might be tempted to see, in the succession of disputes over the past six years between conservatives and left-liberals, the natural clash of opinion arising in a closely divided country as the nation struggles to formulate policy after absorbing a devastating surprise attack that plunged it into a new and very dangerous sort of war with a new and very dangerous sort of enemy.

Dworkin sees matters differently. Orienting his philosophical analysis by a simple dichotomy based on the two colors that television networks use to indicate the victor in state races in recent presidential elections, Dworkin insists that the nation is sharply divided into red and blue, which stand for "radically different political positions." Conservatives and liberals throughout the land, he reports, confront each other across what both sides regard as "impassable political divides." They "disagree radically about politics." From north to south and from coast to coast, they regard members of the other party not as fellow citizens to be persuaded but as enemies to be routed.

To restore civility and thoughtfulness to public debate, Dworkin seeks to identify a common ground, which

he finds in two principles that he contends are widely shared across the great political divides. These "principles of human dignity," according to Dworkin, are so deeply embedded in our shared sensibility that most citizens, both left and right, cannot renounce them without doing violence to their bedrock beliefs about justice and humanity. The first principle holds that "each person is intrinsically and uniquely valuable." The second holds that "each person has an inalienable personal responsibility for identifying and realizing value in his or her own life." Together, he argues, these principles require government to adopt policies and enact laws that show equal concern for all its citizens.

By elaborating the two principles of human dignity and sketching some of their practical implications, Dworkin aims to produce a "contemporary restatement of the liberal position." He means this in two senses. The two principles of human dignity provide a philosophical revision and vindication of the larger liberalism that underlies the American constitutional order. And when properly understood, this larger liberalism invariably yields concrete laws and policies that reflect left-liberal or progressive policy outcomes.

There is much to recommend in Dworkin's short book, which weaves together philosophical themes and political concerns that have preoccupied him for more than thirty years. His quest to discover the common ground he and his fellow citizens actually share is admirable. His recognition that the common ground is to be found in widely shared and deeply held premises about the equality and freedom of all is sound. And his case on behalf of progressive reform—of the legal regime governing the fight against terrorism, of the role of religion in public life, and of the tax code—is elegantly put and will provide fellow left-liberals with fresh inspiration

and conservatives with fresh challenges. Yet the structure and execution of Dworkin's argument call into question his success in restating a position in accord with the best in the liberal tradition.

First, he proceeds from a dubious empirical premise. While intellectual

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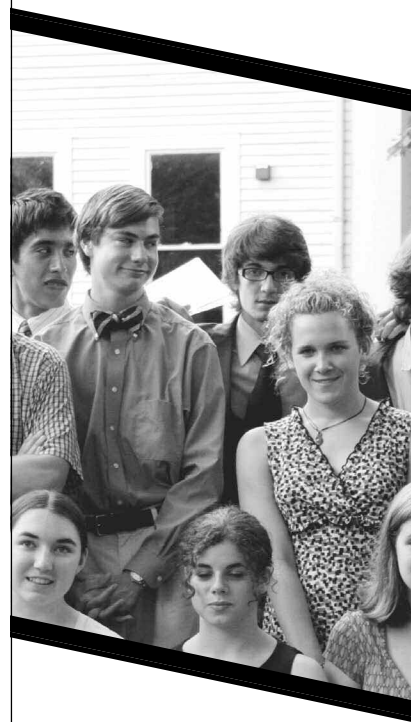
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and political elites certainly have been sharply divided since election 2000, Dworkin entirely overlooks the wealth of empirical data showing that the larger electorate is not particularly polarized and in many cases is better described as purple than as red or blue. (A good place to start is *Culture War? The Myth of a Polarized America* by Morris Fiorina.) Confusing his anger at the Bush administration with the passions of the American people, Dworkin fails to show his fellow citizens the respect involved in familiarizing himself with their sensibilities and judgments. Unlike Dworkin, who is quite confident that the left-liberal position is almost entirely correct and that the conservative position is almost entirely wrong, for substantial numbers of the electorate, as the 2006 election suggests, a good part of the

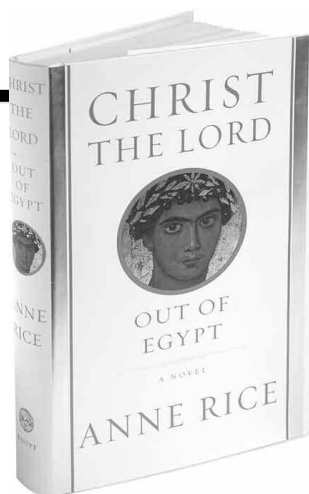
contest between left and right takes place within their divided souls.

Second, the larger liberalism that Dworkin seeks to restate tends to come to a different conclusion about what follows from the common ground established by the liberal premise that all human beings are by nature free and equal. Dworkin believes that our shared assumptions about human dignity entail an exclusively left-liberal politics. In contrast, according to the argument that pervades the *Federalist*—still the authoritative exposition of the principles that inform the Constitution—the partisan spirit is sown in human nature and cannot be squelched without snuffing out liberty. Moreover, argued John Stuart Mill in *Considerations on Representative Government*, democracy needs both a conservative party and a progressive party, not only because opposition enlivens debate but also because

each party embodies a portion of wisdom about the politics on which free, self-governing societies depend.

Third, Dworkin repeatedly misstates, or omits to mention, his opponents' best arguments. This last is a particularly grievous flaw, since, like his mischaracterization of the electorate, it suggests that Dworkin fails to show the respect for his fellow citizens that his theory demands.

Consider his treatment of human rights and the detention of enemy combatants. Dworkin strenuously disagrees with the Bush administration's policy of detaining aliens seized on the battlefield in Afghanistan, or suspected of fighting with al-Qaeda, without charge or trial. Indeed, he believes that the administration's policy is not only wrong but immoral. And strangely enough, despite the vigorous debate overflowing the pages of newspapers and magazines, and resounding through



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out the blogosphere over the past several years, he believes that “there is no national debate about what human rights the detainees have, or even about what human rights are.” In fact, Dworkin’s view is well represented in the public debate and reflects the dominant opinion in the legal academy where he makes his professional home. According to the consensus for which he speaks, the United States violates the human rights of prisoners detained at Guantánamo Bay by failing to accord them the same concern and respect—in the form of the procedural protections of American criminal law—accorded to American citizens accused of criminal conduct.

Dworkin considers a number of arguments that critics of his position might offer: Truth in the realm of ethics and morality does not exist;

the protections of criminal procedure are not critical to respecting human dignity; the rights and rules of American criminal process are appropriate only for fellow citizens; and, though indefinite detention without charge or trial does violate human rights, it is justified by the need to balance rights against national security. For some reason, however, Dworkin never bothers to consider the principal argument that the Bush administration actually does make in support of its decision not to accord Guantánamo Bay detainees the legal rights of domestic criminal process. That argument is also the strongest one: The detainees are not criminals subject to the criminal law but enemy combatants subject to the laws of war.

True, in some cases the Bush administration’s legal arguments

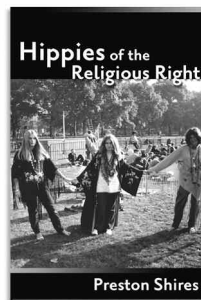
have been strained, and in others wrong. But the administration, and conservatives more generally, have grappled with a legal puzzle of which Dworkin appears to be oblivious. The war against the Taliban, al-Qaeda, and fellow Jihadists around the world has generated novel and difficult legal questions for both international law and American law. It had been widely assumed that only nation-states had the means to engage in acts of war. Thanks to the enormous destructive power that technology has placed in their hands, however, terrorists are now capable of committing acts of war. So they are not criminals. But because they do not fight in uniform or carry their weapons openly, and because they target noncombatants, such terrorists, conservatives have argued, should be regarded as unlawful com-

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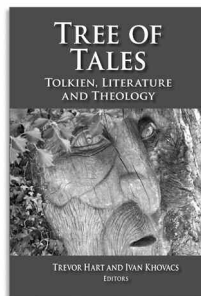
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batants not entitled to prisoner-of-war status and its attendant protections and prerogatives. To be sure, unlawful combatants possess human rights, but among them are not the right to enjoy the benefits of the criminal process of the nation that detains them.

Additionally, in discussing conservative objections to same-sex marriage, Dworkin fails to address conservatives' most important argument. Given the changes in the social meaning of marriage over the past forty years, conservatives worry that the legalization of same-sex marriage will further attenuate the connection between marriage and family that is crucial to a healthy society. This is a serious argument, and it deserves to have been addressed by the author of a book that purports to take seriously the counterarguments made by

fellow citizens. Similarly, in his discussion of reforming the tax code to create a vast new system of social insurance, Dworkin brusquely dismisses conservative concerns about the inefficiency of government and the perverse incentives that can be inscribed in government welfare programs. Instead of taking these arguments seriously, he converts them into a unified call to abolish the welfare state altogether.

Dworkin appreciates that his policy preferences may not command majority support. This does not diminish his confidence in the rightness of his position. Indeed, he contends that lacking majority support does not count against a policy's democratic legitimacy. To the contrary, it is "majoritarian democracy," the belief that the majority should rule, that paradoxically lacks democratic justification. For, according to the theory that Dworkin favors, which he calls "partnership democracy," majority decisions count as democratic only when they meet certain philosophical tests of reasonableness and morality.

This view, which is widely shared by contemporary academic political and legal theorists, seems to conflate the democratic with the reasonable and the moral. It also seems a stragem for discrediting popular opinion while claiming the backing of the will of the people. And it should be seen as inconsistent with the logic of American constitutional government. According to the theory on which the Constitution is based, Dworkin's two conceptions of democracy are less alternative theories than contending claims that arise within liberal democracy, both of which ought to be honored. It is reasonable to suppose that there is a wisdom that resides in the people, which can be refined through public debate, regular elections, and the separation and blending of power in the three branches of government. And it is reasonable to suppose that majorities

and their representatives in government will err, on occasion making decisions that are democratically legitimate but unreasonable and immoral. When that happens, the reasonable response is not to denounce one's fellow citizens as undemocratic but to seek to win over those with whom you disagree in order to form a new majority.

Greater attention to the enduring principles of American constitutional government, and to the opinions held by fellow citizens of opposing partisan loyalties—readily and plentifully available in books and magazines and in the blogosphere—will enable Ronald Dworkin to make further progress in finding the common ground and larger liberalism that he has sought for so long.

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## BRIEFLY NOTED

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### MY LIFE WITH THE SAINTS

by JAMES MARTIN, S.J.

Loyola Press, 411 pages, \$22.95

An account of spiritual peregrinations that is as delightful as it is instructive. In *My Life with the Saints*, Fr. Martin describes with a light touch his encounters with a wide range of saints from the Catholic past and present (not all of them canonized) and how they profoundly changed his thinking, his life of prayer, and his way of being a Christian. He succeeds in making "the cloud of witnesses" persuasively present. Readers familiar with current conflicts and controversies in the Church will raise an eyebrow at the author's occasional partisanship, including his roseate view of all things Jesuit. But it is worth a measure of patience to join in Martin's reflections on living with the saints as one's intercessors, companions, and friends.

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