BIELEFELDER WISSENSCHAFTS PREIS VERLIEHEN DURCH DIE STIFTUNG DER SPARKASSE BIELEFELD IM GEDENKEN AN NIKLAS LUHMANN

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**Festvortrag von Ronald Dworkin**

## Interpretation in General

1.

What are the correct methods and standards for interpreting ourselves – for studying human behavior and societies? Philosophers have been debating this for centuries; it has engaged, among others, both Niklas Luhmann, whose name these lectures celebrate, and Jürgen Habermas, who will generously introduce this lecture. I shall approach the issue in a rather different way than has been traditional, however. I shall expand the question to consider not just the interpretation of human behavior and culture but interpretation in general. We know interpretation in a great variety of distinct genres. The audience will try to interpret me as it hears me speak. Anthropologists and sociologists interpret societies, historians interpret events and epochs, psychoanalysts interpret dreams, lawyers interpret statutes, critics interpret poems and plays and pictures, priests and rabbis interpret sacred texts. Do all these genres of interpretation share some common mode of reasoning? Is that mode of reasoning distinct from the scientific reasoning we bring to bear on physics and biology? If so, what counts as success in that distinct kind of reasoning? Can interpretations, in all these distinct genres, be treated as true or false? If so, in what can the truth of a true interpretive proposition consist?

These are the large questions I shall try to canvas. If I am right, interpretation is a distinct method of reasoning, with distinct standards for success or truth, and the difference does illuminate the old controversies over method in the social sciences. But I will close by applying my conclusions to a different set of issues: the growing trend among lawyers to treat international law as part of the ordinary domestic law of their nations. I cite two examples. The first is the heated controversy about whether it is proper for the United States Supreme Court to cite decisions of for-

eign courts in its opinions, as the Court did in holding unconstitutional the execution of children and making homosexual acts criminal. The second is the growing view that ordinary courts have the power, indeed the responsibility, to punish violations of human rights wherever these have occurred. There was a dramatic illustration of this trend recently in Germany: a group of German lawyers has asked prosecutors in Karlsruhe to investigate the prosecution of the former Secretary of Defence, Donald Rumsfeld, and other American officials for torture and other human rights crimes. I hope to show that this trend is justified by legal interpretation as I conceive it.

2.

I emphasized the variety of genres in which we take ourselves to be interpreting something: a lecture, a society, a dream, a statute, a poem, a vision, an epoch. Of course, the fact that we use "interpretation" to describe all these apparently disparate activities is hardly conclusive that they have some important feature in common. That may be only a linguistic accident. Or the genres may be related only by what Wittgenstein called "family resemblance." Linguistic usage is often misleading in that way: there may be nothing we can usefully call interpretation in general.

That sceptical conclusion might also be suggested by the striking fact that there is no such thing as interpreting in general, that is, interpreting in the abstract rather than in some particular genre. Imagine that flashing dots of color suddenly appear on the wall behind me as I speak, and I ask you to interpret those dots. You could not even make a beginning without some working assumptions, at least, about how the dots were created. You would have to decide whether to treat them as a coded message, perhaps from an extra-terrestrial source, or as a light show designed by some artist, or perhaps just as a natural phenomenon. Only then could you even begin to construct an interpretation: you would need, that is, to take up a particular genre of interpretation before you could interpret at all. That might suggest that the different genres have little in common.

But we should also notice a fact that argues against the sceptical conclusion: that all the genres do seem to share something of considerable importance. In each case we find it natural and illuminating to put our interpretive conclusions in intentional language, the language of purpose and meaning, even when we are speaking not of people but of abstract objects or mental phenomena. We speak of the meaning or significance of a passage in a poem or a play, of the point of a clause in a particular statute, of the motives that produced a particular dream, of the ambitions or understandings that shaped an event or an age.

So, though we cannot assume at the outset that there is any such thing as interpretation in general, I shall treat that as a working assumption, to see what can be made of the idea of a common interpretive method and standards. I begin by noticing a feature of all the genres of interpretation I just mentioned: an odd ambivalence about truth. On the one hand, interpreters seem just to assume that an interpretation can be sound or unsound, correct or incorrect, true or false. We accuse some people of misinterpreting us or Shakespeare or the Renaissance or the Sale of Goods Act; we suppose that there is truth to be found or missed about the meaning of each of these objects of interpretation. We distinguish between an accurate interpretation and one that is admirable in some other way. A musician might find great pleasure in listening to a Glen Gould performance of a Beethoven sonata, but nevertheless think that as an interpretation of the sonata Gould's performance is a travesty. An American lawyer might wish that the Equal Protection Clause could properly be interpreted as requiring states to spend as much educating poor students as rich one, but agree that it cannot be so interpreted.

True, in some contexts it would sound odd for an interpreter to claim unique success. A director or actor who offers a new interpretation of Hamlet need not (and better not) claim that his interpretation is the only correct one and that all other approaches to the play are wrong. But it would be equally odd for a critic who has devoted his life to understanding that play to add, on the last page of his great work, that his study is only one among many interesting approaches, and that other

approaches are equally valid. In some circumstances scepticism would seem not only odd but outrageous. Imagine a judge who sent an accused criminal to jail, perhaps to death, or who awarded a huge verdict against a civil defendant, and then conceded in the course of his opinion that other interpretations of the law that would have required contrary decisions are equally valid to his own.

So at least in most cases what we might call the phenomenology of interpretation – how it feels to interpreters –includes a sense that interpretation aims at truth. But nevertheless interpreters are often uncomfortable making flat claims of truth for their interpretive judgments. Many lawyers, for example, who would be shocked to find the language I just imagined in a judge's opinion are nevertheless also troubled when legal philosophers suggest that there is always one best interpretation of a legal provision or precedent, and that all the other interpretations are wrong. They prefer locutions that avoid that flat claim: a lawyer might say, for example, that though a particular interpretation of the Equal Protection Clause seems the best to him, he knows that others disagree, and he cannot say that there is only one correct interpretation, that those who disagree with him are simply mistaken. That bizarre form of words makes no sense: if in his opinion one interpretation is best then, also in his opinion, contrary interpretations are inferior, and he contradicts himself when he asserts that some of them are not. But the popularity of statements like these underscores the uncertainty many of us feel about the truth-seeking status of interpretation.

It is not hard to explain this widespread ambivalence about truth in interpretation. We may be struck by a particular reading of a poem, yet we know that other people who seem at least equally competent readers have very different views about what the poem means or how some metaphor should be understood, and find that we have nothing to say that is likely to convert them to our opinion. Indeed, each of us finds that different interpretations of the same poems appeal to him himself at different times. Even when we agree with others about some interpretive insight,

about the hidden motives of a character in a novel or the force of an allegory in explaining a poem, for example, we might still disagree about what makes their shared views the truth about the novel or the poem. Worse still, very few of us can even make plain what our own answer is to my question: what, in our view, makes an interpretation true when it is true. Interpretation often seems ineffable. We sense that some reading of a poem or performance of a piece of music or production of a play is right, that it brings out what is really in the work, but that sense often far outruns our ability to explain why it is right. We must fall back on the idea that what seems or feels right is right. But ineffability is troubling: it makes a poor match with truth. If our instincts are right, and one reading of Yeats or one performance of Schubert really is better than another, then why can't we explain, all the way down, why it is?

In spite of these hesitations and confusions, however, the distinctive truth-seeking phenomenology of interpretation survives, and interpretation would end if it did not. We should try to justify that disposition for truth if we can, and we can justify it only if we can answer the difficult question I asked. When an interpretation in any of these genres is true, then what *makes* it true? What furnishes the *ground* of interpretive truth? Interpretive claims can't be *barely* true: it makes no sense to think that it just *happens* to be true that Hamlet is a play about politics not about revenge. There must be something in the world that *makes* an interpretation true. What in the world can that be?

3.

The most popular answer to that question is some variant of a psychological-state thesis: this holds that interpretive claims are made true, when they are true, by actual or counterfactual facts about someone's mental state. Some interpreters claim that Shylock's daughter in the Merchant of Venice, Jessica, hated herself for being a Jew. If so, the ground of that truth, according to this psychological state thesis, is Shakespeare's intention in writing her lines. Is it true that the Equal Protection Clause of the American Constitution forbids all racial quotas? If so, that proposi-

tion is made true by what the 19th Century authors of that clause believed it would do. Was class solidarity rather than liberty the moving ideal of the French Revolution? If so, that is because a very large number of people who played central roles in that drama had class somehow in mind.

The psychological states that make an interpretive claim true need not, on this view, be simple or even transparent to the person or people whose state it is. Shakespeare's intention might have been subconscious. The congressmen who adopted the Fourteenth Amendment might not have thought about racial quotas; their intentions might have been counterfactual. It may only be true, that is, that they would have wanted their clause to forbid quotas if they had thought about quotas. The thoughts that made class the point of a great revolution might have been made up by many thousands of very different thoughts of many thousands of different people who were not aware of having that joint thought at all. But in the end it is psychological states of some kind that make an interpretive claim true, or nothing does.

This psychological state theory seems right in the special case of conversational interpretation. You are indeed trying to discover something about my intentions as I speak to you, namely my intentions as to what you should think I mean to say to your. But the psychological state theory is obviously unsatisfactory as an account of historical interpretation. If the American Revolution, properly understood, was about not freedom but commerce, that fact does not consist in anyone's intentional state. The psychological state theory is also ineligible for legal interpretation because though individual parliamentarians have mental states, parliaments do not. True, the psychological state theory has been popular in literary interpretation: scholars often speculate about what Milton or Shakespeare or Philip Roth had in mind. But the theory is controversial even there, and is rejected by many contemporary literary scholars who believe that the author of a text is only, in Paul Ricoeur's nice phrase, the first interpreter. So the psychological state theory can't be

right as a unified theory of interpretation. It can't be that interpretation just *is* retrieving some historical intention. There must be some other, deeper, explanation of what makes an interpretation true when it is true. That deeper explanation must explain why the psychological state theory seems illuminating in those cases when it does and also why it fails when it does.

I shall now try to state that more general account. We need some background. We carry out each of the genres of interpretation I distinguished collectively, as a kind of cooperative practice. You and I reflect on and discuss and perhaps argue about whether Hamlet is a political play or whether the Equal Protection Clause of the American Constitution rules out affirmative action or what the real meaning is of the Mona Lisa or of the French or American revolution. We all assume that there is point to these discussions: we do not treat them as pointless. And yet there is room for disagreement and argument about what their point should be taken to be. Consider a relatively simple example: legal interpretation. Lawyers assume that the point of interpreting statutes and precedents is to promote the rule of law. But two lawyers might agree on that, and yet disagree about what more concretely that means. One might think it promotes the rule of law to discover what most of the legislators actually intended in using the language they did and another that it promotes the rule of law better to discover what the legislators *should* have intended in using that language. They might disagree in that way because they disagree about exactly what kind of government is most democratic, and they might disagree about *that* because they disagree about the most basic requirements of a just society. And so on.

We can trace a similar tree of possible disagreement in other genres as well, and I shall try to illustrate some of these later. But I want first, finally, to formulate the more general account of interpretation that I promised. I will put it cryptically at first, and then try to make it seem less mysterious. An interpretation of an object or event is true or successful if it best achieves the best understanding of the purposes

of the genre. This is a normative theory of interpretation: it holds interpretation is always, and at bottom, a normative exercise.

This normative theory passes the first assignment I described: it helps to explain when the psychological theory is appropriate and when it is not. In the case of conversation, there is not much doubt about the purpose of interpretation. The purpose is translation: it is better to understand what the speaker intends to be understood as having said. So the best achievement of that purpose lies in a psychological retrieval: retrieval of what I intended to say to you. It also explains why the role of author's interpretation in literary criticism is debatable: it is disputed as a matter of aesthetic theory how much and in what way an author should be allowed control over what his artistic creation should be taken to mean. Those who believe the author should have a large measure of control must think that the purpose of literary interpretation is to discover how he meant to exercise that control. Those who assign a smaller control to the artist will reject that purpose in favor of one that make discovering authorial intent less central. The normative theory also explains the phenomenon I began by noticing: that there is no such thing as interpreting in general. Since interpretation depends on the purpose of its genre, and since genres differ in the purposes we can assign them, we cannot even begin without knowing what genre we are taking up.

4.

Interpretation is largely intuitive and ineffable. Perhaps some genres – literary interpretation, for one -- would be ruined if interpreters were too self-conscious But my proposal suggests a way in which its assumptions and premises could be made articulate if we had any reason to do that. I shall pretend that we do. We would first classify genres of interpretation according to the most general account and uncontroversial account of their purpose and then develop branching points of disagreement and noting how each choice would end in concrete interpretive consequences. With that in mind, I propose the following main categories or families of interpretation. There is collaborative interpretation, explanatory interpretation, and conceptual interpretation.

Collaborative interpretation supposes that the creator of some object and its interpreter are in partnership to achieve some goal: the interpreter, who arrives later, continues a project the creator has begun. Conversational interpretation is a paradigm of collaborative interpretation, and literary and legal interpretation are also paradigms These all suppose a cooperative venture, and they all have a parallel structure. They require a theory of success in the overall enterprise and a theory of the proper division of labor.

In literature, each of these sub-theories is controversial. Compare the theories of the connection between art and morality that were popular in the Bloomsbury circle, which stressed the importance of a moral dimension in art, with the general disdain for that dimension today. Contrast the interpretive styles of, say, F. R. Leavis and Frank Kermode. Or, in the case of artistic interpretation, consider the rise, then fall, and now slight rebound of the theory that artistic value depends on beauty. The Columbia philosopher of art, Arthur Danto, is fascinating on that story. In law, there is consensus, as I said, that the purpose interpretation is to promote legality, the rule of law. But there is wide division about what that means and lawyers and judges divide because they hold different theories of justice, policy and democracy that dictate widely different theories, for example, about the division of labor between legislators as creators and judges as interpreters of law. That disagreement matches in structure the disagreement among literary scholars about the division of labor between author and critic, though of course it is grounded, in the case of law, in a very different sense of the underlying purpose of the interpretive activity.

In explanatory genres of interpretation, the underlying consensus of purpose has nothing to do with partnership. History provides a good example. Historians of the French Revolution are not in collaboration with Jacobins; German historians are not in partnership with Hitler. It is rather a matter of finding something in the object of interpretation that has special meaning or significance for the audience to

which the interpretation is addressed. I believe we should understand sociology and anthropology as genres of explanatory interpretation. They are driven not, I think, by any epistemological axioms of understanding human behavior, but by the much more practical assumption that we study ourselves and our societies for some purpose that requires understanding them, not in terms of observed behavioral regularities or functional systems, but rather in terms of their animating principles and self-understandings. We make best sense of the competing schools of sociology and anthropology by contrasting not their metaphysical assumptions but their sense of the value of sociology for the society it addresses.

The third family of genres of interpretation is that of conceptual interpretation. In conceptual interpretation there is no distinction between author and interpreter. We all share certain interpretive concepts we have together created, and we interpret them as part of using them. The central concepts of personal and political morality – good, right, freedom, equality, democracy and law – are interpretive concepts. We share these as concepts not in virtue of either necessary and sufficient conditions or an agreed extension but because we agree that they name values and that their extension depends on values. Most of what is now called meta-ethics is spoilt by a failure to recognize that the central moral concepts are interpretive concepts of that kind. The reigning assumption of the entire subject of that branch of moral theory, which is that we can analyze the concepts of right and good without adopting substantive moral theories of right and good, is a deep mistake.

5.

I offer these distinctions among families of interpretation to illustrate the structure and complexity of what I have called the normative theory of interpretation. Plainly the typology of genres could be continued into much greater detail and subtlety. But let us now consider a different kind of distinction: between the ways that different interpretations of the same object may or may not conflict with one another. We must distinguish three relations: independence, complementarity and conflict.

Independent interpretations are interpretations that have no bearing on one another. I can construct an explanatory explanation of the rise of novels as an art form in Germany that has no bearing on my collaborative interpretation of The Magic Mountain. Complementary interpretations are different: each brings out a different facet of a creation that the genre assumes have multiple meanings. Different productions of a classic, like Shakespeare's Hamlet, each provide an interpretation intended to be complementary to other such interpretations. Conflicting interpretations, on the other hand, must be understood not as complementary but as competitive: if one is right the other must be false, like two competing interpretations of some provision of the criminal law.

It is often an interesting interpretive question how to classify some interpretive divergences. Imagine two interpreters of Yeats' poem *Solomon and Sheba*. The first treats the poem as a dissertation on the interplay between chance and choice. He never mentions the fact that Yeats wrote the poem on his honeymoon. The second emphasizes that fact and describes the poem's emphasis on sexual imagery. What is the connection between the two? They may be independent: the first may be collaborative and the second explanatory. Or they may be complementary: each may suppose himself to be bringing out something in the poem that is not inconsistent with what the other finds. In some circumstances, however, conflict is the only available understanding of divergence. As I said, two contrary judicial interpretations of a single statute or constitutional provision can only be treated as in conflict. There is no room for independence since both must be collaborative, and no room for complementarity because no legislative value is achieved by multiple readings.

Some cases of difference that might well be treated as independent or complementary seem more like conflict. Traditional critics of Walt Disney's Mickey Mouse legends have stressed the charm of anthropomorphic animals. But recently darker feminist interpretations have become popular that call's attention to Mickey's ex-

ploitation of Minnie Mouse. These two interpretations need not necessarily be in conflict – the feminist interpretation could be explanatory of the forces that produced the comic strip – but the feminists certainly regard themselves as rejecting the old interpretations. They charge that there is something wrong in treating the Disney legend as an occasion for collaborative interpretation, silly to talk about charming rodents when it much more useful to expose miscegenation. This is a different kind of conflict: conflict about when a genre of interpretation is appropriate. That is the complex way in which the deconstructionist critics were in conflict with traditional literary criticism, and in the way the movement called critical legal studies in American law schools was in conflict with more orthodox legal scholarship.

6.

Now we can step back from these distinctions and contrasts to consider again our larger subject: interpretation in general. Interpretation as a distinct kind of intellectual activity that runs through and defines all the different genres. Inquiry, whether scientific or interpretive, is always a purposive activity. We investigate genetic structures and intergalactic space and the birth of the universe and the meaning of Yeats' poetry and the meaning of the German constitution for purposes. Some of these are practical – we hope to cure diseases – but many are simply the excitement of knowledge. In the case of scientific inquiry the purposes of our investigation, whatever these are, play no role in any proper test of our success, of the truth of our conclusions. We may study the stars because we are enchanted by the mysteries of space, but it does not count in favor of the big bang theory that we find it enchanting, if we do. In science, we might say, truth stands apart from purpose.

But interpretation, on the contrary, is drenched in purpose. Whether a particular reading of a poem or a statute is successful as an interpretation depends on what the right reason is for worrying about how to read the poem or the statute. That is a striking and very deep difference. Science is fundamentally, when truth is in ques-

tion, non-normative. Interpretation is normative all the way down. That is the true difference between explanation and understanding.

I am afraid that this account will encourage you to skepticism about interpretation. You may think that if interpretation is normative all the way down, then there is no sense in claiming truth for an interpretation of an historical epoch or a legal provision or a great poem, particularly a controversial interpretation. You may read me as endorsing some skeptical view that claims that there are no true interpretations but only different ones. As I said much earlier, that conclusion is a standing temptation. But it must be resisted because it is a kind of nonsense.

The root idea that there is no truth in morality is itself a kind of nonsense, as I have argued in other work. I can't repeat my arguments here, but I must warn against one confusion. You must distinguish truth from demonstrability. Moral and other normative claims may be true, as I believe many of them are, but there are not demonstrable: they do not admit of proof. In that contrast we have the best explanation of the ambivalence I noted earlier. We are drawn to identify truth and demonstrability, but so long as we do we will face the dilemma that we can neither claim truth or deny truth for what we most profoundly believe about society, poetry, law and history.

7.

Finally I turn, by way of the example I promised, to a particular issue of legal interpretation. How shall we understand the two trends I described, the trend toward national courts citing foreign and international law as bearing on purely national issues, and the trend toward such courts trying alleged human rights violations far away? The Supreme Court quotes the European Court of Human Rights to declare anti-sodomy laws unconstitutional. Pinochet is tried in a British court for murders in Chile. German prosecutors are asked to consider prosecuting Donald Rumsfeld.

It is easy to see why these trends seems problematic, indeed objectionable, to many lawyers. For many centuries it has been assumed that law comes in state-sized bites. That was one consequence of the dominance of legal positivism. Even when lawyers face a legal issue involving multinational transactions, they ask, as an initial threshold question, which nation's law should govern. The two trends I cite challenge that ingrained assumption. They suppose that in addition to national laws as self-contained systems, and international law as law between sovereign states, there is an international common law that applies directly to citizens and officials. Can we interpret the new trend in such a way not simply to explain it, but to justify it as carrying forward the best understanding of law?

Ordinary, conventional legal interpretation, within distinct national legal systems, has as its underlying purpose a political ideal. This is the ideal of integrity: the principle that a sovereign state should so far as possible allow everyone the benefit of the same political principles. Government, as I have said, must speak with one voice in matters of principle. Why? Because the exercise of coercive power must be legitimate, and its legitimacy depends upon integrity. Legitimacy demands equal treatment: it demands that a state judge everyone within its power according to same principles across the full range of their conduct. From that start, lawyers build a theory of what legal integrity is and what it requires. I tried to defend one such theory in my book, *Law's Empire.*

I offer this hypothesis. In fits and starts since World War II, a new idea has gained currency. This is the idea that the international community itself, as a kind of collective body, has legitimate authority over the use of coercion. We may call this the principle of collective international action. The United Nations is the formal embodiment of that idea, but the existence and authority of the UN signals that the idea had already begun to take root. Acts of the UN authorizing military action, or peace keeping actions, exhibit the principle of collective action. But a UN decision is not necessary to international legitimacy: when a UN vote failed to authorize co-

ercive force in Bosnia, but only because one nation vetoed the resolution, it was still widely accepted that the American military action there was authorized by the international community. The most dramatic illustration of the new principle was provided, in a counterfactual way, by Iraq. Much of the debate before the American invasion presupposed the principle; it was widely assumed that the American invasion would have been proper had it secured the votes of a majority of the Security Council. But it is equally widely assumed that the American action was illegitimate without that international sanction.

My claim that the principle of international collective action now exists as part of a world order is of course an interpretive claim. I interpret the statements and actions of states, officials and commentators to yield that principle. You may disagree, although I do not expect that many will disagree. I want therefore to emphasize what I take to be an important consequence of that claim. If the international community claims legitimate power to authorize coercive force, then the community must also accept a demand of integrity in *its* actions, and this demand must be honored not only by the community itself in its collective decisions but by the individual nations that make up the international community when they act alone, either internationally or domestically. In particular, the international community must seek integrity in its judgments of what human rights are and how they should be enforced.

I hope you see the connection between that claim and the two legal trends I described. If my interpretive argument is correct, then the growing practice of constitutional courts citing decisions of other constitutional courts about constitutional rights can be understood as a response to the demand of integrity I described: a demand that the international community speak with one voice on the character and content of human rights. It is not only understandable but required, for example, that the United States Supreme Court should seek to coordinate its decisions about making homosexuality a crime with the decisions of the European Court of Human Rights. If my interpretive argument is correct, it is also understandable that

national courts have begun to feel a responsibility to punish violations of human rights, wherever these have been committed, once it has physical jurisdiction over the alleged violator of human rights. It is understandable that British courts should have undertaken to judge General Pinochet, and that German lawyers believe it would be appropriate for a German court to prosecute Donald Rumsfeld if he were unwise enough to visit this part of old Europe. That would vindicate dramatically the principle that the international community must speak with one voice on matters of human rights, and that no member of that community can unilaterally exempt its officials from such prosecution.

**Bielefelder Wissenschaftspreis 2006**

**Jürgen Habermas, Laudatio auf Ronald Dworkin**

Es war im September 1983, als die von der Bundesregierung beschlossene Raketenstationierung in Mutlangen und anderswo mit Sitzblockaden bekämpft wurde. Peter Glotz, damals Generalsekretär der SPD, hatte zu einer Veranstaltung über Zivilen Ungehorsam nach Bonn eingeladen. Nach den engagierten Vorträgen kam Heinrich Böll auf mich zu, zeigte auf den aus London eingeflogenen amerikanischen Professor, der unserem Unternehmen argumentative Kraft, rhetorischen Glanz und internationales Flair verliehen hatte, und fragte neugierig: „Wer ist das eigentlich?" Ein Jurist, der einen qualifizierten bürgerlichen Ungehorsam rechtfertigt, war damals noch eine Rarität. Eine Ausnahmeerscheinung ist Ronald Dworkin geblieben. Er ist ein Solitär sowohl im Kreise der Rechtsgelehrten wie der Philosophen, er genießt große Reputation unter den öffentlichen Intellektuellen seines Landes, er ist ein begnadeter politischer Redner. Mit etwas weniger Brillanz, Widerspruchsgeist und Genialität wäre er längst Richter am Supreme Court in Washington geworden. Ich will versuchen, auf Heinrich Bölls Frage heute Abend eine Antwort zu geben.

Wenn Sie das jüngst erschienene Buch von Ronald Dworkin – „*Justice in Robes*", Gerechtigkeit in Richterroben – aufschlagen, begegnen Sie in den ersten Sätzen einer Geschichte, die sich um Oliver Wendell Holmes, eine legendäre Gestalt unter Amerikas berühmten Richtern, rankt: „Zu seiner Zeit als Richter am Supreme Court nahm Holmes auf seinem Weg zum Gerichtshof den jungen Learned Hand" – der später Dworkin's Lehrer wurde – „in seinem Wagen mit. Hand stieg, an seinem Fahrtziel angelangt, aus, winkte und rief munter hinter dem weiterfahrenden Auto her: ‚Sorgen Sie für Gerechtigkeit, Richter Holmes'. Holmes ließ den Fahrer den Wagen stoppen und zum überraschten Hand zurückkehren, um sich mit den Worten aus dem Fenster zu lehnen: ‚*That's not my job*'. Anschließend kehrte der Wagen wieder um und beförderte Holmes zu seiner Arbeit, die angeblich *nicht* darin bestand, für Gerechtigkeit zu sorgen." Dworkin will mit dieser Geschichte eine

Frage veranschaulichen, die ihn ein Leben lang beschäftigt: Welchen Einfluss dürfen, ja sollen und müssen die moralischen Überzeugungen eines Richters auf dessen Rechtsprechung haben?

Natürlich weiß der Jurist, dass Recht und Gerechtigkeit zwei Paar Stiefel sind. Aber darf der Richter in der Robe den internen Zusammenhang von Recht und Gerechtigkeit ganz ignorieren? Ja, könnte er es, selbst wenn er wollte? Hier ist eine methodische Unterscheidung wichtig, die ich mit einem Seitenblick auf den großen Gesellschaftstheoretiker erläutern kann, in dessen Namen Ronald Dworkin heute Abend ausgezeichnet wird.

Während Niklas Luhmann das Rechtssystem aus dem Abstand des soziologischen Beobachters beschreibt und die Selbstbeobachtung des Juristen und Rechtstheoretikers in seine eigene, distanzierte Beobachtung einbezieht, entwickelt Dworkin seine Theorie des Rechts aus der Perspektive von Teilnehmern, die in Konfliktfällen Recht suchen und Recht sprechen. Dem Richter, dem er bei seiner Arbeit über die Schulter schaut, gibt Dworkin den Namen Herkules, weil auch der, der Recht spricht, auf der Suche nach der richtigen Antwort bleibt. Gegenüber Luhmanns ökumenischer Umarmung aller Teilnehmer müsste Dworkin darauf beharren, dass auch der Soziologe, bevor er sich auf seinen objektivierenden Beobachterposten zurückzieht, aus der Sicht eines virtuellen Teilnehmers verstanden haben muss, worum es in der Praxis der Rechtsprechung überhaupt geht. Ohne diesen vorgängigen hermeneutischen Blick bliebe für ihn sogar der Code des Rechtssystem, was recht und was unrecht ist, eine *black box*. Hier ist die Frage: Wer kann wen umarmen?

Interessanterweise steht bei dieser Frage mehr auf dem Spiel als eine methodische Option zwischen den Einstellungen der einen oder der anderen wissenschaftlichen Disziplin. Es geht vielmehr um einen Streit, den die Juristen über den Begriff des Rechts unter sich austragen: Lässt sich das Recht als eine moralisch neutrale Größe begreifen? Weil Ronald Dworkin und Niklas Luhmann darauf *als Juristen*, die sie

von Haus aus sind, konträre Antworten geben, bewegen sie sich von ihrer Herkunftsdisziplin aus in entgegengesetzte Richtungen. Beide entwickeln großformatige und einflussreiche Theorien des Rechts und der Politik, der eine als Sozialwissenschaftler, der andere als Philosoph. Sie entfernen sich dabei immer weiter voneinander, weil sich ihre Wege schon am Ausgangspunkt verzweigen.

Es geht um die Stellung zur Tradition des Rechtspositivismus, den Luhmann aufnimmt und Dworkin bekämpft. Dworkin beginnt seine Laufbahn mit einer Aufsehen erregenden Kritik an H. L. A. Hart, dem er übrigens auf dem Lehrstuhl in Oxford nachfolgen wird. Er entfaltet diese Kritik 1977 in seinem ersten großen Werk *„Taking Rights Seriously"* und verteidigt diese noch in seiner jüngsten Publikation gegen Erwiderungen, die sich in Harts Nachlass fanden. Der Rechtspositivismus trägt der Änderbarkeit des modernen Rechts und dem Eigensinn des Rechtsmediums Rechnung. Aber er betont die schon von Kant hervorgehobenen formalen Eigenschaften der Rechtsnormen nur um den Preis einer abstrakten Trennung von Recht und Moral. Gegen die Unterscheidung zwischen den beiden Normsorten hat Dworkin nichts einzuwenden, wohl aber gegen die moralische Neutralisierung des Rechts.

Dworkin hatte als Student in Harvard die Überlegungen kennen gelernt, die John Rawls später in seiner „Theorie der Gerechtigkeit" veröffentlichte. Mit diesem Paukenschlag war auch in der analytischen Philosophie die vornehme Trennung zwischen dem wertenden Gehalt moralischer Urteile und der vermeintlich wertfreien metaethischen Untersuchung dieser Urteile hinfällig geworden. Seitdem ging auch die tonangebende angelsächsische Philosophie wieder davon aus, dass moralische Urteile einen kognitiven Gehalt haben, der kritisiert und begründet werden kann. Ebenso wichtig war der Weg des Kantischen Konstruktivismus, auf dem Rawls die Revolution der empiristischen Denkungsart herbeiführte. Denn auf diesem Wege konnte Dworkin den revolutionären Funken innerhalb der Rechtstheorie zünden, ohne in den sterilen Streit zwischen Positivismus und Naturrecht zu-

rück zu fallen. Um den moralischen Gehalt des Rechts im Prozess seiner Anwendung nachzuweisen, genügte es nun, sich auf den dürren moralischen Standpunkt zu stellen, von dem aus wir jedem gleiche Achtung und Rücksichtnahme schulden.

Gewiss, der Richter ist an die Faktizität des geltenden, vom politischen Gesetzgeber gesetzten Rechts und an die Tradition der bisherigen Rechtssprechung gebunden. Denn ohne Rechtssicherheit, also eine gewisse Prognostizierbarkeit der Entscheidungen könnte das Recht seine Funktion, Handlungen zu koordinieren und Verhaltenserwartungen zu stabilisieren, nicht erfüllen. Andererseits kann der Richter sich nicht nur an einer verbindlichen Vergangenheit orientieren; er muss auch den in der Gegenwart (und ihn selbst) überzeugenden Standards Rechnung tragen. Ohne die intersubjektiv geteilte Voraussetzung, dass ein anhängiger Fall eine gute Chance hat, „richtig" entschieden zu werden, bräche die Praxis der Rechtsprechung zusammen. Wie kann der Richter diesen Bezug zu moralischen Überzeugungen der Gegenwart mit dem der Vergangenheit zugewandten Bezug zum Korpus des geltenden Rechts in Einklang bringen? Herkules darf sich in der Suche nach der einzig richtigen Lösung nicht irritieren lassen und muss sich zutrauen, aus der Perspektive des Einzelfalls die Rechtsordnung als ein integriertes, aber bewegliches Ganzes aus Prinzipien und Regeln zu erschließen. Die richtige Lösung ist nur als Ergebnis einer konstruktiven Leistung zu finden, weil die einschlägigen Prinzipien und Regeln erst durch die kontextsensible und fallbezogene Argumentation in die jeweils angemessene Rangordnung gebracht werden.

In dem 1986 erschienenen Werk „*Law's Empire*" entfaltet Dworkin diesen ingeniösen Gedanken einer prinzipienorientierten Auslegung des Rechts unter dem zweideutigen Stichwort der „Integrität". Dworkin will nicht nur hermeneutische Einsichten gegen ein falsches Modell der Rechtsanwendung zur Geltung bringen. Es geht ihm nicht nur um den holistischen Blick auf die Kohärenz der Rechtsordnung, die die Richterin in casu herzustellen hat. Von der „Integrität" einer Rechtsordnung darf erst dann die Rede sein, wenn die moralischen Gehalte der Rechtsprinzipien

derart zusammenhängen, dass die Legalität jedes Urteils von diesem Ganzen eine moralisch gehaltvolle Legitimitätsprämie bezieht.[1] Das ist der Fall, wo „Rechte ernstgenommen" werden, also im demokratischen Rechtsstaat, der Menschenrechte als Grundrechte positiviert. Denn Menschenrechte gießen moralische Gehalte in die Form individueller Rechte. In der Gestalt der Grundrechte gewinnen die moralischen Gehalte die Geltungskraft positiver Rechte. Und über diese Kanäle durchdringen und imprägnieren sie wiederum die Rechtsordnung im ganzen.

Diese Auffassung nötigt Dworkin zu einem Zweifrontenkrieg. Er kämpft nicht nur gegen Rechtspositivisten, die die moralischen Gehalte des Rechts neutralisieren, sondern auch gegen Rechtsrealisten, die das Recht an die Politik angleichen und es als ein weiteres Instrument zur Gestaltung der Zukunft gebrauchen. Dworkin verteidigt den normativen Eigensinn des Rechtsmediums gegenüber dem Versuch, das Recht in seiner Rolle als Organisationsmittel der staatlichen Macht aufgehen zu lassen. Wer Rechte ernstnimmt, darf sie nicht gegen unerwünschte Konsequenzen abwägen und die Konditionalprogramme, wie Luhmann sagen würde, den Zielprogrammen einfach unterordnen. Angesichts der inflationären Rede von „Rechtsgütern" besteht Dworkin auf dem kategorialen Unterschied zwischen Normen und Gütern. Wenn individuelle Rechte gegen den Sog einer utilitaristischen Folgenabschätzung den deontologischen Sinn von Schutzhüllen bewahren sollen, müssen sie die Kraft behalten, kollektive Zielsetzungen regelmäßig zu übertrumpfen.

Dworkins profilierte Rechtstheorie ist freilich nur der motivbildende Ausgangspunkt für ein umfassendes, in der Ethik wurzelndes und auf die politische Philosophie ausgreifendes Werk, das sich bis in erkenntnistheoretische Fragen hinein verzweigt. Den Philosophen Dworkin für einen Rechtstheoretiker zu halten, hieße so viel wie Luhmann, den Gesellschaftstheoretiker, mit einem Rechtssoziologen zu

[1] R. Dworkin, Law's Empire (Harvard UP), Cambridge, Mass. 1986, 243: "Law as integrity asks judges to assume ... that the law is structured by a coherent set of principles about justice and fairness and due process, and it asks them to enforce these in fresh cases that come before them, so that each person's situation is fair and just according to the same standards. That style of adjucation respects the ambition integrity assumes, the ambition to be a community of principle."

verwechseln. Schon der frühe, 1978 veröffentlichte Essay über Liberalismus lässt den größeren philosophischen Zusammenhang erkennen. Dworkin wollte von vornherein die Politik- und Rechtsphilosophie auf ein breiteres Fundament stellen. Er entfaltet die Grundbegriffe und Verfahren des demokratischen Rechtsstaates aus der Substanz und dem kämpferischen Geist eines *ethischen* Liberalismus. Dieser steht und fällt mit einer bevorzugten Konzeption des richtigen Lebens und einer spezifischen Lebensform.

Der Aristoteliker in Ronald Dworkin scheut vor einer anthropologischen Begründung der gerechten politischen Ordnung nicht zurück. Das richtige Bild vom Menschen trägt die ästhetisch-expressiven Züge der schöpferischen Person, die die Verpflichtung spürt, aus ihrem Leben etwas Produktives zu machen. Am Anfang steht die Einsicht, dass wir für die Gestaltung unseres eigenen Lebens verantwortlich sind. Kant behält nicht das letzte Wort. Am Jüngsten Tage müssen wir Rechenschaft ablegen, aber nicht in erster Linie über die Wunden, die wir anderen zugefügt haben, sondern über die verspielten Möglichkeiten des eigenen, falsch genutzten Lebens.[2] Die Achtung gegenüber anderen gründet in der Generalisierung dieser Pflicht sich selbst gegenüber: "Our various responsibilities and obligations to others flow from that personal responsibility for our own lives. Only in some special roles and circumstances – principally in politics – do these responsibilities to others include any requirement of impartiality between them and ourselves."

Dieser Vorrang der ethischen Freiheit des einzelnen Gesellschaftsbürgers vor der moralisch-politischen Freiheit des Staatsbürgers erklärt den interessanten Unterschied zwischen Rawls' und Dworkins Konzeptionen der Verteilungsgerechtigkeit. Der sozialdemokratische John Rawls hält in einer kapitalistischen Gesellschaft nur das Maß an sozialer Ungleichheit für legitim, das auch noch die benachteiligten Klassen aus eigenem Interesse in Kauf nehmen können. Demgegenüber entwickelt

[2] R. Dworkin, Justice for Hedgehogs: Synopsis (MS. 2006),1. Dem geht der Satz voran: „We each have an enduring and special responsibility for living well, for making something of value of our own lives, as a painter makes something valuable of his canvas."

Dworkin in seinem anspruchsvollen Buch *„Sovereign Equality"* (2000) eine sozialliberale Theorie der Verteilungsgerechtigkeit. Weil die persönliche Freiheit der Privatperson im Mittelpunkt steht, trägt jeder selbst das Risiko für die Wahl des Lebens, das er führen möchte. Gleichheit der Chancen wird dadurch gewährleistet, dass alle *zu Beginn* über die gleichen Ressourcen verfügen und durch eine Art Auktion einen Ausgleich zwischen mehr oder weniger kostenintensiven Lebensentwürfen herbeiführen. Unter dem Gesichtspunkt der Ressourcengleichheit bedürfen auch die unverschuldeten Defizite und Benachteiligungen, mit denen Umstände und genetische Ausstattung das persönliche Leben belasten, der Kompensation. Diese höchst raffinierte Versuchsanordnung hat unter den Experten viel Beachtung gefunden.

Eine Rede auf den Juristen und Philosophen Ronald Dworkin verfehlt an dieser vitalen Person einen wesentlichen Zug. Ich meine die Geistesgegenwart des Intellektuellen, der seit vielen Jahrzehnten in der *New York Review of Books* und in den angesehensten Law Reviews zu den Themen, die das Land bewegen, mit Sachverstand und Eloquenz Stellung nimmt. Die einzigartige Verbindung von argumentativem Scharfsinn und rhetorischer Eleganz verdankt sich auch der frühen Schulung des Advokaten, der gelernt hat, die Sache eines Mandanten vor Gericht zu vertreten. Als Bürger und Intellektueller hat Dworkin freilich keine Klienten mehr. Er greift aus eigener Initiative – auch dann, wenn die Aussicht auf Erfolg gering ist – in die Debatte ein.

Seit den 1960er Jahren gibt es in der amerikanischen Öffentlichkeit kaum eine politische Kontroverse von Wichtigkeit, die Dworkin nicht dazu herausgefordert hätte, seine politischen Gegner vor das Forum wohlerwogener Gründe zu zitieren. Es mag sich um affirmative action oder Abtreibung handeln, um Pornographie und Pressefreiheit, hate speech oder Sterbehilfe, um zweifelhafte Kandidaten für den obersten Gerichtshof oder um exzentrische Urteile des Supreme Court selber, wenn dieser – wie im Falle Gore vs. Bush – die Verfassung eher strapaziert als

schützt. Dabei spielt auch die Kultur eines Landes, wo sich politische Streitfragen vor Gericht in *hard cases* verwandeln, dem Juristen Dworkin in die Hände.

Aber schon die Theorie des Juristen und Philosophen stiftet, wenn sie aus den Fragmenten des geltenden Rechts ein System der Rechte entziffert, das zur Verwirklichung *drängt*, eine Verbindung zur Praxis des engagierten Intellektuellen. Die traurigen Fakten des bestehenden Rechtszustandes verraten bereits die Aspiration auf eine wohlverstandene Herrschaft des Rechts. In diesem Sinne spricht Dworkin vom *aspirational concept of law*. Darin drückt sich ein sehr amerikanischer Patriotismus aus, dessen anrührenden Impuls ein anderer amerikanischer Philosoph, Richard Rorty, auf einen unverdächtigen Begriff gebracht hat – *achieving our country*. Ronald Dworkin hat mit seinem letzten Buch von diesem Brechtschen Impuls, das eigene Land zu verbessern, ein bewegendes Zeugnis abgelegt.[3]

Die kleine Schrift beginnt mit dem Eingeständnis „Die amerikanische Politik befindet sich in einem entsetzlichen Zustand". So beginnt sie nur deshalb, weil sie aus der beängstigenden politischen Polarisierung des Landes zwischen den Lagern einer religiösen Rechten und eines marginalisierten Linksliberalismus herausführen soll. Dworkin verleugnet natürlich nicht den parteinehmenden Anwalt der liberalen Sache; aber er verteidigt diese Sache in der Rolle eines Moderators, der beide Seiten erst geduldig zu Wort kommen lässt, um sie dann an die Basis ihrer gemeinsamen Werte zu erinnern.

Dworkin lässt kein heißes Eisen aus. Er verhandelt uneingeschüchtert Guantanamo und die Verweigerung von Justizgrundrechten, die terroristischen Gefahren und jene Folterpraktiken, die als *coercive interrogation* verniedlicht werden; er diskutiert über staatliche Sicherheitsinteressen und die Eingriffe in individuelle Bürgerfreiheiten, über die Todesstrafe und die utilitaristische Aushöhlung des Strafrechts; er spricht über den religiösen Fundamentalismus und die weltanschauliche Neutralität

[3] R. Dworkin, Is Democracy Possible Here? (Princeton UP), Princeton, NJ, 2006

des Staates, über die Homosexuellenehe und das Verhältnis des biblischen Glaubens zur Autorität der Wissenschaften; er erörtert die neoliberale Wirtschaftspolitik und die Frage der sozialen Gerechtigkeit, den Sozialstaat als Legitimitätsbedingung der Demokratie und die Zerstörung der politischen Öffentlichkeit durch die Medienmacht der privaten Konzerne. Aber dieses Mal zeichnet sich seine Argumentation dadurch aus, dass er als Patriot über sehr tiefe Gräben hinweg die Grundlagen der gemeinsamen politischen Kultur beschwört. Hier appelliert einer im Tenor von „We Americans" an die Gegenseite, den besseren Teil der nationalen Werte nicht zu vergessen.

Weil ich weiß, wie sehr mich selbst die Polemik in ähnlich angespannten Situationen reizt, verhehle ich nicht meine Bewunderung für die demokratische Geistesart dieser um Konsens werbenden Intervention, die den Faden der diskursiven Auseinandersetzung auch mit extremen Gegnern nicht abreißen lassen will. Blindes Vertrauen in die Zerreißfestigkeit der eigenen politischen Kultur ist gewiss nicht ungefährlich; aber in begründeten Fällen ist es Ausdruck der reiferen demokratischen Tradition.