

Alan Dershowitz: On the Philosophy of Law

Interview by Gil Labav

HRP: Recently, there has been some controversy at Harvard Law School about the proposed ban on hate speech. What are your views on speech codes?

Dershowitz: What I am in favor of is a specific provision that makes it clear that nothing can be banned unless it's specified by rule. And the only thing that I personally am prepared to see prohibited is harassment that borders on the physical. That is, an employer shouting at an employee in a racist, sexist, or otherwise denigrating manner, because of [his or her relative superiority in a] hierarchical situation. But I am unequivocally opposed to any ban on any speech that is content-laden, classroom speech, or speech involving any political issues. I am as close to an absolutist on free speech as anyone in the Harvard University community. If we were to have any restrictions at all, I would prefer to see them in a code than to leave them to the discretion of some administrator. It is the arbitrary discretion of an individual that I am afraid of.

HRP: What do you think should be the philosophical mission of the Supreme Court?

ALAN DERSHOWITZ IS Professor of Law at Harvard Law School. His recent books include *Chutzpah and Best Defense*.

Dershowitz: In the most general terms, the Supreme Court ought to do several things. It ought to clear the channels of democracy, [by ensuring] that voting is fair, that the democratic process operates fairly, that free speech is open and complete, that legislatures are properly apportioned. That's its primary mission: to see that democracy operates so that the legislatures can make [society's] decisions fairly. Beyond that, I think its other important role is to vindicate the constitutional rights of minorities who don't have the political power to have their rights prevail in the popular branches of the executive and the legislature.

HRP: In what ways is that mission compatible or incompatible with its political function?

Dershowitz: It's incompatible to the extent

that the Supreme Court has become very politicized lately. It could be compatible. There is a proper role the Supreme Court could play, in which it is much more neutral on substantive issues but sees as its mission the vindication of minority rights that could not be vindicated by the popular branches.

HRP: How do you define “minority?”

Dershowitz: Well, it’s not easy to define it. It’s a continuum. The Supreme Court should have more power to vindicate the rights of those minorities who are weakest. Organized minorities deserve less protection than unorganized minorities, like atheists, criminal defendants, Communists, or Fascists. People who have no political constituency in this country can’t use political processes. I don’t define minorities in the way they’re defined in civil rights statutes.

HRP: So what are your views on affirmative action as a way to protect minority rights?

Dershowitz: My views on affirmative action are very complex. I don’t personally believe in race-specific or gender-specific affirmative action. I do believe in affirmative action based on how far a person has come from his or her



personal origins. Universities ought to take into account where a person has come from, rather than only a static view of where that person is. But race [or gender] alone should be given little weight. I think race-specific affirmative action tends, in the end, to favor wealthy minorities over poor minorities, and more advantaged women over less advantaged women.

HRP: In *Doing and Deserving*, Joel Feinberg argues that legal responsibility, unlike moral responsibility, can be quite arbitrary. According to him this is the case because, with legal responsibility, the line must be drawn somewhere. Does that mean that there can be no right place to draw the line?

Dershowitz: I disagree with that formulation. In law you don’t have to have a strict line; you could have a continuum too. We should not have a continuum when it comes to protected speech or areas where it’s very important that we have clear lines, but it’s in the nature of the legal system that we sometimes draw lines and sometimes have a continuum, and knowing when a line is appropriate [as opposed to] a continuum is a very important legal-philosophical consideration.

HRP: What makes one line more appropriate or better than another line?

Dershowitz: If we have to draw lines, we should draw them by the democratic process, because they're arbitrary and arbitrary decisions ought to be made in majoritarian ways, [and] not by judges. And for the most part, public decisions in the United States are made in this way. When we decide that 18-year olds should vote, that's a legislative judgment — there's nothing right or wrong about it. We need a line. We don't want to inquire [about] everyone's capability of voting. We instead want to delineate a clear, but arbitrary line.

HRP: How removed should judges and Supreme Court Justices be from the world which they impact with their decisions?

Dershowitz: Judges should be familiar with how the world operates because they're being asked to make decisions that will have real effects, and these decisions must be based on [some] conception of how the world operates. For example, the current Supreme Court suffers from not having really experienced, excellent lawyers, and that shows in the quality — or lack thereof — of some of its decisions, particularly in the criminal justice system, which I know best. We see a series of naive decisions that don't reflect the reality of the poor.

HRP: What are your views on the movement to increase the number of court proceedings that are televised?

Dershowitz: It's not cost free, but I think it's worth the cost. My idea is to have a publicly owned station, much like C-span, that would cover the judiciary. It wouldn't try to focus only on the sexiest and most provocative cases, but [rather] on the most important ones, even if they're boring. It wouldn't have as one of its goals to bring viewers to the screen, but to make the judiciary more accessible to those interested in its process or decisions. It should be as open, in a democracy, as any other institution of government, so I'm in favor of more televising, though I don't like the way it's done now.

HRP: But don't you think that televising important or very emotional trials can create the danger of mob justice?

Dershowitz: Well, the alternative to mob justice is elite justice, and what we have to do is strike a balance. Mob justice is a phrase that was also used to denigrate democracy. What's so delicate about the balance that our constitution strikes is that, on the one hand, it calls for a republican form of government with many attributes of a democracy and, on the other hand, it leaves some of the most important decisions to an elite, namely the judiciary. Keeping that balance right is very difficult.

HRP: In the first lecture of your course "Thinking about Thinking" you seemed to deny that there could be any truth in the world of legal discourse. You claimed that lawyers simply select as premises the level of analysis that suits the needs of their client's case, and then argue the case from those premises. If that is correct, then does justice amount simply to the level of analysis which most impresses a judge or a jury?

Dershowitz: I think it is possible to have truth. I just think that it's something that few people care about deeply in our legal system. Our legal system is eminently manipulable and good lawyers know how to manipulate it. There have been times in our history when the search for truth was genuine. Today our legal system has become so politicized that I see more manipulation than I do [any] search for truth. Justice is a process — a fair process. Since I don't believe in natural law, and I don't believe in legal positivism, I need to look at law as a fair process, which doesn't necessarily guarantee fair outcomes.

HRP: What would a fair process entail?

Dershowitz: A fair process entails fairly selected judges and jurors, clearly articulated rules, rules that don't differentially impact based on race, sex, poverty, or other such factors. Substantively clear rules that contain basic elements of justice. But it's very hard to define justice, or even fairness, in a paragraph. In some sense we know it when we see it. It's much easier to see its opposite than to see justice. I never expect to see absolute justice. I have seen absolute corruption, but I have never seen absolute justice.

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HRP: Given the fair process as you've just conceived of it, what aspect of America's legal system needs the most improvement right now?

Dershowitz: Judges and the judiciary. We have cynical judges who don't believe in justice, cheat and lie, are intellectually dishonest in every way, and yet who are elected. And that combination is an indication of disaster.

HRP: What do you think accounts for the selection of inappropriate judges?

Dershowitz: The politicization of the process. The fact that the judiciary is seen as a plum. The fact that people aren't trained to be judges. In many parts of the country being a federal judge means being a mediocre lawyer who has a senator for a friend, and being a state judge means being a mediocre lawyer who has a governor for a friend. The process by which we pick our judges is an abomination. It's one of the worst processes of any civilized country in the world.

HRP: Do you think judges should be elected?

Dershowitz: No. That's the only worse system, because then we essentially have

one branch of government pretending to be divided into three. It's important that we have an elite branch of government that is picked for stability and selected without day-to-day accountability to the popular will. But I think they ought to be picked more professionally — more in terms of peer review and less in terms of politics.

HRP: If the United States had to improve its legal system by emulating that of another country's which country would you recommend?

Dershowitz: I don't think any country can emulate any other country's legal system because every legal system has to evolve from the culture of the country. There is no country in the world that is as multi-linguistic, multi-religious, multi-racial, as ours. So we have to have our own legal traditions. Any time that we've tried to borrow too heavily from other traditions we've failed. When other countries have tried to borrow from us they've failed. We have to improve our legal system on our own terms. There are elements we can borrow, but not the system. One of the reasons I generally refuse to consult other countries on how to write their constitutions is that I think too many countries borrow from other countries without thinking through what's right for them.

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HRP: From your observations, which other countries have exemplary or fair justice systems?

Dershowitz: None. I don't

think any country has a perfectly fair justice system. Every country that I've been to and examined has major flaws in its legal system. Some are better than others, and some systems are better than other systems in certain ways but not in other ways. For example, the military system is very efficient, but when any element of politics comes into play, it's terrible. The English system is very good, but it is [too sheltered from the press], and so its abuses cannot be as effectively monitored. The Israeli system is quite good, except when it comes to protecting the rights of Palestinians. So every system has its particular flaws.

HRP: Some opponents of the death penalty base their opposition on the skeptical claim that there is always doubt as to a defendant's guilt. What do you think of this view?

Dershowitz: They're wrong. Sometimes there is no doubt. There is no doubt that Adolf Eichmann killed many Jews. Sometimes there is undeniable evidence, like with a video tape.

HRP: But those opponents might counter that even video tapes can be doctored, and so there is always room for doubt.

Dershowitz: That's true. But not every video tape is doctored. I still believe in

the existence of simple facts, like whether the guy pulled the trigger which caused the bullet to pierce the victim's lung. I'm not an epistemological skeptic. If I'm sitting in a chair, I don't doubt that it's a chair.

HRP: In more general terms, what are your views on the death penalty?

Dershowitz: I'm also opposed to the death penalty, but for another reason. In America, as in all other countries, the death penalty is applied inconsistently and unfairly. If you're a black man who kills a white man, you're much more likely to get the death penalty than if you're a white man who kills a black man. If one day the death penalty could be applied fairly and correctly, I might have to reconsider my position, but I don't think that day will come.

HRP: How would you classify your views on how the institution of punishment is to be justified? Do you subscribe to a retributivist or a utilitarian theory of punishment, or do you believe in some kind of Rawlsian composite theory?

Dershowitz: I don't subscribe to any prepackaged views. I think about each issue individually and form an eclectic opinion which borrows a little from whatever perspective or analysis seems appropriate to the issue. Above all, I ask myself what kind of society I want to live in and what kind of society I want my kids and grandkids to live in, and then I look for the principles whose application would bring about such a society. φ