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Taking Rights Seriously

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BOOK REVIEW

TAKING RIGHTS SERIOUSLY. By Ronald Dworkin.¹ Cambridge: Harvard University Press, 1977. Pp. xv, 293. \$12.00.

*Reviewed by Alan Mabe*²

Ronald Dworkin is one of the two or three most innovative contemporary legal philosophers. After several centuries of debate between proponents of legal positivism and natural law theory, we may now have a genuine alternative that defies classification in either of those traditional categories. *Taking Rights Seriously* is a collection of eleven previously published essays and two new essays written especially for this volume. While all the major components of Dworkin's position are now available in a single work, they are not systematically unified in this reprint format. For the present the reader must perform the task of synthesis, though Dworkin has indicated that he will make a systematic presentation of his position in the future.

The central idea of Dworkin's philosophy is the rights thesis: "[J]udicial decisions enforce existing political rights."³ One might add that this is so even in hard cases at law where competent lawyers disagree about what the outcome of the case should be. Dworkin also maintains that there is no judicial discretion and that there is a single right answer in every case.

Dworkin is attempting to provide a systematic alternative to legal positivism, which he describes as the ruling theory of law. In particular, he attacks H.L.A. Hart's version of legal positivism as articulated in *The Concept of Law*.⁴ Dworkin dubs positivism "the model of rules." According to the model of rules, there is a master rule (Hart's rule of recognition) which allows one to determine which rules of the legal system are valid. Because of the positivist's insistence on the separation of law and morality, the determination of the validity of law is primarily a factual matter: whether the particular rule meets the conditions of the master rule of recognition. One has legal rights and obligations when there are legal rules which provide them. If there are no legal rules available for a case, or if the available rules are inconsistent or vague, the judge will not have

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3. R. DWORKIN, *Hard Cases*, in TAKING RIGHTS SERIOUSLY 87 (1977).

4. H.L.A. HART, *THE CONCEPT OF LAW* (1961).

adequate legal standards for deciding the case. According to the model of rules, the law has "run out" at this point and the judge has discretion to find extralegal material on which to base the decision. When the law runs out, there is inadequate legal material for determining a single right answer, so many answers would be legally acceptable.

Dworkin rejects this model. He argues in effect that the law never runs out. Dworkin argues that the law is more than a set of rules. In his early work he emphasized the role of principles in the law. If one has principles in addition to rules, the law cannot run out; hence there can be no judicial discretion.⁵ Dworkin recognizes that the introduction of principles is not in itself adequate to counter the model of rules. In later essays, especially "Hard Cases,"⁶ he develops a more elaborate theory of law. He introduces a mythical judge, Hercules. Hercules is to construct a set of principles that best explain and justify existing law. This theory will include a theory of the constitution, a theory of legislation, and a theory of precedent. In order to develop a consistent theory, a theory of mistakes must be included. In effect, then, Hercules is to construct a set of principles that fits the institutional material (constitution, statutes, and precedents). If more than one theory fits the institutional material, Hercules is to choose the one that most appeals to our theory of morality.

Presumably Hercules will arrive at a theory (set of principles) that can be used to decide the hardest case. This theory will be the basis for deciding whose rights are to prevail in a given case. As Dworkin puts it, "A proposition of law may be asserted as true if it is more consistent with the theory of law that best justifies settled law than the contrary proposition of law."⁷ A typical proposition of law would be: "Plaintiff has the right he claimed before the court." Dworkin's elaborate theory fills in the gap found in the model of rules and eliminates judicial discretion, since there is available a legal standard which Hercules can use to decide hard cases.

Effectively, Dworkin argues that the determination of what is the law is a normative matter, in contrast to the positivists who consider this determination a factual matter. Dworkin believes that "judges must sometimes make judgments of political morality in order to decide what the legal rights of litigants are."⁸ In working out his

5. Dworkin defines discretion as there being no standards available for guiding the decision. *The Model of Rules I*, in R. DWORKIN, *supra* note 3, at 32.

6. *Hard Cases*, *id.* at 81-130.

7. *Can Rights Be Controversial?*, *id.* at 283.

8. *Hard Cases*, *id.* at 90.

theory of law, Hercules must include moral concerns in the determination of the standard to be used to settle a case. Dworkin wants to avoid use of the idiosyncratic values of a particular judge, so he would apparently follow Rawls' method for establishing the moral principles Hercules would use in constructing his theory of law. This method involves constructing the set of moral principles that best explain and justify the considered moral judgments that would be assented to by those subject to the law. This part of Dworkin's position is very controversial and is inadequately developed, but his position offers an alternative to legal positivism that seems to stop short of traditional forms of natural law theory.

With the aid of Hercules' theory, one can explicate the rights thesis: "Judicial decisions enforce existing political rights." Political morality enters into the determination of the standards to be used in deciding whose rights are to prevail in a hard case, so one cannot determine in any neutral or factual way what legal rights one has. Contrary to the positivist view that rights are simply created in hard cases, Dworkin argues that even in hard cases rights exist for us to discover, in the sense that the constructed theory of law will merely sanction the preexisting rights of one of the parties in the case. Dworkin thinks there is always a single right answer, since there is always a best theory of law that can serve as the standard for determining the answer—even though the answer may be controversial and judges may make mistakes.

Dworkin gives some attention to working out a critical theory of rights. The fundamental right he articulates is the right to equal concern and respect. He distinguishes between the right to equal treatment and the right to be treated as an equal. The right to equal treatment entails the equal distribution of goods and opportunities, whereas the right to be treated as an equal guarantees equal concern and respect in the political decision about how those goods and opportunities are to be distributed. The latter is the more fundamental and is compatible with unequal treatment. This distinction is the basis for Dworkin's support of preferential treatment and for his argument that Allan Bakke has no right that the Supreme Court should vindicate.⁹

Dworkin's substantive theory of rights needs far more work before it can reasonably be evaluated. Dworkin's moral theory and his theory of rights are anti-utilitarian. That is, rights function to limit interference with one's activities even when the social good would be served by such interference. The problem is that Dworkin does

9. Dworkin, *Why Bakke Has No Case*, THE N.Y. REV. OF BOOKS, Nov. 10, 1977, at 11.

not provide a rich enough account for us to understand how his theory of rights would differ from rule-utilitarianism.

Dworkin has devoted much attention to the role and justification of the judicial function. He distinguishes between principles and policies and maintains that judicial decisions should be generated by principles rather than by policies. Given the widespread belief that judges legislate, or, more particularly, that they make policy determinations in their decisionmaking, Dworkin's claim may seem quite radical. But because he argues that the rights thesis and a principled basis for decisions are compatible with both consequentialist reasoning and discussion of the issues in economic terms, the theory ultimately is not very radical. Counterarguments to Dworkin's theory must be framed very carefully if they are to be effective.

Dworkin distinguishes between arguments of policy and arguments of principle. An argument of policy justifies a political decision "by showing that the decision advances or protects some collective goal of the community as a whole."¹⁰ An argument of principle justifies a political decision "by showing that the decision respects or secures some individual or group right."¹¹ According to Dworkin, arguments of policy are most appropriate in the legislature: judges should limit their reflection to arguments of principle in articulating the rights of litigants. Legislative policy decisions create institutional rights which, of course, a court may enforce. But to secure a right based on a legislative policy does not mean that the court's decision is a policy decision. Dworkin suggests in a recent article that a true counterexample to the rights thesis would require a case in which a court determined that one litigant had the right to win, but as a matter of policy decided to award the decision to his opponent.¹² Dworkin concedes that many cases are compatible with either an argument-of-principle reading or an argument-of-policy reading. However, Dworkin sees the compatibility of both types of arguments with the cases as something of a victory for him, since so many of his critics adopt the policy reading as obvious.

Dworkin uses his reflection on the role of principle to defend an active role for the judiciary. Opponents of judicial activism argue that it is undemocratic, since unelected judges make decisions that should be made by the majority-decision process. Dworkin argues that the distinctive function of the court is countermajoritarian and anti-utilitarian. Its role is to decide what people's rights are, which rights may often be against the interests of the majority. So long as

10. R. DWORKIN, *supra* note 3, at 82.

11. *Id.*

12. Dworkin, *Seven Critics*, 11 GA. L. REV. 1201 (1977).

judges limit themselves to arguments of principle, they are not super legislators and hence are not usurping anyone else's function. But if judges engage in policymaking, a legitimate counterdemocracy argument may be made against them. Dworkin's account, then, is both a defense of judicial activism and a theory of the limits of judicial decisionmaking.

Perhaps the most controversial part of Dworkin's theory is the role of political morality in the determination of legal rights. Even though Dworkin has shown how Hercules might construct a legal theory which eliminates any judicial discretion arising from the absence of standards relevant to the decision, a critic might argue that there is enough uncertainty at the level of legal theory and at the level of moral theory for us to call these standards into question. So one might say there is judicial discretion at the level of legal theory or moral theory or both. Dworkin admits there will be controversy over his theory, and he never claims that there is any certain way to determine the right answer in a case even though there is one. But even accepting this reservation, critics may claim that Dworkin's model is so indeterminate that little judicial discretion is actually foreclosed. However, given the available institutional material (constitution, statutes, precedents), one could, it seems, give a rather determinate account of some legal principles which would best justify existing law.

Perhaps the problem comes ultimately at the level of moral theory. Dworkin would counter an attack at this level by arguing that morality for the purposes of the law is not so amorphous. He says that "his [Hercules'] theory identifies a particular conception of community morality as decisive of legal issues; that conception holds that community morality is the political morality presupposed by the laws and institutions of the community."¹³ Dworkin would argue that the morality presupposed by legal and other institutions of society can be determined, so that in principle we can have closure even for the moral standard.

This issue in Dworkin's model is far from settled, but it appears that he has made a valuable contribution to legal theory in structuring the issue as he has. Other American legal theorists have addressed this problem, but none has been able to focus the issue as sharply as Dworkin. Holmes reflected on the role of values in judges' decisions, and Fuller has labored to show the role of rationality and values in judicial decisionmaking, but neither seems to offer any determinate theory, either explanatory or justificatory. A theory

13. R. DWORKIN, *supra* note 3, at 126.

that would explain how moral values get into the law and would give an account of the appropriate role moral values are to play in judicial decisionmaking would be a valuable contribution to legal philosophy. Even if Dworkin is not entirely successful, he has made more headway with this problem than any other contemporary legal philosopher.

Much more detail is in Dworkin's essays than I have been able to communicate here, and many other controversial and important issues are discussed in these essays. One thing is clear: Dworkin will have as much influence on legal philosophy in the next decade as Hart had in the last one. At the very least, anyone interested in contemporary legal philosophy must encounter and assess Ronald Dworkin's views.