

---

## Seeking a Common Ground on Human Rights

Joseph Cardinal Bernardin

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

---

### Recommended Citation

Joseph C. Bernardin, *Seeking a Common Ground on Human Rights*, 36 DePaul L. Rev. 181 (1987)  
Available at: <https://via.library.depaul.edu/law-review/vol36/iss2/2>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

## SEEKING A COMMON GROUND ON HUMAN RIGHTS

*Joseph Cardinal Bernardin\**

I have been invited to address several bar association meetings in Chicago, usually on the topic of professional ethics.<sup>1</sup> On these occasions and from personal encounters with attorneys, I have learned that many of them hunger for truth, justice, and mercy. Many choose to labor in the profession of law because they desire to serve people. I identify strongly with their hunger and desire; the legal profession and the Church share many mutual concerns.<sup>2</sup>

We also share a common concern about human rights. The Church approaches human rights from a long tradition based on the religious concept of natural law. The approach of legal philosophers to human rights is rooted instead in the relationship of the individual to society. Although we may address the same question from different perspectives, we find broad areas of agreement, because we ultimately are concerned with the nature and rights of the human person, the protection of those rights, and their relationship to the rights of others in society.

Nevertheless, because we approach this question in different ways, we sometimes find it difficult to communicate. We may use the same words with slightly different connotations, or we may use different words to express the same reality. We need a common ground, a mutually agreed upon language, that will enable us to communicate more effectively.

Recently, I have become familiar with the work of Ronald Dworkin, professor of jurisprudence at Oxford University in England. He provides a legal analysis that may help locate such a common ground. I will explore the potential of Dworkin's work in this article, which is not intended to be a scholarly analysis or critique of his legal philosophy. I will highlight certain of his ideas and indicate how they might enable us to come to a clearer understanding of human rights. Let me acknowledge at the outset that many attorneys and judges may, at first, find Dworkin's legal philos-

---

\* Cardinal Bernardin is the archbishop of Chicago.

I am honored that the editors of the DePaul Law Review have invited me, a pastor with no professional training in the law, to contribute an article to this journal. On several occasions in recent years I have addressed such topics as religion and politics as well as the relationship of Church and State. The DePaul Law Review published one of these addresses through the Center for Church/State Studies. See Bernardin, Marty & Adams, *The Role of the Religious Leader in the Development of Public Policy*, 34 DEPAUL L. REV. 1 (1984).

1. I was invited to address the Chicago Bar Association on Jan. 30, 1986. On June 18, 1986, I addressed the Federal Bar Association. Many of the ideas expressed in this article were developed in these addresses.

2. In 1934, the Archdiocese of Chicago established the Catholic Lawyers Guild of Chicago, a permanent forum for Roman Catholic lawyers to share common concerns.

ophy and the Church's understanding of natural law rather foreign to their way of thinking and unrelated to the way they practice and interpret the law. I hope to persuade them to reconsider their opinion.

On January 30, 1986, I had the privilege of addressing the Chicago Bar Association. I was asked to speak on the crisis in morality and morale that followed in the wake of "Operation Greylord."<sup>3</sup> On that occasion, and again on June 18, 1986, in an address to the Federal Bar Association, I quoted Charles Evans Hughes to highlight the importance of the legal profession: "We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution."<sup>4</sup>

Many attorneys and judges would probably accept Chief Justice Hughes' words as both descriptive of legal practice and normative of our constitutional system. However, I have recently become convinced that his words are neither wholly accurate nor particularly helpful in describing our fundamental law. There must be more to the Constitution and, particularly, the Bill of Rights than simply "what the judges say it is." Otherwise, we are subject to judicial tyranny, and the law is disconnected from the notion of justice.

In my address before the Chicago Bar Association, I also referred to the work of Ronald Dworkin, without adverting to the inconsistency between his views and those that necessarily follow from Hughes' description of the Constitution.<sup>5</sup> I have since learned that Dworkin's scholarly studies have been collected and published in two volumes, *Taking Rights Seriously*<sup>6</sup> and *A Matter of Principle*.<sup>7</sup> I have found that his ideas have much in common with the natural law theory which I espouse. His jurisprudence is especially valuable because it puts forth a credible rights thesis.

In *A Matter of Principle*, Dworkin offers the premise that two dominant themes in twentieth-century jurisprudence have distorted the concept of law: *legal positivism* and *utilitarianism*. Legal positivism asserts that the only existing rights and duties are those explicit in positive law—that is, legislative statutes or past judicial decisions. This assumes that law exists only because of human action. Utilitarian theories go further. They argue that what is good for society is the foundation of law—in other words, whatever constitutes the greatest good for the greatest number should dictate what laws exist. These views stand in contradistinction to an understanding of law as being grounded in, expressive of, and judged by

---

3. "Operation Greylord" is an ongoing federal investigation of corruption in the Cook County courts. See e.g., Chicago Tribune, Mar. 16, 1984, at 1, col. 2.

4. Speech by Chief Justice Charles Evans Hughes, May 3, 1907, quoted in R. ALDISERT, THE JUDICIAL PROCESS 501 (1976).

5. A narrow interpretation of Chief Justice Hughes's description leads to a blatant form of legal positivism in which law is nothing other than "what the judges say it is."

6. R. DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

7. R. DWORKIN, A MATTER OF PRINCIPLE (1985).

rights and principles that exist prior to and apart from written law, and that serve as parameters for the ordering of the proper relationship between the individual and society.

In retrospect, it is easy to see the difference between the concept of law as an expression of a higher natural law and the blatant legal positivism of Hughes's interpretation of the Constitution. If the Constitution is the equivalent to what the judges say it is, then we are at the mercy of their discretion, and rights mean nothing. Dworkin's work, as I understand it, stands primarily for two things: (1) the primacy of individual human rights, and (2) the reality of principles that provide a moral context for interpreting the Constitution and adjudicating "hard cases." His jurisprudence also opposes all forms of positivism and utilitarianism as adequate justifications for law.

### I. THE PRIMACY OF RIGHTS

Belief in the primacy and, therefore, the reality of human rights entails denial of the central tenets of both legal positivism and utilitarianism. By definition, rights make legal sense to the legal positivist only to the extent that they are created and enforced by positive law. While not denying that the law may create rights by way of legislation, Dworkin holds, with the tradition of natural law theory, that individuals possess certain rights by virtue of their existence as human beings. In fundamental ways each human person possesses inalienable rights that the state must respect. This is the concept Dworkin has in mind when he asks us to take rights seriously.<sup>8</sup>

In its political expression, utilitarianism takes seriously the good of the majority. Naturally, one would expect the good of the majority to be discovered by consulting the opinion and will of the majority. This method appears to be fundamentally fair and a basis for democracy. However, most cannot resist the further step of making the good of the majority, as determined by the majority, decisive for all cases. In the name of the majority rule, utility ignores the individual, rights are not taken seriously, and law is nothing more than the possibility of tyranny by the party in power.

In rejecting both legal positivism and utilitarianism, Dworkin places moral limits on the state's power and includes in the definition of the rule of law the belief that the state and the government are, in some important ways, servants of the individual. A proper constitution admits the existence of certain rights and recognizes an obligation on the part of the government to defend them. The Constitution is neither the source of these rights, nor the definitive articulation of what they are in particular circumstances.<sup>9</sup>

---

8. R. DWORKIN, *supra* note 6, at 184-205.

9. As Dworkin noted, "[T]hrough the constitutional system adds something to the protection of moral rights against the Government, it falls far short of guaranteeing these rights, or even establishing what they are." *Id.* at 186.

Beyond the written words of the Constitution is the principle of the constitutional state.<sup>10</sup>

## II. THE REALTY OF PRINCIPLES

An important aspect of Dworkin's jurisprudence is the matter of principles. Commitment to the place and function of principles within the concept of law corrects the prevailing view of the law as a mere collection of rules.<sup>11</sup> Rules of law, whether articulated through the development of common law or the direct product of legislative action, are generally justified by policy. Rules articulate a decision that the general welfare or the public good will be served by general application of a standard that requires, permits, or forbids certain conduct or results. The model rule would be an act of legislation, applicable only to future circumstances and the facts pertaining to the subject under consideration. Where rules of law exist, they typically determine the outcome of the cases to which they apply. Rules articulate the desire of the legislative will, and from that desire they have their authority and force.

Principles fill in where rules do not apply. Situations not covered by an existing rule still exist, and courts need to provide some rationale for their decisions. Dworkin defines "principle" as a rationale: "I call a 'principle' a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality."<sup>12</sup> Principles form the basis for a decision even where no rule defines the decision. The adjudication of so-called "hard cases" provides the setting in which principles govern the outcome of cases.<sup>13</sup>

According to Dworkin, principles operate at the heart of the legal system. Of particular importance are such concepts as *liberty*, *fairness*, and *equality*, concepts constitutionalized in the equal protection and due process clauses of the fourteenth amendment—the grounds of the American political experiment. These are moral concepts, and they are meant to function as moral principles. Nevertheless, there is no consensus regarding all they entail or how they are to be applied. For Dworkin, these principles are the vehicle by which individuals can argue for the existence of rights not specifically legislated, not found to be recognized by any rule of law.

---

10. Most people may think of constitutional law solely in reference to the document itself and its subsequent interpretation by the courts. In the United Kingdom, however, the term presupposes not only notions of empowering and legitimating government, but also the recognition that government is limited—limited precisely because individuals have rights. This is certainly the Roman Catholic Church's vision of a constitution found in *Dignitatis Humanae*, the Declaration on Religious Freedom promulgated at the Second Vatican Council in 1965.

11. See, e.g., H. HART, *THE CONCEPT OF LAW* (1961).

12. R. DWORKIN, *supra* note 6, at 22.

13. See R. DWORKIN, *supra* note 6, at 81-130.

## III. THE FUNDAMENTAL RIGHT TO EQUALITY

Dworkin devotes a chapter of *Taking Rights Seriously* to "Justice and Rights."<sup>14</sup> There he develops the idea of the "original position" first expressed in John Rawls's *A Theory of Justice*.<sup>15</sup> Behind the "original position," Dworkin sees what he calls "the theory" that entails an explicit recognition that rights are *natural*. This deep theory, he insists, is based on rights, and he explains it this way:

It must be a theory that is based on the concepts of rights that are *natural*, in the sense that they are not the product of any legislation, or convention, or hypothetical contract. I have avoided that phrase because it has, for many people, disqualifying metaphysical associations. They think that natural rights are supposed to be special attributes worn by primitive men like amulets, which they carry into civilization to ward off tyranny.<sup>16</sup>

Dworkin endorses this theory behind Rawls's "original position," but in the endorsement he makes it clear that he is not accepting a "metaphysically ambitious" understanding of natural law.<sup>17</sup> For those intent on providing an ontological foundation for the existence of rights, Dworkin's work will not be satisfying. His formulation of the Rights Thesis remains a constructive model.

I understand Dworkin's natural rights theory as an assumption that pulls together the various components within the political/legal systems of liberal democracies. The philosophy here is more intuitive than rational, more phenomenological than metaphysical.<sup>18</sup> Assumption of this idea of natural rights, this non-theological and non-metaphysical construct of the natural law theory, allows productive dialogue between adherents of religious beliefs and those with a secular stance.<sup>19</sup> This is most evident in Dworkin's development, through Rawls, of the right to equality as fundamental.

As I made clear in the address previously published in this journal, the most fundamental element in Catholic social doctrine concerns the principle of the dignity and worth of every individual: Human life is sacred.<sup>20</sup> I also indicated my belief that human dignity is the basis for the development of

---

14. *Id.* at 150-83.

15. J. RAWLS, *A THEORY OF JUSTICE* (1971).

16. R. DWORKIN, *supra* note 6, at 176 (emphasis in original).

17. *See id.* at 176-77.

18. *See* Stake, Book Review, 27 *DEPAUL L. REV.* 567, 570 (1978).

19. "There is a legitimate secularity of the political process, and there is a legitimate role for religious and moral discourse in our nation's life. The dialogue which keeps both alive must be a careful conversation which seeks neither to transform secularity into secularism nor to change the religious role into religiously dominated public discourse." Joseph Cardinal Bernardin, Address to Woodstock Forum, Georgetown University, Oct. 25, 1984, *published in* 14 *ORIGINS* 321, 323 (1984).

20. *See* Bernardin, Marty & Adams, *The Role of the Religious Leader in the Development of Public Policy*, 34 *DEPAUL L. REV.* 1, 3 (1984).

public policy.<sup>21</sup> Dworkin seemingly would agree with this belief, but he discusses it more specifically in terms of equality,<sup>22</sup> indeed a particularly fundamental conception of equality: "Individuals have a right to equal concern and respect in the design and administration of the political institutions that govern them."<sup>23</sup> At the most basic level, individual women and men have the right to treatment as equals. All other claims to rights or entitlements can be derived from this right, including claims to equal treatment. Although these other claims may be secondary, they are often put forward as more important than treatment as equals.<sup>24</sup>

Under Dworkin's jurisprudence the fundamental concepts of our political morality are implied in the Constitution. Particular clauses of the Constitution, such as the equal protection clause, the due process clauses, or the eighth amendment prohibition of cruel and unusual punishment are derived from moral principles. These clauses are not "vague" attempts to constrain interpretations of the Constitution within limits defined by some notion of the framer's intent. Rather, they are "appeals to moral concepts"<sup>25</sup> that require lawyers and judges to squarely face issues of moral principle when they frame arguments and decide cases. Dworkin views these appeals as articulating the most compelling conceptions of moral concepts. Equal concern and respect—the fundamental conception of equality derived from Rawls's theory, and the root from which all other rights are derived—are the very rights protected by the equal protection clause.<sup>26</sup>

I do not know how seriously Dworkin's work is taken within the legal profession. Nor am I aware of any success his work may have had in influencing the teaching of law or the argument of cases. It is possible that most lawyers have not been exposed to his thought, or that those who have may reject it as contrary to the reigning belief that law and morality should not be so closely connected. Nevertheless, Dworkin's own work indicates that he seeks to overcome a long and counterproductive commitment of the legal profession to the schools of positivism and utilitarianism, both of which strive to be value-free. I would like to encourage attorneys to find common cause with what the ordinary citizen understands to be the case: that the law and the Constitution are, or should be, reflections of values that are shared in our society and have been handed in trust by generations who espoused them before us.

Dworkin's work is a major contribution to this endeavor precisely because it avoids allegiance to theological and metaphysical concepts that do not

---

21. *Id.*

22. R. DWORIN, *supra* note 6, at 184, 198-99.

23. *Id.* at 180.

24. The point is made clear in the general moral example involving two persons suffering from the same disease when there is only one dosage of treatment available. Equal concern and respect requires that the dosage be given to the individual who is dying rather than to the one who is only uncomfortable. *Id.* at 227.

25. *Id.* at 136.

26. *Id.* at 229.

serve the varying convictions of our pluralistic society. At the same time, his writings are not antagonistic to the tradition of natural law that he expresses in secular terms. I am in agreement with Dworkin's argument in his essay on judicial review:

Learned Hand warned us that we should not be ruled by philosopher-judges even if our judges were better philosophers. But that threat is and will continue to be a piece of hyperbole. We have reached a balance in which the Court plays a role in government but not, by any stretch, the major role. Academic lawyers do no service by trying to disguise the political decisions this balance assigns to judges. Rule by academic priests guarding the myth of some canonical original intention is no better than the rule by Platonic guardians in different robes. We do better to work, openly and willingly, so that the national argument of principle that judicial review provides is better argument for our part. We have an institution that calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become questions of justice. I do not call that religion or prophecy. I call it law.<sup>27</sup>

Perhaps the most fitting tribute lawyers can make during this Bicentennial of the Constitution is to urge a recommitment of the law schools to the serious teaching of fundamental jurisprudence. Its subject matter is constitutional law in its widest scope; but it is rarely a required course. I am not aware of its having been a subject for bar examinations in this country in recent times.

Dworkin demonstrates that law is much more than the mechanical application of rules and the search for legislative intent. Law is, in some important ways, the vehicle for the decision of important questions of politics and moral principle. This is especially true for constitutional law, that domain in which our rights are recognized and, hopefully, protected. Yet, here is where we have been the most deficient. Rights have either been ignored or erroneously articulated due to incomplete attention to the moral component of recent cases.<sup>28</sup> We also need to give serious attention to the question of what, if any, rights we might admit in the economic sphere, and whether that can be done without harm to our political rights. All of these issues are fundamentally philosophical problems, and Dworkin's work implies that lawyers must be philosophers.<sup>29</sup>

---

27. R. DWORKIN, *supra* note 7, at 71.

28. See R. DWORKIN, *supra* note 6, at 223-39. See generally, R. DWORKIN, *supra* note 6, at 293-315 ("reverse discrimination" cases in which Dworkin believes that incomplete attention was paid to the moral component).

29. "There is no need for lawyers to play a passive role in the development of a theory of moral rights against the state, however, any more than they have been passive in the development of legal sociology and legal economics. They must recognize that law is no more independent from philosophy than it is from these other disciplines." R. DWORKIN, *supra* note 6, at 149.

