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Taking Rights Seriously

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TAKING RIGHTS SERIOUSLY by Ronald Dworkin. Cambridge, Mass.: Harvard University Press. Footnotes, index. 1977. Pp. xv + 293. $12.00 cloth.

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Taken at its word, *Taking Rights Seriously* is a definition and defense of a liberal theory of law.[1] However, in the course of elucidating such a theory, Professor Dworkin challenges another theory, also called "liberal," that comprises the conglomerate of utilitarianism[2] and legal positivism[3] found dominant among English speaking lawyers over the past two centuries.[4] Dworkin's analysis of the state of contemporary jurisprudence assumes the liberal doctrine of primacy of individual human rights, and goes further to argue that the most fundamental right is "a distinct conception of the right to equality," which he calls "the right to equal concern and respect."[5]

The practical consequences of Dworkin's theory are ably demonstrated in those sections of the book that discuss hard cases recently presented in the courts of the United States. The reader is particularly referred to the chapters which treat the problem of civil disobedience[6] and the claim of reverse discrimination as it was presented in *DeFunis v. Odegaard.*[7] This review, however, is not concerned primarily with the application of Dworkin's theory; rather, its purpose is to comment on the theory insofar as it supplants the views of utilitarian-positivism. Criticism of Dworkin's position lies not in its consequences for the workings of the judiciary, but in the failure of

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1. R. DWORKIN, TAKING RIGHTS SERIOUSLY vii (1977) [hereinafter cited as DWORKIN].

2. *See generally* J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789). The philosophy of Jeremy Bentham holds that the law should serve the general welfare.

3. *See generally* H. HART, THE CONCEPT OF LAW (1961). The philosophy of H. L. A. Hart holds that legal truth consists in facts about rules adopted by constituted authority. *See also* J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832).

4. Dworkin refers to the other theory as the "ruling theory of law." DWORKIN at vii. This appellation is due to the fact that it is taught both explicitly and implicitly by the faculties of both American and British law schools.

Accepting Dworkin's views, one could legitimately question whether this ruling theory is in fact liberal. It supports certain traditional notions of liberty, particularly with respect to property, but it places so much attention on majoritarian politics that it loses sight of human rights per se.

5. DWORKIN at xii.

6. *See id.* at 206-22 (ch. 8 "Civil Disobedience").

7. 416 U.S. 312 (1974). *See* DWORKIN at 223-39 (ch. 9 "Reverse Discrimination"). *See also* Regents of Univ. of Cal. v. Bakke, Docket No. 76-811, argued before the Supreme Court of the United States, October 12, 1977 (decision pending).

its proponent to offer an adequate philosophical basis for the assumption that individual rights are primary.[8]

If, with Dworkin, one assumes the primacy of individual rights, there is little difficulty in denying the tenets of utilitarianism as the measure for legal justice. Indeed, the fallacy of utilitarian justification is clear, for taking rights seriously entails the proposition that the individual citizen possesses rights against the state itself. From this perspective, justice cannot consist simply in the surrender of the individual to the decisions of a majority regarding the common good.

Dworkin's theory also requires the abandonment of legal positivism. Positivism holds that the validity of law is tested by a wholly internalized *rule of recognition,* which in turn is justified by either a combination of monopoly power and force or a constitution *accepted* by the community of individuals making up the state.[9] The conglomerate theory of legal positivism, subordinated to the utility of majoritarian decision-making, equates the issue of obligation with a duty of conformity to a catalogue of pre-existing rules. Subject only to validation *via* the rule of recognition, rules define the totality of one's rights *vis-à-vis* the state and other individuals.

Dworkin refuses to accept the proposition that obligation can be defined solely by reference to rules of law. The concept of justice and the obligatory character of the law must be grounded in a consideration of morality as well. Rules do not suffice to allow such consideration, for they are often the result of policy decisions. Individual human rights, on the other hand, are founded on principle, and the totality of the law can be expressed only through an incorporation of principles and rules.[10]

Taking Rights Seriously also entails a refreshingly new description of the process of law in the decision of actual cases. Legal positivism has imparted to our way of thinking the idea that rules of law determine the outcome of litigated matters. This position also has described the role of the court in the decision of hard cases. The role is viewed as one in which the court exercises its discretion. Such discretion involves looking outside of the law and resolving controversies by justifying the decision through any means that satisfies the court. Indeed, in such cases the court rightfully assumes the posture and au-

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8. *See* text accompanying notes 13-16 *infra.*

9. Austin's positivism viewed government and law as resting ultimately on the power of the sovereign. Hart's refined version of positivism accounts for the authority of a constitutional form of government by way of its acceptance.

10. DWORKIN at 22: "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."

thority of the legislature. The decision of the case results in the promulgation of a new rule of law, and since this rule is made applicable to the instant case only retrospectively, neither party can claim entitlement to a decision. All this is rejected by Dworkin.

A central position of Dworkin's theory is that the resolution of hard cases is properly accomplished through judgments which consider the competing values of rules and principles. In his opinion, all legal controversies have a right solution. Litigants appear before the court asserting contrary positions, one of which deserves the imprimatur of the court. Judges have no discretion to rule one way or another simply because the rules of law conflict. No matter how difficult the task, no matter how weak the precedents, it is the court's duty to give judgment in favor of the party entitled to it in principle. Dworkin concedes that there may be error in the judgment but, with respect to claims of right, it clearly is unjust for a court merely to balance that claim with any competing societal interest founded on the common good.[11]

There is support for this view of the judicial process within the framework of the positive law itself. Dworkin finds such support in the constitutional guarantees of due process and equal protection. These guarantees suggest no particular conception or rule of expected treatment; nevertheless, they command respect for fairness and equality. They demand a continuing reassessment of what is fair and what is equal. Their status is that of principles, and their importance is in how well they operate in the protection of individual rights. Dworkin is not content, however, to have these principles rest solely upon the authority of the national Constitution. The rights they serve are primary and thus essential to any truly liberal theory of law. Futhermore, any attempt to repeal these principles of constitutional law would be an act immoral in itself.[12]

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11. *Id.* at 199:

> So if rights make sense at all, then the invasion of a relatively important right must be a very serious matter. It means treating a man as less than a man, or as less worthy of concern than other men. The institution of rights rests on the conviction that this is a grave injustice, and that it is worth paying the incremental cost in social policy or efficiency that is necessary to prevent it. But then it must be wrong to say that inflating rights is as serious as invading them. If the Government errs on the side of the individual, then it simply pays a little more in social efficiency than it has to pay; it pays a little more, that is, of the same coin that it has already decided must be spent. But if it errs against the individual it inflicts an insult upon him that, on its own reckoning, it is worth a great deal of that coin to avoid.

12. *Id.* at 186: "[T]hough the constitutional system adds something to the protection of moral rights against the Government, it falls short of guaranteeing these rights, or even establishing what they are." *See also id.* at 191.

One returns then to the assumption of the primacy of human rights. Unfortunately, Dworkin never adequately demonstrates the existence of these rights. Contrary to his apparent distaste for the tradition of natural law theory,[13] his views are necessarily within that tradition. His own description of rights is that they are natural.[14] Dworkin, however, refuses to go beyond description, preferring instead to rely upon an equivalency of metaphysical and ontological support between his theory and that which he opposes.[15] To be effective, an argument in support of the position which Dworkin proposes requires more than a phenomenology of the judicial process. This is not because his phenomenology is in error, but because it is not self-evident that individual human rights ought to take priority over the collective good of the community of which the individual is but a part.[16]

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13. *See id.* at 176.

14. *Id. See also* the discussion of positivism's opposition to the concept of natural rights, *id.* at xi.

15. *Id.*: "[T]he idea of individual rights that these essays defend does not presuppose any ghostly forms; that idea is, in fact, of no different metaphysical character from the main ideas of the ruling theory itself."

It is surprising that Dworkin would rest without further investigation of the ontology of human rights. He does pay a compliment to John Rawls; however, he departs from Rawls' foundation of right in the idea of the "original position." *See* J. RAWLS, A THEORY OF JUSTICE (1972). Dworkin sees Rawls' position not as one forming a basis for rights, but as flowing from the fact that rights exist. *See* DWORKIN at 150-83 (ch. "Justice and Rights"). For one who argues that better philosophy now exists to deal with the problems of jurisprudence, it would be to Dworkin's credit to fill out the gaps with more than a leap of faith to human rights and their primacy.

16. Already there has been comment from the left that Dworkin's jurisprudence pays too much attention to the rights of the individual, and too little to the needs of the masses. *See* Gabel, Book Review, 91 HARV. L. REV. 302 (1977). While it is not clear that human rights and human needs must compete for the goods of this earth, Dworkin's argument for the priority of rights would stand a better chance of meeting the challenges of the needy in the event it were clear that his assumptions have a sure foundation, and that they are not simply props for the present economic order.