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# Book Review: Taking Rights Seriously, by Ronald Dworkin

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## Book Reviews

TAKING RIGHTS SERIOUSLY, RONALD DWORKIN, Cambridge, Mass.: Harvard University Press, 1977. Pp. 295.

Over the last ten or eleven years, Professor Dworkin has published a number of papers elucidating what one commentator has described as "the third theory of law,"<sup>1</sup> which is offered as a more satisfactory jurisprudential theory than either legal positivism or natural law. This volume comprises eleven such papers, together with two new chapters, and provides a handy sourcebook of the evolution and development of Dworkin's thought.

The task that Dworkin sets himself is the definition and exposition of a truly liberal theory of law, as opposed to the pseudo-liberal theory which he sees in the union of legal positivism and utilitarianism.<sup>2</sup> The fundamental concept in Dworkin's theory is that of a "right," and he bases his attack on the pseudo-liberal theory on its supposed rejection of the notion that individuals can have rights against the state that are prior to rights created by explicit legislation.

Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals to have or to do, or not a sufficient justification for imposing some loss or injury upon them.<sup>3</sup>

This notion of rights as "trumps" over collective goals is a recurring theme in Dworkin's analysis. Yet, as I hope to demonstrate in this review, his attitude toward utilitarianism is strangely ambivalent and the power of his "trumps" correspondingly attenuated.

A second recurring theme in Dworkin's critique of legal positivism is his rejection of what he terms the "social rule theory" of duty and obligation. Dworkin charges that legal positivists who assert the existence of a duty presuppose the existence of a social rule and signify their acceptance of the practice described by the rule.<sup>4</sup> In the absence of such a social rule governing a particular case before a judge, the positivists say that the judge exercises discretion (a choice among alternatives) in making a decision. Dworkin denies the existence of this freedom to choose:

I shall argue that even when no settled rule disposes of the case, one party may

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<sup>1</sup> J. Mackie, *The Third Theory of Law* (1977), 7 *Philosophy & Public Affairs* 3.

<sup>2</sup> R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977) at vi.

<sup>3</sup> *Id.* at xi.

<sup>4</sup> *Id.* at 51-52.

nevertheless have a right to win. It remains the judge's duty, even in hard cases, to discover what the rights of parties are, not to invent new rights retrospectively.<sup>5</sup>

At the same time, however, Dworkin denies that there is some mechanical procedure for demonstrating rights in hard cases.

One might think that there is some practical, if not logical, inconsistency in maintaining simultaneously that judicial decisions are always matters of duty and not of choice, but that there is no definitive mode for discovering what that duty is in particular cases. Dworkin denies any such inconsistency and rejects the notion that rights cannot be said to exist if they are controversial.

What, then, distinguishes a judge from a legislator? To deal with this question, Dworkin introduces the first of a number of distinctions that are crucial to his theory, but which, I shall argue, are essentially spurious.

The first distinction is that between principles and policies. Arguments of principle, we are told, justify a political decision by showing that it respects or secures some individual or group right. Arguments of policy, on the other hand, justify a political decision by showing that it advances or protects some collective goal of the community as a whole.<sup>6</sup> An individual has a right to some opportunity or resource or liberty when it counts in favour of a political decision that the decision is likely to advance the state of affairs in which the individual enjoys the right even though no other political aim is thereby served and some political aim is disserved. A collective goal does not mandate any particular opportunity, resource or liberty for any particular individual or individuals. On the contrary, collective goals encourage trade-offs of benefits and burdens within the community to produce some overall benefit for the community as a whole. Thus the particular distribution suggested by a particular collective goal in a particular context is not valued in itself, but is subordinate to some conception of aggregate collective good.<sup>7</sup>

Three questions may be asked regarding this purported distinction between principles and policies:

- (1) Does the distinction have substance and is it logically coherent?
- (2) If the distinction does have substance, what is its relationship to the distinction between judge and legislator?
- (3) If the distinction does have substance, how does it contribute to the discovery of judicial duty and litigants' rights in particular cases?

Dealing first with the question of substance and coherence, it is evident that principles and assertions of right are propositions about the proper distribution of opportunities, resources and liberties among discrete individuals. Policies and assertions of goals are propositions about collective welfare. Policies and goals in a particular setting are served by a particular distribution

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<sup>5</sup> *Id.* at 81. For a more extended discussion and evaluation of the differences between Dworkin and the legal positivists, see J. Steiner, *Judicial Discretion and the Concept of Law*, [1976] *Camb. L.J.* 135. Among the papers discussed are earlier published versions of chapters 2 and 3 of *Taking Rights Seriously*.

<sup>6</sup> Dworkin, *supra* note 2, at 82.

<sup>7</sup> *Id.* at 91.

of opportunities, resources and liberties. But to say a person has a right is to say, one would think, that he is not to be deprived of his share as dictated by the right for the sake of some collective goal. If that is correct, then policies can justify political decisions only to the extent that there are gaps in the specifications of the proper distribution provided by the scheme of rights. It is certainly not obvious that any such gaps exist in a fully articulated scheme of rights. Indeed, one would be rather surprised if they did.

Perhaps we have accorded too much power to rights. Perhaps not all rights trump all goals. Dworkin says that, "It follows from the definition of a right that it cannot be outweighed by all social goals."<sup>8</sup> Rights, we are told, may be less than absolute as "one principle might have to yield to another, or even to an urgent policy with which it competes on particular facts."<sup>9</sup> (Emphasis added.) This is rather peculiar. One can understand a right to a particular share being outweighed or qualified by a competing right. But what does it mean to say that a right to a particular share can be outweighed by some urgent requirement of collective welfare? Who or what experiences "collective welfare"? Has society taken on the character and moral significance of a sentient being? Surely for a genuine liberal like Dworkin the notion of an individual right giving way to a collective goal must be shorthand for the assertion that a particular individual's right is outweighed by the individual rights of a large number of other individuals. Or have we happened upon a back door to utilitarianism?

Now let us suppose that there is something of significance left in the category "policy."

How does the distinction between principle and policy assist in the differentiation of judge from legislator? Dworkin says that there are two general grounds advanced for subordinating adjudication to legislation. The first is the fact that judges are not responsible to the electorate and therefore judicial originality compromises democracy. The second is that a judge who makes new law is creating rights and duties retroactively in respect of the parties before him.

The first ground, we are told, is more telling against judicial decisions based on policy than against judicial decisions based on principles. A judge, being insulated from public opinion, is more likely to recognize the trump value of rights being asserted before him than is a legislator who is dependent upon those persons whose interests are sought to be trumped. As for the second ground, it is simply incoherent in a model of adjudication based on the judge's duty to discover rights. Of course, these two counter-arguments succeed only if adjudication is accurately described as a search for pre-existing rights and duties. We thus come to the third question: how does the distinction between principle and policy contribute to the discovery of judicial duty and litigants' rights in particular cases?

To answer this question we must examine Dworkin's theory of judicial

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<sup>8</sup> *Id.* at 92.

<sup>9</sup> *Id.*

decision-making more closely. The basic element is the "rights thesis," which holds that judicial decisions enforce existing rights.<sup>10</sup> The rights thesis is closely related to the doctrine of political responsibility which requires that "political officials must make only such political decisions as they can justify within a political theory that also justifies the other decisions they propose to make."<sup>11</sup> The basis for the doctrine is simply that

. . . it is unfair for officials to act except on the basis of a general public theory that will constrain them to consistency, provide a public standard for debating or predicting what they do, and not allow appeals to unique institutions that might mask prejudice or self-interest in particular cases.<sup>12</sup>

Thus the doctrine of political responsibility demands "articulate consistency" of officials. This demand represents only a mild constraint in the case of policies as equal treatment of individuals need not be part of a responsible strategy for reaching a collective goal. In the application of principles, however, articulate consistency implies distributional consistency from one case to the next as strategic considerations are barred.<sup>13</sup>

The role of the doctrine of political responsibility and the requirement of articulate consistency in adjudication can, perhaps, be better appreciated by examination of the process of statutory interpretation. Dworkin tells us that the notion of the "intention" or purpose of a statute provides a bridge between the political justification of the general idea that statutes create rights and those hard cases which ask what rights a particular statute has created. The idea that principles "underlie" or "are embedded in" positive rules of law provides a bridge between the political justification that like cases be decided alike and those hard cases in which it is unclear what the general doctrine requires. If a judge accepts the settled practices of the legal system, he must, according to the doctrine of political responsibility, accept some general political theory that justifies those practices. The concepts of legislative purpose and underlying principles are devices for applying such a general political theory to controversial issues of legal rights. Thus, in a constitutional case, a judge must deliberate in the context of a full political theory which justifies the constitution as a whole, and that theory will inform his decisions on the applicability of particular constitutional provisions in particular cases. In applying a statute, a judge must seek out that interpretation which most satisfactorily ties the language used by the legislature to its constitutional responsibilities.<sup>14</sup>

Similar considerations apply to common law precedents. Dworkin tells us that precedents exercise "gravitational force" arising from the fairness of treating like cases alike. However, this gravitational force is limited to the extension of arguments of principle, not policy, upon which the earlier decisions were founded.<sup>15</sup> It follows from the same notion of fairness, Dworkin

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<sup>10</sup> *Id.* at 87.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 162.

<sup>13</sup> *Id.* at 88.

<sup>14</sup> *Id.* at 105-07.

<sup>15</sup> *Id.* at 113.

argues, that a judge must discover and be governed by principles that fit not only the particular precedent to which a litigant directs his attention, but also all other decisions within his general jurisdiction as well as statutes generated by principle rather than policy. The notions of underlying and embedded principles and of the gravitational force of precedent are simply restatements of the rights thesis.

Dworkin recognizes that there is no unique theory that will account for and rationalize all of the principles that a judge must consider and enable him to discriminate between those principles which he must consider and those which are not to enter into his decision-making process. It follows that the individual judge's views will necessarily be partial determinants of his decisions. Yet, we are told such a judge does not exercise discretion, does not choose.

So the impact of [a particular judge's] own judgments will be pervasive, even though some of these will be controversial. But they will not enter his calculations in such a way that different parts of the theory he constructs can be attributed to his independent convictions rather than to the body of law he must justify . . . His theory is rather a theory about what the statute or precedent itself requires, and though he will, of course, reflect his own intellectual and philosophical convictions in making that judgment, that is a very different matter from supposing that those convictions have some independent force in his argument just because they are his.<sup>16</sup>

Thus we see another of Dworkin's crucial, yet questionable, distinctions. The positivist sees the judge who finds no binding precedent or statute as exercising choice. Dworkin's judge is not so presumptuous. His views merely enter into the process of defining and organizing the body of material which he is duty-bound to consider so as to discover the true rights of the parties before him.

That this is a distinction without a difference becomes even clearer when we consider Dworkin's discussion of the treatment of past judicial errors. Why does this question even arise? It arises because no theory will provide a consistent rationalization for the historical body of legal material which the judge has a duty to consider. Furthermore,

This is hardly surprising: the legislators and judges of the past did not all have [Dworkin's ideal judge's] ability or insight, *nor were they men and women who were all of the same mind and opinion.*<sup>17</sup> (Emphasis added.)

Where does that leave us? Dworkin's dutiful judge, bound by the doctrine of political responsibility and therefore subject to the requirement of articulate consistency, must make his decisions in the context of a political theory that lends consistency to the historical body of legal materials. No such theory exists, however, because the various authors of that body of legal material subscribed to different theories. How, then, does a judge decide who among his forbears was wrong, for he can reject only that which is wrong, not that with which he merely disagrees. Dworkin offers us two tests. First, if the judge can show, by arguments of history or appeal to some sense of the legal com-

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<sup>16</sup> *Id.* at 118.

<sup>17</sup> *Id.* at 119.

munity, that a principle now has so little force that it is unlikely to generate further judicial and legislative decisions, then the argument from fairness (i.e., uniformity of application) that supports the principle is undercut. Second, if the judge can show by arguments of political morality that such a principle, apart from its popularity, is unjust, then the argument from fairness that supports the principle is undercut.<sup>18</sup> Thus our dutiful judge must operate within the constraints of *his own* theory which rationalizes the received body of legal material and *his own* theory which indicates which portions of that received body of legal material may be ignored. But the judge sees his task as one of fulfilling duty, and any appearance of exercising choice is illusion!

The fundamental difficulty in applying Dworkin's theory is its almost complete open-endedness and lack of substantive implications. This is best seen from an examination of examples offered by Dworkin of the purported application of his theory to particular areas of law and particular situations. I turn first to his analysis of constitutional cases and, more particularly, cases involving the United States Bill of Rights.<sup>19</sup>

Dworkin argues that the controversy between advocates of "strict" and "liberal" construction of the Bill of Rights is fundamentally misplaced as it proceeds from a misunderstanding of the meaning of the terms of the Bill of Rights. We must distinguish between moral concepts and particular conceptions.

When I appeal to the concept of fairness I appeal to what fairness means, and I give my views on that issue no special standing. When I lay down a conception of fairness, I lay down what I mean by fairness, and my view is therefore at the heart of the matter. When I appeal to fairness I pose a moral issue; When I lay down my conception of fairness I try to answer it.<sup>20</sup>

Unlike some of the other distinctions made in this work, this one, though difficult, is meaningful. Dworkin argues that the Bill of Rights is an appeal to the moral concepts set out therein and is not to be interpreted as embodying the particular conception(s) of its framers.

The Bill of Rights is therefore to be seen as enjoining the courts to develop and apply their own conceptions of the concepts in issue subject to the doctrine of political responsibility. If that is the case, then one is in error in accusing the courts of legislating when they invoke the Bill of Rights in support of newly announced rights. One is equally in error to say that the task of the courts is to discard outdated conceptions and replace them with new ones, for the older conceptions were never part of the Bill of Rights.

What is important to discern in this argument is not that it is logically wrong, for it is not, but that if it is supportable, it is on empirical and not logical grounds. Why can a constitution be appealed to in opposition to statutes and official acts? Surely it must be because of the process whereby the constitution came into existence. If that is the case, however, then the power of the constitution to override statutes and official acts must be limited by what was intended and understood by its framers. Thus Dworkin's argument depends upon a demonstration that the framers of the Bill of Rights intended

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<sup>18</sup> *Id.* at 122-23.

<sup>19</sup> *Id.*, chapter 5.

<sup>20</sup> *Id.* at 135.

to set up certain moral concepts as limits on government, but to leave it to the occupants from time to time of certain judicial offices to read in their own particular conceptions subject only to very weak consistency constraints that are not even a bar to direct reversal of earlier pronouncements. Of course, it is possible that the founding fathers, having only recently disposed of what they considered a tyrannical government, knowingly delivered such extraordinary political power to a tiny group of officials responsible and accountable to no one. But one doubts it, and there can hardly be any question of where the burden of proof of that issue lies. Nor can there be any doubt that Dworkin has not even addressed the issue.

What are we to make of Dworkin's failure to consider the actual intentions of the framers and enactors of the Bill of Rights? It is possible that he simply chose to leave the historical question to historians. If that were the case, however, one would expect his conclusions to be far more tentative and to be expressed as conditional on the intentions of the framers and enactors.

One is therefore led to the conclusion that Dworkin would consider it irrelevant that the framers and enactors had a particular conception in mind when they brought the Bill of Rights into effect. If that is his position, however, it becomes very difficult to see what the source of the constitution's authority is. We began with the proposition that the authority of the constitution derived from the manner in which it was passed. It follows that the authority is limited to what was understood and intended by the framers, for only that can be said to have been passed by them. It follows, further, that if the framers and enactors understood and intended to embody particular conceptions of morality in the Bill of Rights, then the courts act illegitimately and extra-legally in using the Bill of Rights to strike down practices that were clearly acceptable to the framers. By such rulings, the courts create new institutional rights that have not been "blessed" by the process that distinguishes the constitution and gives it its force. Therefore, when Dworkin asserts that the courts are required to pour their own conceptions into the concepts of the Bill of Rights, he is either assuming an historical circumstance which is probably false, or he bases his assertions on something other than the institutional origins of the constitution. This other basis for the assertion must be some non-institutional theory of political and moral rights.

If that is correct, then it is this theory that matters, and the constitution and its institutional origins are irrelevant. And if that is the case, then the doctrine of political responsibility (whose operational corollary is the requirement of articulate consistency operating over the body of legal materials not excluded as mistaken) imposes virtually no substantive constraints on decision-making. The conscientious fascist, the scientific socialist and the liberal democrat all stand on the same footing, and none of their claims or denials of legal rights is subject to refutation as long as internal consistency is maintained by each of them.

Dworkin's malleable conception of rights, which permits his theory to be turned to a wide variety of uses, is well illustrated by his analysis of so-called "affirmative action" programs.<sup>21</sup> One must remember that, as an indi-

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<sup>21</sup> *Id.*, chapter 9.



vidual rights theorist, Dworkin cannot base an argument in support of reverse discrimination on grounds of compensation, for that would require the demonstration of a nexus between the benefits undeservedly received by particular members of the favoured group and burdens unfairly imposed on particular members of the disfavoured group. Even then, compensation could justly flow only between the particular individuals between whom this nexus has been established, and only to the extent of the unfairness inflicted by one on the other. To support a program of affirmative action, Dworkin must demonstrate that there is no right in the individual now discriminated against to be admitted to particular benefits on the same basis as the individual now favoured, while maintaining that discrimination against the latter violates his rights.

Dworkin uses the recent case of *De Funis v. Odegaard*<sup>22</sup> to set the context for his argument. De Funis had applied in 1971 to the University of Washington Law School. He was rejected though his academic qualifications would have been sufficient to obtain admission if he had been a member of one of a number of minority groups whose applications were dealt with separately and subject to different standards. De Funis sought a declaration that this dual admissions policy violated his Fourteenth Amendment equal protection rights.<sup>23</sup> In Dworkin's opinion,

There cannot be a good legal argument in favour of De Funis . . . unless there is a good moral argument that all racial classifications, even those that make society as a whole more equal, are inherently offensive to an individual's right to equal protection for himself.<sup>24</sup>

A preliminary point should be made here, and that is that the notion of "making society as a whole more equal" is not self-explanatory. What are the dimensions in which equality is to be sought? What are the appropriate categories of individuals across which comparisons are to be made? These are moral questions, questions of principle, and one wonders what additional direction the policy of "making society as a whole more equal" will yield when these questions are answered.

Having stated what he thinks De Funis must demonstrate, Dworkin goes on to an analysis of the right to equal protection of the laws. We are told that equal protection encompasses two sorts of rights. One is a right to equal treatment, meaning a right to an equal share of some opportunity, resource or burden. The other is a right to treatment as an equal, which means a right to be treated with the same respect and concern as anyone else. Dworkin says that the right to equal treatment is derivative from the right to treatment as an equal but exists only in some situations, apparently when the necessity for the opportunity or resource in question exceeds some threshold level. Dworkin denies that admission to law school qualifies for the right to equal treat-

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<sup>22</sup> 416 U.S. 312, 94 S.Ct. 1704 (1974).

<sup>23</sup> De Funis was subsequently admitted prior to his case being heard by the Supreme Court, and the justices took the opportunity to avoid a decision. The issue was once again before that Court in the *Bakke* case, which was decided after this review was written. The meaning of the *Bakke* decision is generally considered to be obscure and unlikely to be clarified until after several further "affirmative action" cases are decided.

<sup>24</sup> Dworkin, *supra* note 2, at 226.

ment, but he acknowledges that De Funis, like all others, is entitled to be treated as an equal. This requires that "his interests be treated as fully and sympathetically as the interests of any others when the law school decides whether to count race as a pertinent criterion for admission."

But what does this "right" mean? One would have thought that it means that no distinctions can be made except on the basis of morally relevant categories. Furthermore, one would have thought that morally relevant categories are incapable of being isolated on the basis of the utilitarian calculations which are offered as the basis for the *policy* of affirmative action, all the more so when that calculation is highly speculative.<sup>25</sup> Dworkin's right to treatment as an equal appears to be nothing but a right to have one's speculative utility included in speculative calculations of "the welfare of society as a whole." Are we once again being re-introduced through a back door to the utilitarianism we were invited to reject?

In certain circumstances, Dworkin tells us,

. . . a policy which puts many individuals at a disadvantage is nevertheless justified because it makes the community as a whole better off.<sup>26</sup>

This is possible, of course, only if there is no right in individuals to be free of such discriminatory disadvantage. Thus Dworkin assumes, but does not prove, the proposition that he requires to defeat De Funis' claim.

Setting that aside for the moment, let us consider what it means for "the community as a whole to be better off." Dworkin says that "better off" may be interpreted in either an ideal or utilitarian sense.

Discrimination against blacks, we are told, cannot be said to make the community better off in an ideal sense as it must detract from equality and, hence, justice. Reverse discrimination, on the other hand, may well serve equality and, hence, justice, given the facts of history. The difficulty with this argument is that it assumes the universal validity of the ideals on which it is based. But discrimination against blacks can serve other ideals such as those of apartheid. If those ideals are to be ruled out by Dworkin, then it must be the case that either he accepts the proposition that race is not a morally relevant category, or that he asserts, as an article of faith, that discrimination against blacks is bad, but discrimination against whites is not.

Dworkin also denies the possibility of a utilitarian justification of discrimination against blacks, while upholding a justification for reverse discrimination. Reverse discrimination may make everyone in the community better off by contributing to the reduction of inequality between races and hence to increased racial and social harmony. Not so for discrimination against blacks.

To show that no utilitarian argument can be made for discrimination against blacks, Dworkin introduces another distinction. This is the distinction between "personal" and "external" preferences. A personal preference relates to one's own enjoyment of goods or opportunities. An external preference

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<sup>25</sup> See the discussion of what was once called the "Rap Brown" law, *id.*, chapter 7, especially at 202-03.

<sup>26</sup> *Id.* at 232.

relates to one's desires in respect of the assignment of goods and opportunities to others. Dworkin holds that external preferences cannot count in the utilitarian calculus since that would make the process unfair *vis à vis* members of the group against whom prejudice is directed. Such individuals will not count as equals in the calculus if the external preferences of others are to count.

This is surely nonsense. If the utilitarian calculus is an appropriate way to determine the distribution of benefits and burdens, then there is no basis for counting some preferences and not others. To do so would destroy the nexus between individual utility and collective decision-making upon which the utilitarian calculus is based. If, on the other hand, there is a sound moral basis for excluding external preferences for moral consideration, what is it? And when that question is answered, does the answer permit any role for such a truncated utilitarian calculation in collective decision-making? The fundamental issue is the morality of decisions based on the utilitarian calculus and on that issue Dworkin's ambivalence approaches the bizarre.

This ambivalence is nowhere clearer than in the following passage from one of the new chapters written for this book:

I now wish to propose the following general theory of rights. The concept of an individual political right, in the strong anti-utilitarian sense I distinguished earlier, is a response to the philosophical defects of a utilitarianism that counts external preferences and the practical impossibility of a utilitarianism that does not. It allows us to enjoy the institutions of political democracy, which enforce overall or unrefined utilitarianism, and yet protect the fundamental rights of citizens to equal concern and respect by prohibiting decisions that seem, antecedently, likely to have been reached by virtue of the external components of the preferences democracy reveals.<sup>27</sup>

But if Dworkin's rights are a response to the defects of utilitarianism inherent in the existence and non-separability of external preferences, then the ambit of his rights must be commensurate with those defects. Indeed, it follows that in a world populated by individuals who view each other solely as rivals in the acquisition and exploitation of resources and opportunities, there is neither need nor room for Dworkin's rights. There being no external preferences and therefore no "defects" in pure utilitarianism, no response to defects is called for. It must therefore be the case, if Dworkin is to be believed, that there is no moral counter to, no claim of right against, the notion that "might makes right," except to the extent that might is exercised to show disdain rather than to appropriate resources. Similarly, there can be no claim to minimal, let alone equal, entitlements except to the extent that their denial can be ascribed to spite rather than simple acquisitiveness. What then is left of the right to treatment as an equal, the right to equal concern and respect? If it means only that external preferences do not count, then it is cold comfort.

At the beginning of this review, I referred to two recurring themes in Dworkin's work. The first was the emphasis on rights and their characterization as "trumps" over collective goals not to be overridden on utilitarian grounds. During the course of the discussion, I have, I hope, brought out the peculiar relationship between the utilitarian calculus and Dworkin's concep-

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<sup>27</sup> *Id.* at 277.

tion of rights. I have also attempted to demonstrate the lack of substantive implications of Dworkin's theory and the ethereal nature of the rights it supports which seem so sensitive to semantic distinctions that do not stand up well to analysis. Such considerations bring us to the second recurring theme, Dworkin's rejection of the social rule theory of rights as it applies, *inter alia*, to legal rights.

Dworkin acknowledges that there is a large measure of subjectivity in propounding a theory which rationalizes the body of settled law. There is a further measure of subjectivity in defining the contents of the body of settled law to be rationalized.<sup>28</sup> Dworkin could not deny that different judges or lawyers or reasonable persons could arrive at different conclusions, though commencing from the same body of material, and yet agree among themselves that the analysis of each of those reaching such opposing conclusions was in no way an affront to legal reasoning or the general rules of logic and argument.

Yet Dworkin insists that all this is irrelevant unless it is the case that rights exist only when they are not controversial. If the social rule theory is false, however, the judges can be said to have a duty to discover "the right answer," and the conscientious judge attempts to do so. But what is the use of such a characterization if "the right answer" is not objectively demonstrable? It may well describe the thought processes of a judge, but does it describe the judicial enterprise? What answer does Dworkin's theory give to a litigant who can show that the "discovery" in his case would likely have been different had a different but equally conscientious judge heard the case? To speak of "legal rights" in such a context is to dissemble and deceive. To point out and commend sincerity and conscientiousness on the part of judges sheds no more light on the process of adjudication than referring to the piety of the Grand Inquisitor illuminates the issues raised by the persecution of heretics.

The fact of the matter is that even if Truth exists, it cannot be demonstrated. It is equally the case that the premises from which a judge begins his search for the truth and the principles that he recognizes as governing that search are not matters of general agreement. It follows that anyone who is affected by a judge's decision has an interest in the premises and principles acknowledged by the judge. If individuals have rights against the state, they have rights against all of its apparatus, including the judges. If those rights are really to be shields against arbitrary action, then there must be institutional constraints on what judges can do.

Dworkin's theory provides only the minimal constraint of requiring each individual judge to be consistent in his own analysis and exposition of legal material, and in his own analysis and exposition of what constitutes legal material. Such non-substantive constraints are incapable of supporting genuinely enforceable rights. But Dworkin's theory makes any other form of constraint incoherent because it does not permit any objective circumscription of legal material.

The great virtue of legal positivism is that it permits a distinction between

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<sup>28</sup> See the discussion in the text of the treatment of past judicial errors, accompanying note 17, *supra*.

operations *within* rules and operations *upon* rules. Only when this distinction can be made is it logically possible to debate the proper scope of judicial power, and that is surely a fundamental issue in a democracy where judges are not accountable or responsible to the people. If, as Dworkin's theory implies, this issue is incapable of being addressed, then one must seriously question whether the value of a politically independent judiciary outweighs the threat which that independence poses, not only to democracy as a system of collective decision making but to democracy as a system of individual rights.

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