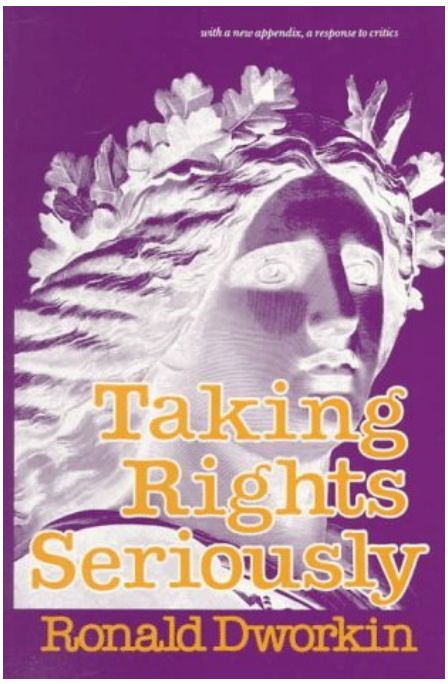

Taking Rights Seriously

Ronald Dworkin

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What is law? What is it for? How should judges decide novel cases when the statutes and earlier decisions provide no clear answer? Do judges make up new law in such cases, or is there some higher law in which they discover the correct answer? Must everyone always obey the law? If not, when is a citizen morally free to disobey? A renowned philosopher enters the debate surrounding these questions. Clearly and forcefully, Ronald Dworkin argues against the "ruling" theory in Anglo-American law--legal positivism and economic utilitarianism--and asserts that individuals have legal rights beyond those explicitly laid down and that they have political and moral rights against the state that are prior to the welfare of the majority. Mr. Dworkin criticizes in detail the legal positivists' theory of legal rights, particularly H.L.A. Hart's well-known version of it. He then develops a new theory of adjudication, and applies it to the central and politically important issue of cases in which the Supreme Court interprets and applies the Constitution. Through an analysis of John Rawls's theory of justice, he argues that fundamental among political rights is the right of each individual to the equal respect and concern of those who govern him. He offers a theory of compliance with the law designed not simply to answer theoretical questions about civil disobedience, but to function as a guide for citizens and officials. Finally, Professor Dworkin considers the right to liberty, often thought to rival and even pre-empt the fundamental right to equality. He argues that distinct individual liberties do exist, but that they derive, not from some abstract right to liberty as such, but from the right to equal concern and respect itself. He thus denies that liberty and equality are conflicting ideals. Ronald Dworkin's theory of law and the moral conception of individual rights that underlies it have already made him one of the most influential philosophers working in this area. This is the first publication of these ideas in book form.

Taking Rights Seriously Details

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Tyler says

Do human rights exist before laws are made, or do laws create them? Are law and morality even commensurable? Dworkin argues that they are. In a twist on the usual approach, he starts with law and works back toward moral theory in a series of essays. Three of the topics he covers give examples of his thinking.

Legal Positivism:

Under the theory of legal positivism rights are thought to be purely a product of jurisprudence. Positivists like this detachment from moral reasoning, which they don‘t believe should supersede legal reasoning. Law, construed as a system of rules, means courts decide cases based on statutes, precedent, or judicial discretion in hard cases.

Dworkin distinguishes several concepts in order to look critically at positivism. He notes a difference, for example, between laws of policy which set goals and laws of principle which set standards. It is the latter that entail rights and bring law into the moral realm. No one, then, can really say that only legal principles can count in legal arguments.

Legal rules require justification, which inevitably leads to moral reasoning. Law, Dworkin writes, is no more independent of moral reasoning than of any other discipline. The use of precedent, as an example, upholds equal consideration, an idea that depends upon moral principles. With judicial discretion, positivism holds that litigants have no rights until a judge rules. Dworkin disputes this and argues that it is a judge’s duty to discover rights in hard cases, not to invent new law.

Equality:

Dworkin devotes some of the book to Rawls’s theory of justice. He distinguishes between antecedent and actual self-interest in order to justify the original position (the choice of equality as one's core political value). He writes that to abandon the original position would mean to abdicate moral reasoning altogether. Rights, as opposed to duties or goals, are the real basis for a sound political structure. And the most essential of these is the right to equality.

Making a distinction between rights and liberties, Dworkin denies a general right to liberty, saying it cannot provide an adequate basis for rights. He argues that there isn’t any one general liberty but instead many, each justified by separate arguments. Individuals could not be sure the general concept would protect their legal standing and have reasons to suspect it would not. They may have interests that can be protected only by political constraints on others. The writer disputes what he calls the “dangerous notion” that individualism is the enemy of equality.

Utilitarianism:

The author argues that political rights are a response to the defects of utilitarianism and a right to equality is anti-utilitarian. Utilitarianism applies only to issues of policy. Legal and political principles, on the other hand, are rights-based. Thus, a goal-oriented right to liberty claimed by some cannot trump the claim to equal treatment by others. Laws of policy, on the other hand, take away nothing an individual has a right to. Thus, utilitarian arguments of policy respect equality, whereas utilitarian arguments of principle do not.

Rights are trumps over appeals to the collective welfare.

Some issues remain because Constitutional law in the United States has had difficulty isolating the problem of rights against the state. Dworkin suggests that by rejecting the positivist approach to law, the difficult clauses of the Bill of Rights would be understood as referencing moral concepts, not as laying down some specific conception of rights. But, he asks, does the Equal Protection Clause extend past laws of principle to include laws of policy?

The 13 chapters of this book are followed by a lengthy but enlightening appendix in which Dworkin replies to critics of his essays and extends a discussion of consequentialism. I like that. On the other hand, the index was much too short and doesn’t include many of the binary concepts Dworkin uses. The reading can get tedious, but only for short stretches. Otherwise, the book is a significant contribution to political philosophy. I recommend it for people interested in the question of how morality can be converted to political doctrine.

Bisser Dyankov says

A wonderful book for people living in societies with little-to-none experience in personal rights, importance of law and relation between the state and the citizen.

Adam says

it turns out that Philosophy of Law is really difficult. Dworkin's a big name for the right reasons, but I don't buy this by the end. Rights are just real fuzzy-type things, if they are even really things. Legal positivism and realism are much more sober about the realities of law, even though Dworkin makes a convincing case sometimes. Still, there's too much natural law-type stuff in his account, often quite well-hidden too.

Bottom line is he throws a few curveballs that positivists and realists need to learn to hit, or they're going to strike out every time.

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Sergei Moska says

This book is surprisingly clear in its exposition. The ideas are interesting, the attack against (Hart's) legal positivism is clear, and Dworkin's own positive position shines through at the end. Caveat: Dworkin believes that he is providing both an empirical and normative account of the jurisprudential process (something he elaborates in the appendix of the 1978 edition of the book). It would take someone with a way better understanding of legal history than I to be able to say whether or not his empirical case holds up.

But really, this is one of the clearest books I've read in the past year. At times I didn't even notice that the material was really not at all easy or trivial.

Michael Burnam-Fink says

Dworkin aims at a grandly ambitious apologia for moral liberalism in this book, trying to defend an enlightenment philosophy of human rights and common welfare against attack from the Left and Right. Towards the Left, Dworkin argues against legal positivism, which says that laws are essentially arbitrary and political in nature, a matter of interest groups and power rather than justice. Towards the Right, Dworkin makes a case for judicial discretion and the use of law to advance equality even at the cost of liberty. Written through the mid 70s, these books deal with issues that are still salient today-civil disobediance, affirmative action, the balance between public and private interest, and the legal philosophy of Strict Constructionism.

Jeremy Bentham called human rights 'nonsense on stilts'. How then should a philosopher who considers himself a utilitarian include human rights in their system of justice? Dworkin sets up a three tiered system: at the bottom is policy-the enacted and enumerated laws and legal precedents that describe how disputes are to be resolved and the public good obtained. Policy should be describable by legal principles, the foremost being consistency--that the same principles describe all similar cases. Above principles is morality, and the idea that rights serve as a kind of override on the utilitarian calculus of politics. Drawing from Rawl's veil of ignorance, Dworkin develops fundamental rights of liberty and equality of respect (not outcomes, or even opportunity). From a utilitarian perspective, personal preferences (those affecting only yourself) are legitimate, while external preferences (those affect others) are not. Dworkin's judges are active, intelligent, moral agents, responsible for seeking balance between competing principles and interests according to their own interior sense of rightness. Ordinary citizens act as judges as well, whether in matters of conscience like avoiding the draft in an unjust war, or in selecting their representatives.

Dworkin's thinking is dense and subtle, and there's a lot for ideologues of any stripe to dislike and misinterpret in this book. From my own perspective, I'm concerned about the prescriptive vs descriptive elements of this book. Judges *should* be moral adjudicators balancing competing rights in a society that protects both liberty and the common good. However, after Foucault and Jasanoff, judges *are* agents which create knowledge and exercise power. What purpose do rights serve in a more descriptive account of the law?

Fatimah Elfeitori says

Deep but conversational. An extraordinarily ambitious book, Dworkin stands with some of the monuments of contemporary political theory like Rawls and Habermas.

Rodny Valbuena says

The book that is still making earthquakes inside legal positivism. Specially relevant on these times of civil disobedience.

Jan says

Response to positivism. Unlike Hart, Dworkin is not very clear and not always logical, but his point of view has definite merit. Some of what he is saying makes a lot of sense, but it more applicable to common law system of US and Britain than to the civil law. Which system is better - still open for debate.