Dworkin's Rights Thesis: Implications for the Relationship Between the Legal Order and the Moral Order

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I. INTRODUCTION

A. The Invitation

I have just received a formal invitation from "Archbishop" Dworkin to join his "Order." This invitation is disquieting. I am being asked to give up the predominant Order of Archbishop Hart, in whose modest vineyards I have labored since seminary. One cannot be lightly asked to give up loyalty to a process, a methodology, and a philosophy that has become comfortable and convincing and that has been passed on by earlier generations that labored diligently and competently in constructing it.

I have spoken to others who have received the same invitation and have observed a variety of reactions. Many are comfortable in their present orders. Several, especially those in the Order of Hart, wish to remain with an order whose success has been proven. A few, however, are curious enough to listen, but must be persuaded.

I am in the latter group. While I consider the invitation on its own merits, it is worth examining the effect it may produce should Archbishop Dworkin's thesis turn out to be so attractive as to swell the ranks of his new order. There is evidence that he is mining a rich vein of discontent with the prevailing orders of our time. His rights thesis reflects a trend to focus on the need for moral argument to resolve difficult and puzzling legal problems.

B. Dworkin's Taking Rights Seriously

Professor Ronald Dworkin has introduced, developed and spiritedly defended a fresh way to look at law—a rights-based

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theory of law. He has packaged the evolution of his general theory in a single volume, *Taking Rights Seriously*, which has drawn widespread and serious attention. The criticism of Dworkin's theory has been particularly valuable in unraveling some of its complexities and in adding useful insights and variations. However, this essay examines not only the theory itself but also its implications for society—the shaping of social forces by legal norms and vice versa.

What justifies such attention at this time? One justification is the growing popularity of Dworkin's theory. There has been a discernible trend in American political and legal thinking during the last two decades toward theory-building in terms of individual rights. Dworkin contributes to and plays a recognized leading role in this growing trend. He is challenging prevailing theories of law, such as positivism and realism, with a new and comprehensive rights theory. His theory has the potential of being assimilated into both the legal order and society at large. Thus, those concerned with the legal order and the moral order should begin to take account of the implications Dworkin's rights thesis may raise for the legal and moral orders and the relationship between them.

Dworkin has based his theory on a number of independent legal concepts. This essay focuses on a concept that plays a key role in his rights thesis—the sharp distinction between *principles* and *policies*.

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4. Although Dworkin's distinction between principles and policies has received some critical attention, the only extended analysis is an attack by Greenawalt. Greensawalt, *Policy, Rights and Judicial Decision*, 11 Ga. L. Rev. 991 (1977). See also Regan, *supra* note 2, at 1254-61.
DWORKIN'S RIGHTS THESIS

II. PRINCIPLES AND POLICIES

Dworkin relies on the distinction between principles and policies for both his descriptive and normative account of the operation of a legal system. According to this distinction, a court does in fact and quite properly should prefer arguments of principle to arguments of policy when considering and giving reasons for a decision (particularly in a hard case). The early evidence indicates that this distinction and its uses are likely to become the subject of disagreement among lawyers and judges. One reason for this controversy is that others simply will not agree with Dworkin’s description of what judges in fact do or have characteristically done. Another reason is Dworkin’s normative claim that judges ought not to take account of policy considerations.

The rights thesis provides that judges are political officials who enforce existing political rights. Dworkin’s “doctrine of political responsibility” reflects his insistence that “[j]udicial decisions are political decisions.” He rejects the prevailing positivistic view that if a judge reaches a novel case in an area covered by legislation, then the judge should and does act as a deputy legislature, taking into account policy considerations. The doctrine of political responsibility demands “articulate consistency.” This consistency is not easily satisfied by arguments of policy, but is satisfied by arguments of principle which provide “distributional consistency from one case to the next.”

While efforts to distinguish between the roles of the legislature and ju-

5. See Hart, American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream, 11 GA. L. REV. 968 (1977). Hart ventures the “prophecy” that the chief criticism of Dworkin will be directed at his insistence on there being one right answer for each legal issue addressed by a judge. However, Hart goes on to say that Dworkin challenges a basic theme of English jurisprudence which says that judges and legislators properly should take into account utilitarian concern for the general welfare in deciding what the law ought to be. Hart’s respectful diplomacy keeps him from including American jurisprudence in that characterization, though to a lesser extent, clearly, he would agree that the characterization is fitting.

6. See, e.g., Summers, Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification, 63 CORNELL L. REV. 707 (1978). Summers’ analysis leads to “goal reasons” as one of three main types of substantive reasons that courts have traditionally used. He acknowledges Dworkin’s claim that courts do not characteristically base their decisions on goal reasons but concludes, “The case law, however, does not seem to bear him [Dworkin] out.” Id. at 717 n.28. See also Brilmayer, The Institutional and Empirical Basis of the Rights Thesis, 11 GA. L. REV. 1173, 1180-96 (1977).

7. R. DWORKIN, supra note 1, at 87.
8. Id. at 87, 88.
9. Id. at 82.
10. Id. at 88.
The meaning of the principles-policies distinction has been explained by Dworkin on three separate occasions. He introduced the distinction in an essay written in 1967:

I call a "policy" that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change). 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.

This explanation characterizes the use of policy arguments as teleological in nature and the use of arguments of principle as deontological in nature. Thus, an argument of policy is an argument to maximize the realization of a goal that has been selected for its intrinsic value. On the other hand, an argument of principle focuses on moral considerations independent of their effect on any desired goal. It would be no more than a coincidence

12. Note that one of the consequences of a rights-based theory is that rights may be limited only by competing rights; policy considerations cannot be used to limit rights. R. DWORKIN, supra note 1, at 194-95, 199.
A theory of adjudication and legislation may not necessarily match up with established institutions along the lines of a traditional separation of powers. That Dworkin is focusing on theory and not on the judiciary and legislature as institutions is a point made by Griffiths, supra note 2, at 1133 n.40.
14. Rawls uses these contrasting terms to describe utilitarianism as teleological in character and his own concept of justice and fairness as deontological. J. RAWLS, supra note 3, at 24-30. Dworkin, looking for a "deep theory" in Rawls' work, argues that it "must be a particular form of deontological theory, a theory that takes the idea of rights so seriously as to make them fundamental in political morality." R. DWORKIN, supra note 1, at 169.
Even if Dworkin has a preference for a deontological theory of rights in his normative arguments, it is not required content for the conceptual framework of his rights thesis. He fully recognizes the role that consequentialist arguments can play in various theories of rights. See R. DWORKIN, supra note 1, at 313-15. His rights thesis, in its descriptive and conceptual account, does not rest on a particular theory of rights that may be employed. For this reason, the deontological-teleological distinction is used here only
for an argument of principle to advance a desirable goal; indeed it could well retard progress toward that goal.

Dworkin reinforced the deontological-teleological distinction in 1975. In a second essay, he reexplored the central theme of the rights thesis—that judges have the political responsibility to enforce existing political rights through the use of arguments of principle and not arguments of policy.15 The principles-policies distinction played a fundamental role in developing the rights thesis:

It follows from the definition of a right that it cannot be out-
weighed by all social goals. We might, for simplicity, stipulate not to call any political aim a right unless it has a certain threshold weight against collective goals in general; unless, for example, it cannot be defeated by appeal to any of the ordinary routine goals of political administration, but only by a goal of special urgency.16

Consideration of “a goal of special urgency” is the only room allowed a judge for considerations of policy.

In addition to focusing on the deontological-teleological dif-
fERENCE, Dworkin outlined another key feature of the principles-
policies distinction:

A political right is an individuated political aim. An individual has a right to some opportunity or resource or liberty if it counts in favor of a political decision that the decision is likely to advance or protect the state of affairs in which he enjoys the right, even when no other political aim is served and some political aim is disserved thereby . . . . A goal is a nonindividuated political aim, that is, a state of affairs whose specification does not in this way call for any particular opportunity or resource or liberty for particular individuals.17

This individual-collective dichotomy suggests that the central focus of the judiciary is and should be the individual.18 Thus,
the essence of Dworkin's principles-policies distinction is found in two dichotomous features: deontological-teleological and individual-collective.

That Dworkin considers both of these features fundamental to the principles-policies distinction becomes clear in his third explanation of the distinction. In reply to Greenawalt's attack, Dworkin once more tries to package a definition:

What are arguments of principle and arguments of policy, and what is the difference? Arguments of principle attempt to justify a political decision that benefits some person or group by showing that the person or group has a right to the benefit. Arguments of policy attempt to justify a decision by showing that, in spite of the fact that those who are benefited do not have a right to the benefit, providing the benefit will advance a collective goal of the political community. It is important not to confuse this distinction, between arguments of principle and arguments of policy, with a different distinction, which is the distinction between the consequentialist and non-consequentialist theories of rights.19

Dworkin goes on to argue that the consideration of claimed rights can indeed take account of consequences, including consequences to non-parties to the dispute in question, and not lose their deontological character.20

At this point, it may be well to note one other important feature of the rights thesis which, though somewhat implicit in the foregoing description, has an important bearing on our separate examination of the principles-policies distinction. Dworkin's thesis relies on the nature of argument.21 Principles and policies are not existing "things" lying around waiting to be discovered. For example, in an effort to show that Greenawalt and others by

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19. R. DWORKIN, supra note 1, at 294. Greenawalt's attack on the principles-policies distinction (supra note 4) receives the major portion of attention in Dworkin's "Appendix: A Reply to Critics." Id. at 294-330.

20. R. DWORKIN, supra note 1, at 294-301.

21. Efforts to accommodate Dworkin's rights thesis to a positivist approach show a tendency to ignore or down play Dworkin's insistence on the role of argument as a central feature in shaping legal principles. For a good example of this tendency, see Carrio, Professor Dworkin's Views on Legal Positivism, 55 IND. L.J. 209 (1980). See also Richards, Rules, Policies and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication, 11 GA. L. REV. 1069, 1095 (1977), and Dworkin's response in R. DWORKIN, supra note 1, at 338, 344-45.
their examples fail to grasp the distinction, Dworkin says:

The difference between an argument of principle and an argument of policy, then, is a difference between two kinds of questions that a political institution might put to itself, not a difference in the kinds of facts that can figure in an answer. If an argument is intended to answer the question whether or not some party has a right to a political act or decision, then the argument is an argument of principle, even though the argument is thoroughly consequentialist in its detail.22

Here, Dworkin is assuming that the nature of the argument in response to a question respects the nature of the question raised. That the nature of an argument determines its character is clear from Dworkin's earlier assertion that an "argument is an argument of principle if it respects the distributional requirements of such arguments."23 If, however, arguments of principle can be substituted for arguments of policy by changing the nature of the argument, then that seriously questions the usefulness of the distinction. Dworkin has an answer: "But it is a fallacy to suppose that because some argument of principle can always be found to substitute for an argument of policy, it will be as cogent or as powerful as the appropriate argument of policy would have been."24 In short, a strong argument of policy (appropriate for consideration by a legislature) when converted to an argument of principle might not bear as much weight against competing arguments of principle in resolving a judicial dispute.

Treating the relationship between principles and policies in this way raises at least two major difficulties. First, how and where does one draw the line between arguments of principle and arguments of policy in any practical sense? If the difference is anything more than simply a matter of form, how do the interests or considerations involved affect this question?25 Second, and perhaps more poignant to the concerns of this essay, what is one to make of Dworkin's claim that there is a tendency for an argument of policy to lose force when converted to an argument

22. R. Dworkin, supra note 1, at 297.
23. Id. at 100.
24. Id. at 96.
25. Greenawalt makes this criticism and suggests that if the difference depends on the kinds of interests involved, it remains too difficult to identify those interests counting for arguments of principle or arguments of policy to make the principles-policies distinction useful. Greenawalt, supra note 4, at 1020-26. Perhaps Dworkin's recognition of this difficulty is one reason why he gives the name "Hercules" to the judge confronting a "hard case." See R. Dworkin, supra note 1, at 81-130.
of principle? One commentator, Regan, has added an interesting and somewhat clarifying explanation: Policy arguments resting on broad social considerations when converted to individuated claims do not carry the same weight as those rights that function primarily as trump rights, such as freedom of expression.\textsuperscript{26} Although this difficult and complex point deserves further analysis, it is sufficient now to note how this idea sharply reduces the role of the court in shaping and considering policy considerations, in contrast to familiar contemporary perceptions of judicial responsibility.\textsuperscript{27}

III. IMPLICATIONS FOR THE RELATIONSHIP BETWEEN THE LEGAL ORDER AND THE MORAL ORDER

The foregoing clarifies the relation of Dworkin's principles-policies distinction to his rights thesis. We may now examine some of the implications of the rights thesis and the principles-policies distinction for the relationship between the legal order and the moral order. Admittedly, this question is not considered by Dworkin as he unfolds his theory. Yet, if the rights thesis continues to grow in influence, the question will become increasingly important.

A. Moral Order Affecting the Legal Order

How can the moral order affect the legal order in Dworkin's model, in which judges are restricted to considering principles to enforce "existing" rights? Doesn't Dworkin reject the "social rule theory" of the positivists, which posits that social norms of behavior shape the sense of obligation underlying a legal system?\textsuperscript{28} Dworkin addresses this issue and defends his thesis by explaining that the principles-policies distinction does not deny what he calls the "anthropological thesis":

\textsuperscript{26} Regan, \textit{supra} note 2, at 1233.

\textsuperscript{27} Greenawalt's criticisms of Dworkin reflect a widely held view that courts do not, and should not, "totally [exclude] from judicial consideration broad classes of arguments that would obviously be of weight for conscientious legislators dealing with a social problem." Greenawalt, \textit{supra} note 4, at 993. \textit{See also} Gellhorn, \textit{Contracts and Public Policy}, 35 \textit{COLUM. L. REV.} 679 (1935). One is also reminded of the influence of the so-called "Yale School" of policy science. \textit{See} Schwartz, \textit{The Law and Behavioural Science Program at Yale: A Sociologist's Account of Some Experiences}, 12 \textit{J. LEGAL EDUC.} 91 (1959).

\textsuperscript{28} \textit{See} Dworkin's broad attack on the "social rule theory" of H.L.A. Hart and other positivists in R. DWORKIN, \textit{supra} note 1, at 46-80.
It may be entirely reasonable to think, as this [anthropological] thesis provides, that the principles the members of a particular community find persuasive will be causally determined by the collective goals of that community.

The distinction [between principles and policies] presupposes, that is, a further distinction between the force of a particular right within a political theory and the causal explanation of why the theory provides that right.

Thus, Dworkin accepts that collective goals may shape community principles, though he provides no argument why that causal connection must necessarily exist. In fact, he does not show why the causal connection might not work in the opposite direction.

By defining the rights thesis in this manner, Dworkin accommodates the conclusions of those who explain legal development in terms of social goals. But this accommodation is only partial; he still limits the courts' access to considerations of policy. Thus, they cannot be creative in relating individual values to social values in the form of collective goals. This conservative consequence is inherent in Dworkin's doctrine of political responsibility for judges and in his democratic theory. He places full responsibility for initiating legal norms from policy considerations in the legislature. Dworkin focuses primarily on the judiciary in expounding his rights thesis and narrows his interest even further by staying "within the enterprise" of the judiciary and showing little interest in the source of the values for their arguments of principle. The "anthropological thesis" does not explain so much as it simply narrows the focus and dilutes any socially dynamic picture of the rights thesis.

B. Legal Order Affecting the Moral Order

More interesting than Dworkin's attitude toward the ways

29. Id. at 94-95.
30. Id. at 94.
31. Dworkin deals with the historical analysis of riparian rights developed by Horwitz in M. Horwitz, The Transformation of American Law (1977). R. Dworkin, supra note 1, at 297-301. He asserts that the historical analysis, in terms of social goals, is not inconsistent with his "story of principle" of how judges decide cases. He uses the same technique in reacting to the economic analysis of R. Posner, Economic Analysis of Law (1972). R. Dworkin, supra note 1, at 97-98.
32. See text accompanying note 84 infra, which describes how Dworkin does provide some dynamic between the moral intuition of the judge and general moral theory by analogy to Rawls' concept of "reflective equilibrium."
moral norms might influence law is the question of how legal norms might in turn influence the moral order. Dworkin does not directly address this question. He recognizes that legal norms may affect moral norms under his rights thesis, but goes no further.88 However, inherent in Dworkin’s development of a normative theory of fundamental rights, and particularly in his most fundamental right of “equal concern and respect,”84 is the strong wish to influence and shape not only legal but also social values. As will be seen, Dworkin places the judiciary in a central role in the articulation of moral argument.86 This aspect of his theory makes examination of how his legal order might affect the moral order of promising value.

On this question, one can see aspects of Dworkin’s general theory pulling in opposite directions. On the one hand, there is a picture of a legal system somewhat self-enclosed and potentially static and reactive. On the other, there are elements pointing toward a limited dynamic that can account for change. The static image tends to follow from the descriptive part of the theory found in the rights thesis,86 including the principles-policies distinction and in particular the deontological-teleological feature described earlier. The dynamic image tends to follow from the normative effort to develop the content of fundamental rights and from the methodological feature emphasizing the role of argument noted above. In taking this Janus-like approach, one is reminded of Fuller’s attack on Kelsen, in which he accused Kelsen of offering a static image of the legal system while proclaiming the dynamic aspects of his own system.87

1. The self-enclosed, static image

The heart of the rights thesis, which forms the framework of Dworkin’s conceptual model of a legal system, focuses on rights which “trump” collective goals. Since it is a rights-based theory,

33. See note 36 and accompanying text infra.
34. See, e.g., R. DWORKIN, supra note 1, at 150-83. Here, Dworkin makes use of Rawls to evolve this fundamental abstract right, which becomes the foundation for other rights.
35. See, e.g., id. at 129.
36. Consider the attack by Hare on descriptivists who, in the guise of description, include terms that also carry evaluative weight. See R. HARE, ESSAYS ON THE MORAL CONCEPTS 55-75 (1972). Dworkin’s reliance on the courts’ use of “principles” might misleadingly suggest a normative attitude as well.
37. See L. FULLER, THE LAW IN QUEST OF ITSELF 114 (1940).
only competing rights can limit rights. In this way, arguments of principle are self-contained, or deontological. In other words, the validity of an argument of principle rests on its own strength without regard to any considerations of a collective goal of society.

The Dworkin model focuses primarily on the process of adjudication of these rights. In that process, courts characteristically are, and should be, limited to considerations of principle. Furthermore, the model is based on a coherence theory in which Dworkin’s ideal judge, “Hercules,” pursues arguments that are the most consistent with principles or legal precedents justified by principle: “Hercules must discover principles that fit, not only the particular precedent to which some litigant directs his attention, but all other judicial decisions within his general jurisdiction and, indeed, statutes as well, so far as these must be seen to be generated by principle rather than policy.” Notice that the process is primarily one of discovery rather than invention. The emphasis is on consistency in an overall coherent pattern. In the institutional setting of the legal system, a judge must recognize the “gravitational force” of legal precedent because the idea of “fairness requires the consistent enforcement of rights.”

Thus, according to Dworkin, this comprehensive legal universe or “seamless web,” which includes constitutional principles and even background rights, is held together and governed by the force of coherent argument.

Dworkin further argues that “familiar legal systems” characteristically recognize one right answer for each legal question, even in hard cases. This is certainly a controversial claim. Dworkin defends his one-right-answer thesis by pointing out that the no-right-answer thesis is invalid because it is based on “truth conditions . . . independent of human convention. . . .

38. R. DWORKIN, supra note 1, at 194-95. There are further refinements in Dworkin’s model, involving distinctions between institutional and background rights and between abstract and concrete rights, which are not important for the present discussion.
40. Dworkin admits to heavy reliance on this characterization. Id. at 280.
41. Id. at 116.
42. Dworkin even uses the phrase as his ideal judge, Hercules, addresses a “hard case.” Id. at 115.
43. “Background rights” back up the institutional rights explicitly recognized by the legal system. Though in their abstract form they do not provide a basis for claims to specific institutional decisions, background rights should be used to fulfill the meaning and purpose of institutional rights. Dworkin extends the doctrine of political responsibility even to background rights. See id. at 93, 101-05.
Without some special truth conditions, which enable us to resist the inference that if a proposition is not true then it is false, the no-right-answer thesis cannot be maintained at all.” Dworkin asserts that the enterprise conducted by a judge is based on the truth conditions which permit assertion or denial of the truth of a proposition of law. This is part of the structure of a conventional normative system which Dworkin has styled a “constructive” model carrying its own reality in the world rather than a “natural” model providing a test for the validity of law external to the positive legal system. Of course, Dworkin recognizes that rights can be controversial and that reasonable minds may differ in hard cases. Accordingly, he offers a theory of mistakes to account for inconsistent patterns of developing legal precedent. Dworkin’s arguments to these conclusions are long and at times difficult. Their metaphysical complexities and ramifications qualify for separate treatment. However, the nature and importance of the one-right-answer thesis for Dworkin is now clear enough for our purposes.

One characteristic of Dworkin’s theory of particular significance to legal sociologists is that it is not empirical. It does not rest on the occurrence of a social fact or event. It undertakes to explain, particularly in hard cases, the existence of rights that cannot be attributed to an enacting event in the form of a rule, command or holding of a specific case. This view has been a frequent source of objection and perhaps misunderstanding on the part of Dworkin’s critics, whom Dworkin thematically criticizes as trying to adapt positivism to include principles as part of the existing furniture of a legal system.

44. R. Dworkin, supra note 1, at 289-90.
45. Id. But see Temin, Toward an Account of the Truth of Propositions of Law, 49 U. Cin. L. Rev. 341 (1980). Temin argues that Dworkin is implicitly constructing a realist account of the truth of propositions of law. There is little in Taking Rights Seriously to support this thesis and much in Dworkin’s constructive model to discredit it.
46. R. Dworkin, supra note 1, at 159-68.
47. See id. at 279-90.
48. Id. at 121-23.
49. See id. at 381.
50. See Farago, Judicial Cybernetics: The Effects of Self-Reference in Dworkin’s Rights Thesis, 14 Val. U.L. Rev. 371 (1980). Farago attacks Dworkin’s one-right-answer thesis and further claims that in any event it is not necessary or useful to the rights thesis. One basis for this position is his rejection of a coherence model with a “common metric” to permit comparison of all competing principles. Id. at 388. At one point Farago suggests that “uncertainty is in some ways vital to our very conception of what law is.” Id. at 381.
51. This is the crux of his response to Richards. R. Dworkin, supra note 1, at 338-
I do want to reject, however, the picture of existing law I described earlier. . . . They [positivists] think that the law of a community is a distinct collection of particular rules and principles (and heaven knows what else) such that it is a sensible question to ask whether, at any given moment, a particular rule or principle belongs to that collection.53

Furthermore, Dworkin rejects the positivists' reliance on what he calls a "pedigree" test for determining what the "existing law" of a legal system is. In fact, he rejects any test at all.54 These positions limit the usefulness of analyzing a legal system on the basis of empirical observation or at least counsel caution in drawing conclusions from such observation. Dworkin thinks that to observe and analyze a line of cases in terms of changing community goals is interesting and (under his antropological thesis) of some value, but it is essentially backward looking. Forward-looking projections of change in legal values would at best involve small steps as the ideal judge, Hercules, struggles to locate existing rights in a complex and coherent legal system. Dworkin seems to want to de-emphasize the conservative consequences of this model by insisting that "the main force of the underlying argument of fairness is forward looking, not backward looking."55 Unfortunately, he does not explain further.56

The distinctive responsibility for moral and legal argument assigned to the adjudication process suggests an autonomy to the legal system that fits strikingly with what Unger has referred to as the "legal order."57 For Unger, the legal order is the third of three concepts of law which tend to follow an evolutionary pattern among societies. "The legal order emerged with modern European liberal society"58 and has the following characteristics: "Law as legal order is committed to being general and autonomous as well as public and positive. Autonomy has a substan-

45. Dworkin makes the same point in response to criticism from Sartorius and Raz. Id. at 64-68, 71-80.
52. Id. at 343.
53. See id. at 59-64.
54. Id. at 118.
55. See, e.g., Henkin, "Neutral Principles" and Future Cases, in LAW AND PHILOSO-
PHY 301 (S. Hook ed. 1964). Henkin defends Wechsler's call for principled decisions by explaining that a constitutional principle must have some degree of "predictive general applicability." Id. at 306. Dworkin may intend nothing more than this by his use of the term "forward looking."
57. Id. at 54.
tive, an institutional, a methodological, and an occupational aspect." Dworkin insists on the autonomy of the legal system with even more optimism than Unger. This is especially visible in Dworkin's treatment of how his ideal judge handles legislation:

If a judge accepts the settled practices of his legal system—if he accepts, that is, the autonomy provided by its distinct constitutive and regulative rules—then he must, according to the doctrine of political responsibility, accept some general political theory that justifies these practices. The concepts of legislative purpose and common law principles are devices for applying that general political theory to controversial issues about legal rights.

In his theory of statutory interpretation when a statute is the result of policy determination, Dworkin makes a distinction between the "gravitational force" of judicial precedent and legislation based on principles and the "enactment force" of judicial precedent and legislation based on policy. Dworkin does not agree that the judge's responsibility in a hard case is to supplement the legislative act with a determination of what the legislature would have done if it had been aware of the problem. This is a form of judicial discretion that he rejects. Instead, Hercules must construct a larger political theory which is able to account for the legislative purpose within the coherence demands of that theory.

What, then, are the limits of judicial interpretation of the enactment force of a statute? Dworkin offers only the language of the statute and whatever reasonable limits it provides. Such a sharp division of responsibility presents difficulties in accounting for legislative expectations (or express mandates) that courts

58. Id. at 52.
59. One of Unger's particular concerns is the inherent potential of an autonomous legal order to be unduly influenced by special interests that tend to undermine its generality and autonomy. See id. at 197. This picture contrasts sharply with Dworkin's view that the legal system emphasizes the moral values of society and tends to protect individual rights. Dworkin says that the legislator-politician is better suited under the theory of democracy for weighing considerations of policy, not for reasons of expertise, "but rather [because] it puts him under weights of political pressure from which the judge is rightly immune." R. Dworkin, supra note 1, at 324.
60. R. Dworkin, supra note 1, at 105 (emphasis added).
61. See id. at 110-15. See also Dworkin's response to Greenawalt's criticism. Id. at 318-30.
62. Id. at 109.
63. Id. at 109-10.
take account of changing policy considerations in applying a statute.

The individual judge in this model plays a large and central role in articulating the moral order of a society.\textsuperscript{64} He does not defer to others, for "Hercules' technique encourages a judge to make his own judgments about institutional rights."\textsuperscript{65} Of course, he is fallible and subject to the theory of mistakes; but, Dworkin argues, "There is no reason to credit any other particular group with better facilities of moral argument . . . ."\textsuperscript{66} The impact of this assertion cannot be ignored. The group holding such responsibility is presumably itself an elite subgroup of the priesthood of lawyers from whose ranks judges are selected. If it turns out that this group does not exhibit such superior skills for moral argument, Dworkin's solution is to improve the selection process for judges.\textsuperscript{67} Another more modest argument for why judges should not defer to others is available: The doctrine of political responsibility of the judge includes the right of a party to have his institutional rights proclaimed by the legal system without any delegation of responsibility.

Thus, the limitations on the kinds of considerations appropriate for a nonempirically based coherence theory of adjudication, the relative autonomy of the legal system, and the central role played by the judge in articulating rights in a rights-based theory all suggest a self-enclosed, autonomous system whose normative effect on other aspects of society is indirect at best.

2. The dynamic image

By contrast, Dworkin does provide some sense of the dynamic in the conceptual part of the rights thesis. He attempts to change and expand our vision of the legal system by asking us to shift our focus to the individual as the holder of rights and to adopt the methodology of moral argument. The image that Dworkin consciously tries to foster of his legal system is in-

\textsuperscript{64} One interesting and useful byproduct of Dworkin's focus on the judicial role is the importance he attaches to the written opinion and its intended meaning. By comparison, American realists and sociological jurists have left a legacy of skepticism as to the precedential weight to be given to the articulated reasons in a legal opinion. Dworkin's model could lead to more directness, and perhaps even optimism, in understanding judicial efforts in hard cases.

\textsuperscript{65} R. DWORKIN, supra note 1, at 130.

\textsuperscript{66} Id.

\textsuperscript{67} Id.
tended to alleviate the system's potential for self-enclosure in its operation.\textsuperscript{68} For example, the positivists' theory of law as sketched by H.L.A. Hart is from an external perspective—what does a legal system look like? This may seem to accommodate a social theory of law better than the internal perspective dominating Dworkin's focus on the process of judicial decision-making "within the enterprise."\textsuperscript{69} Dworkin tries to ward off this conclusion by seizing on the positivists' insistence on a sharp separation of law and morals and then comparing his theory which "uses reasoning about social obligations as the model for reasoning about legal obligations. But it also, and independently, provides for a more intimate connection between these institutions."\textsuperscript{70}

The rights thesis does provide for the consideration of fundamental moral values of a society in the form of "background rights."\textsuperscript{71} While background rights do not in the abstract provide the basis for a claim to a concrete institutional right, they can and should come into play in at least two kinds of cases. First, in a "hard case" an institutional right clearly dispositive of the case does not exist. There the judge must construct a larger theory including abstract and background rights to find the right answer that best fits within the coherence model.\textsuperscript{72} Second, the legal system often provides rules and principles which by their terms make moral values in the form of background rights relevant. The best example of a means by which the legal order participates in a changing moral order can be found in Dworkin's treatment of constitutional adjudication. He distinguishes between a "concept" such as due process, equal protection, or cruel and unusual punishment, and a particular "conception" of that concept. The founding fathers can be said to have laid down a concept in full expectation that the concept will accommodate

\textsuperscript{68} I have heard Dworkin in a lecture express concern over the danger that his theory in its descriptive aspects "may lead to excess screening out of 'background rights' in shaping and articulating 'institutional rights.'" Address by Ronald Dworkin, New York University Law School (Oct. 13, 1975). This comment discloses how much reliance Dworkin places on the role of "background rights" to provide the means by which fundamental values of a society influence established institutional rights.

\textsuperscript{69} This is essentially the position spelled out in Mandel, \textit{Dworkin, Hart, and the Problem of Theoretical Perspective}, 14 L. & Soc'y Rev. 57 (1979).


\textsuperscript{71} See note 52 supra.

\textsuperscript{72} See R. DWORKIN, supra note 1, 105-23.
changing conceptions because of changing social conditions.\textsuperscript{73} This distinction is useful to describe certain kinds of legal norms which invite change in their moral content. However, it is not clear how much of a leadership role the judiciary should be permitted in effecting such a change.

Dworkin also projects a generative view of how the moral order can be affected through the use of legal argument. The rights thesis centers on moral principles that underlie community institutions, not just references to a community consensus or belief at a particular time on a particular issue: "Whether a principle is a principle of the community in this sense would be a matter for argument, not report, though typically the weight of the principle, not its standing, would be at issue."\textsuperscript{74} The method of argument to be used by a judge is analogous to the concept of "reflective equilibrium" used by Rawls and favored by Dworkin. Working within a coherence model that is constructive in nature, a judge argues back and forth between his moral intuition and a general moral theory until he reaches a satisfactory result. This result is ultimately limited by the judge's ability to articulate its coherence with a moral theory held throughout the community. Nevertheless, it is still shaped in part by the individual intuition or conviction of the judge.\textsuperscript{75}

In normative terms, Dworkin does show some interest in change effected by the legal order. The legislature is free to initiate change in legal norms on the basis of either principle or policy. But Dworkin's central focus is on the judiciary, and his recognition of the role of fundamental rights is as a protection against the majority. Given this focus and recognition, the judiciary seems to play the central role in shaping of a moral order to the extent that it is grounded in principles rather than collective goals.

In terms of content, Dworkin examines Rawls' theory of justice as fairness and finds the basic right of Rawls' "deep theory" to be the abstract fundamental right of equal concern and respect.\textsuperscript{76} This sense of equality focuses on respect as a human being, a kind of natural right in the Kantian sense, and not on

\textsuperscript{73} See id. at 131-49.
\textsuperscript{74} Id. at 79. The same point is made on behalf of Hercules. Id. at 129.
\textsuperscript{75} For an explanation of Dworkin's use of the Rawls technique along these lines, see id. at 159-68.
\textsuperscript{76} Id. at 178-83.
equality in the distribution of goods.77 Dworkin hints that such a fundamental right might be influential in holding together a moral order that is suffering from strains of heterogeneity.78 Unfortunately, he has gone no further in exploring any systematic impact of his normative theory on the moral order.

IV. THE REPLY

Since the invitation said “RSVP—acceptance only” and gave no time limit for response, I shall only take it under advisement at this time. The foregoing analysis discloses a number of disquieting implications for the relationship between the legal order and the moral order.79 The focus has been primarily on the conceptual or methodological aspects of the rights thesis, which is the strongest and potentially most influential part of Dworkin’s theory.80 Admittedly, Dworkin’s normative efforts at putting content into such concepts as “principles” and “background rights” have been tentative, and even his fundamental principle of “equal concern and respect” must be defended against competing views.81

The preceding analysis of the conceptual framework of the rights thesis reveals three essential characteristics: (1) It is a constructive model in the tradition of idealism rather than empiricism which places the individual at the center; (2) It places the judiciary in a central role in shaping fundamental legal and social values; and (3) It stresses primary reliance on the methodology of moral argument in shaping those norms.

A constructive, ideal model focused on the rights of individ-

77. See id. at 182.
78. The bulk of the law—that part which defines and implements social, economic, and foreign policy—cannot be neutral. It must state, in its greatest part, the majority’s view of the common good. The institution of rights is therefore crucial, because it represents the majority’s promise to the minorities that their dignity and equality will be respected. When the divisions among the groups are most violent, then this gesture, if law is to work, must be most sincere.

Id. at 205.
80. Richards, supra note 2, at 1331-38, agrees with this conclusion and characterizes Dworkin’s rights thesis as a “methodological natural law theory.”
81. For example, how would Dworkin respond to the thesis of E. Cahn, The Sense of Injustice (1949)? Cahn persuasively argues that a sense of injustice or of inequality is a real phenomenon of our social condition and is much more efficacious in value-building than a sense of a positive content to justice and equality.
uals raises the questions of how efficaciously those rights will, in reality, be recognized and protected by political and social institutions.83

The heavy responsibility placed on the judiciary raises the question of how social values are to be incorporated into a potentially self-enclosed system. The anthropological thesis and ideas expressed in other writings of Dworkin suggest that the judiciary properly plays the leading interpretive role in assimilating social facts.84 Perhaps in order to counteract overtones of elitism, Dworkin provides no basis for judicial authority independent of the strength of arguments made by the judges.85 This goes beyond rejection of a "pedigree" test for law and raises questions of constitutional and institutional perception, if not of normative constitutional values.

Finally, what is disquieting about reliance on moral argument? Nothing, unless it is at the rejection of other important considerations, such as accumulated experience. Hercules is not much impressed by accumulated experience.86 He is limited by his capacity to articulate a concrete result in terms of institutional and background rights. Such a form of rationalism without the correctives of realism and empiricism is disquieting.86 A recent example of taking an even stronger position than Dworkin has explicitly taken on the function of moral argument is the work of Fried. He asserts that the way to understand legal change is to understand moral arguments rather than history because "moral arguments can provide the backbone of a social theory."87 He concludes, "Explanatory social theory merges with normative moral discourse."88 Such a position has the virtue of

82. See, e.g., S. SCHEINGOLD, THE POLITICS OF RIGHTS (1974). Scheingold thinks that courts often help create a "myth of rights" by asserting rights which can be made real only by a political redistribution of power.

83. Dworkin stresses this interpretive role for judges in Dworkin, Social Sciences and Constitutional Rights—the Consequences of Uncertainty, 6 J.L. & Educ. 3 (1977).

84. The idea that the authority of the law, especially the Constitution, resides in the law itself is supported by Robison, The Functions and Limits of Legal Authority, in AUTHORITY: A PHILOSOPHICAL ANALYSIS 112 (R. Harris ed. 1976).

85. See R. DWORKIN, supra note 1, at 318.

86. See Adams, The Philosophical Grounds of the Present Crisis of Authority, in AUTHORITY: A PHILOSOPHICAL ANALYSIS 3 (R. Harris ed. 1976).


88. Id. at 349.
simplicity and directness of method but asks us to risk too much in abandoning social theories which have proved useful in understanding how legal systems function in society.