Cash savings to the court and the probation service were estimated at U.S. $1,040,563 plus 27,715 work-hours over two years.

This seems to indicate one direction for further progress not only, I suggest, with respect to status offenders, but also other juvenile offenders. Both are indicia of family failure and, to quote Floyd Feeney (p. 257): "The issue . . . is not really whose fault the problem is but rather what is to be done about it." It would seem obvious that the solution cannot lie in isolating the child with whose upbringing the family is failing, subjecting the child alone to the judicial process and frequently detaining him with others similarly placed at vast expense to the public and great detriment to the child. The solution must lie in counselling and the attainment of minimum standards within the family setting (please note the use of the words "family setting" instead of "family unit". The family is not and must never again be considered as a static unit into which any of its members is locked. It is a constantly-changing complex of interacting relationships between each of its members).

Two programs in California have now demonstrated that developments on these lines are both more efficient and much cheaper than the existing system. It is now for other jurisdictions, including Alberta, to explore solutions along these lines, at a saving of public money, judicial and professional expertise and—not least—a happy and law-abiding future for the young.

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TAKING RIGHTS SERIOUSLY: By Ronald Dworkin. Harvard University Press. 1977. Pp. 295.

In 1971 John Rawls published *A Theory of Justice*. It is well known that this work asserts a version of the old social contract theory and the concept of individual rights which may not be overridden on the basis of the general welfare. It states and defends a liberal theory of justice.

Rawls' work was important for a number of reasons. It marked a return to grand normative theory in ethics.[1] It was no less than a systematic theory of social choice which drew on developments in a number of disciplines. These facts made the work of immediate interest to individuals outside the relatively narrow circle of professional philosophers.

The work was also of ideological significance. It defended liberalism at a time when "liberalism was becoming unfashionable, dismissed in smart circles as shallow compared with the deep (not to say unfathomable) truths of Hegel or a Hegelianized Marx".[2] Indeed, certain critics, among whom are many lawyers, suggest that Rawls' conception of justice is "a particularly subtle rationalization of the political status quo in the United States."[3]

1. For a more elaborate statement of these points see the Introduction to Reading Rawls. Critical Studies on Rawls' *A Theory of Justice*, (ed.) N. Daniels.

2. B. Barry, *The Liberal Theory of Justice*, at 4.

3. R. Dworkin, *Taking Rights Seriously*, at 82.

Ronald Dworkin, the American Professor of Jurisprudence at Oxford University, has now published a defence of a liberal theory of law. Like Rawls' work, Dworkin's theory developed out of a number of previously published essays. *Taking Rights Seriously* brings together these essays, with the addition of two previously unpublished chapters.

Dworkin builds his theory through a critical contrast with what he terms the ruling theory of law, which is also regarded by many as being a liberal theory of law. This ruling theory has two parts; a conceptual part, that is, a theory about the necessary and sufficient conditions for the truth of a proposition of law, and a normative part, utilitarianism. The conceptual part of the ruling theory is of course the theory of legal positivism, first stated by Bentham and Austin, and refined and developed by H. L. A. Hart.[4] The normative part, utilitarianism, has become, in alliance with welfare economics, a set of complex standards for evaluating the welfare of the community.

Dworkin attacks both parts of this theory.

His criticism focuses on judicial decision-making in "hard cases".[5] These are cases where there appears to be no established legal rule which covers the case at hand. An example he gives of such a case is *Spartan Steel & Alloys Ltd.* v. *Martin & Co.*[6] which raised the issue in tort of recovery for economic loss unconnected to physical damage.

The legal positivist views this as a case where the legal rules have run out.[7] A judge must therefore step outside rhe existing law, and in the exercise of his discretion legislate a solution to the problem. The judge is therefore creating new legal rights and obligations which are imposed retroactively on the parties before the court.

Dworkin rejects this picture both as a description of what courts do in hard cases and as an adequate political justification for the institution of adjudication. In developing his contrasting theory he also rejects the positivist model of law and legal system. Dworkin argues that in hard cases judges are not legislating new rights on the basis of extra-legal policy arguments. He argues that even in the hardest case one party is entitled at law to a decision in his favour; that judges in these cases are enforcing pre-existing legal rights; that these rights are established by arguments of legal principle.[8]

The concept of a legal principle is a central part of Dworkin's theory and deserves some elaboration. He asserts that if we examine the case reports closely we will see that in addition to rules, principles play an important part in judicial decision-making. He refers as an example to the principle that no man may profit from his own wrong, cited in the well

4. *See* H. L. A. Hart, *The Concept of Law* (1961) and *Positivism and the Separation of Law and Morals* (1958) 71 Harv. L. Rev. 593.

5. Greater clarification is needed on what constitutes a "hard case". The description I give in the text is a summary of a number of ambiguous accounts in the text. *See*, for example, Taking Rights Seriously pp. 82, 83, 110. One of his descriptions of a hard case suggests that it is a case which "raises issues so novel that they cannot be decided even by stretching or reinterpreting existing rules." Such cases must be rare. *Spartan Steel* certainly would not fall into this category.

6. [1973] 1 Q.B. 27.

7. *Supra*, n. 3 at 17.

8. Principles are introduced in *Taking Rights Seriously* at p. 22. They are defined as "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." Principles are contrasted with policies. The latter are, "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." Dworkin at pp. 82-100 develops the distinction between arguments of principle and policy, arguing that judicial decision making is and ought to be generated by arguments of principle, not policy.

known decision of *Riggs* v. *Palmer*.[9] Principles such as this, he argues, do not function logically in the same way as legal rules. Unlike rules they do not operate in an all or nothing fashion; they act as reasons that argue in one direction but they do not necessitate a particular decision.[10] In addition, we would not argue for the validity of a legal principle in the same way as we would for a legal rule, *i.e.* by pointing to the fact that its validity could be traced to one or a number of judicial decisions. Rather we would point to a principle's "sense of appropriateness" and the extent to which it was supported by the moral concerns and traditions of the community.[11] For example, if a lawyer were asked to argue for the validity of the principles of natural justice he would engage in a process of justification that might well involve considerations of moral and political philosophy. To argue for a particular legal principle therefore requires the development of a theory of justification why a particular principle ought to count as law.

Legal principles serve two functions in Dworkin's theory. Firstly, they form the link between the settled precedents and the decision which the judge must make in the hard case, establishing the pre-existing rights of the parties.[12] Secondly, they are a conceptual link between the law and the morality of the community.

Dworkin illustrates his theory by depicting how Hercules, a superhuman judge, would decide a hard case. Hercules must build out of the established precedents the best set of principles to justify the settled law. The doctrine of precedent itself rests on the principle of fairness, the fairness involved in the consistent enforcement of rights by the judicial process. This principle of fairness requires therefore that the principles which Hercules constructs fit not only the particular precedents before the court but also all other statutes and judicial decisions within his jurisdiction.[13] Thus, if Hercules decides upon a particular conception of equality as justifying the precedents before him, he must, in addition, test that conception against all other areas of the law.[14] This is why Dworkin's judge is called Hercules. He must construct a theory of law setting out the best set of principles to justify the settled law.

Dworkin recognizes that this task may involve difficult issues of moral and political philosophy, and that different judges may arrive at different conceptions of the principles.[15] He recognizes that a familiar objection will be made to his model of adjudication: that non-elected judges are making these hard decisions on their own political or moral convictions; that this is undemocratic; and that these decisions ought rather to be taken by an elected body, the Legislature. Thus this might be a form of objection to a decision in *Spartan Steel* recognizing a right in tort to recover for purely economic loss.

Dworkin counters this objection with the following argument.[16] It is true, he says, that judges make controversial personal judgments in hard

9. 115 N.Y. 506, 22 N.E. 188 (1889).

10. *Supra*, n. 3 at 23-28.

11. *Id.* at 39-41.

12. Arguments of principle are arguments intended to establish an individual right. . . . Principles are propositions that describe rights. *Taking Rights Seriously* at 90.

13. *Supra*, n. 3 at 115-118.

14. *Id.* at 116.

15. *Id.* at 127. This does not mean, of course, that there is more than one answer to the determination of the legal rights of the parties.

16. *Id.* at 123-130.

cases, and that there is a moral dimension to these judgments. The judge is however making a personal judgment within the institutional framework of the law; the law shares with the morality of the community certain principles such as fairness and justice. These principles are constructed out of the rules and practices of the law and the judge makes a personal judgment as to which set of principles best fits the rules and practices of the law. This is clearly not, however, the same as making a judgment based on his own personal convictions. Thus Dworkin states: "Hercules' theory of adjudication at no point provides for any choice between his own political convictions and those he takes to be the political convictions of the community at large. On the contrary, his theory identifies a particular conception of community morality as decisive of legal issues; that conception holds that community morality is the political morality presupposed by the laws and institutions of the community. He must, of course, rely on his own judgment as to what the principles of that morality are."[17]

Dworkin then applies his theory to the issue of constitutional adjudication in the United States. He argues that the framers of the U.S. Constitution were appealing to a moral concept in, for example, the due process clause, but that they did not lay down any particular conception of this concept. The Supreme Court, faced with applying these clauses must therefore undertake the task of asking why particular instances in the settled law are regarded as offending the clause. This will involve asking and answering difficult questions of political morality in order to construct a set of principles which justifies a particular conception of the due process clause. He therefore concludes that the traditional controversy between strict constructionists and activists presents a misleading picture, because "a court that undertakes the burden of applying these clauses fully as law must be an activist court, in the sense that it must be prepared to frame and answer questions of political morality."[18]

The remainder of the book is concerned with developing other aspects of his theory of law. In Chapter 6 he outlines a theory of legislative rights based on Rawls' work. Chapters 7 and 8 discuss the nature of the citizen's duty to obey the law. Chapter 9 discusses the important issue of reverse discrimination in the context of the recent case of *De Funis* v. *Odegaard*.[19]

Chapters 10, 11 and 12 deal with the right to liberty and Chapter 13 defends his theory against the criticism that in hard cases there is no right answer but only a range of answers.

## *II.*

This is an important work in legal philosophy. Dworkin's theory, like Rawls,[20] is rights based. The fact that adjudication settles the legal rights of the parties makes, in Dworkin's view, certain types of argument legitimate and others illegitimate. Arguments of policy, the type that a legislator would appeal to, are inappropriate to adjudication. A judge is not a legislator, and does not/should not balance interests on argu-

17. *Id.* at 126.

18. *Id.* at 136.

19. The case of *Bakke* v. *Regents of the University of California* which is presently before the U.S. Supreme Court raises the same issues as *De Funis*. It makes the discussion in chapter 9 of special interest.

20. I do not want to labour the comparison between Rawls and Dworkin. However, after reading *Taking Rights Seriously*, I could not help thinking that Rawls and Dworkin seemed like complementary parts of a general liberal philosophy. In addition, many of the tools and concepts used by Dworkin in the development of his theory are derived from Rawls' work.

ments designed to promote the collective welfare unless these arguments establish rights. Even in hard cases he does not, unlike Hart, see the judge stepping beyond the law and making a decision on the basis of extra-legal policy arguments.

The usual conclusion of Dworkin's style of argument is that judges should restrict themselves to a relatively narrow role. This is because those making this kind of argument often share the positivists' conception of law as a system of relatively certain established rules. Dworkin, however, gives a much more expansive description of what constitutes the law, implicitly suggesting an activist role for judges in discovering what the law is on any particular issue. Even in hard cases, that is, those cases from which judges often shrink because of the fear of legislating, the law is never silent. There are legal principles such as justice, fairness and equality in the law to help lead the judge to the correct legal decision. Of course, because it is still adjudication, working within the framework of establishing concrete rights, policy arguments of the type the legislature would make are inappropriate. An example of this latter type of argument is provided by Henry J. in *Stephens* v. *Gulf Oil Canada Ltd.*[21] where he wished to strike down a covenant in restraint of trade partly on the ground that the agreement "impaired the dynamic operation of the competitive market in Canada."

The principle/policy distinction in relation to legal argument seems to be a key part of Dworkin's theory. It is also a distinction which, I suspect, deserves closer examination than this reviewer has space or time for. It will, perhaps, form the Achilles' heel of his theory.

Perhaps Dworkin's greatest contribution to legal philosophy is the connection which he makes between law and morality. Dworkin does not believe that one can separate legal from moral or political standards. There is, in his view, a conceptual connection between the law and the morality of the community through such shared concepts as fairness and justice. Thus his test for the truth of a proposition of law is a normative one. It is whether the rule is more consistent than a contrary rule with the theory of law that best justifies the settled law. This test involves a moral dimension. In deciding a hard case a judge may have to decide whether the rule that he proposes to adopt is more consistent with, for example, a particular conception of fairness or equality.

This type of test is in clear contrast to positivism in which the test for the truth of a proposition of law has nothing to do with the content of a rule but simply with the manner in which it was adopted, for example, judicial decision, legislation.[22]

Dworkin's theory can thus be seen as an attempt to put legal theory

21. (1974) 45 D.L.R. (3d) 161.

22. Dworkin sees this issue as his central disagreement with legal positivism. Thus at pp. 59-60 of *Taking Rights Seriously* he states: "I shall start by setting out three different theses, each of which has something to do with the idea of a fundamental test for law. . . . The first thesis holds that, in every nation which has a developed legal system, some *social* rule or set of social rules exists within the community of its judges and legal officials, which rules settle the limits of the judge's duty to recognize any other rule or principle as law. The thesis would hold for England, for example, if English judges as a group recognized a duty to take into account, when determining legal rights and obligations, only rules or principles enacted by Parliament, or laid down in judicial decisions, or established by long standing custom, and recognized, as a group, that they had no duty to take into account anything else. Hart advances this first thesis; in fact, his theory that a social rule of recognition exists in every legal system may be regarded as one of the most important contributions he has made to the positivist tradition. (ii) The second thesis holds that in every legal system some particular *normative* rule or principle, or complex set of these, is the proper standard for judges to use in identifying more particular rules or principles of law. . . . The disagreement between Hart and myself is about the first of these three theses. He proposes that thesis, and I deny it. The issue is important; upon it hinges the orthodox idea that legal standards can be distinguished in principle and as a group from moral or political standards." It is clear that Dworkin is putting forward the second thesis.

back to where it emerged from—moral and political philosophy. In his view most issues which have puzzled legal theorists are issues of moral principle. This expansion of our view of the nature of law and the task of legal philosophy can be not too fancifully compared with the expansion of vistas accomplished by Rawls in *A Theory of Justice*.[23]

Like Rawls, Dworkin will be criticized on ideological grounds; that his theory of law, as applied, defends the status quo in the United States. This seems the silliest criticism of all. It is no less silly because I suspect it will be held by many lawyers and has, even already, graced the pages of the Harvard Law Review.[24]

## *III.*

It is not necessary to anticipate all the criticisms that will be made of Dworkin's work. The bones of his theory were well known before the publication of this work and there have already been several articles dealing with general or particular parts of it.[25]

Many readers of the book will associate Dworkin's theory with natural law. This is unfortunate. It moves consideration of his views from the book itself to the old and hackneyed positivism/natural law debate. The term natural law is also, as Dworkin himself notes, a pejorative one for many lawyers, conjuring up pictures of visionary priests and ancient Greeks. Dworkin's theory is not a theory of natural law. Hercules does not discover pre-existing objective and unchanging principles to guide his decision making; rather he constructs them out of the materials before him.[26] Hercules must use his personal judgment to reflect back and forth between different conceptions of principles and the settled law in order to come up with the best set of principles.

It thus differs from a natural law theory in which the principles already exist and the judge simply discovers them. However, I wonder if Dworkin's "constructive model" does not leave us with a difficult gap to explain.[27] How does a judge get from the precedents to the principles? If a judge constructs principles out of the precedents and then applies them to the case at hand, can it be said that the judge is really enforcing pre-existing legal rights, based on pre-existing principles? Is there not a personal element of discretion involved in this process? I think Dworkin can answer these questions by an expansion of his distinction between making a personal judgment about X based on certain standards and making a judgment about X based on one's own personal convictions. However, it is one aspect of the theory which deserves more clarification.

His theory will also be subject to the criticism that in hard cases there

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23. Dworkin's concern to join jurisprudence and ethics can be traced back to one of his early articles. *See: Philosophy, Morality and Law—Observations prompted by Professor Fuller's novel claim.* (1964-65) 113 U. of Penn. L. Rev. 668, especially at 686-690. An earlier writer who showed a similar concern was Felix Cohen. *See*, for example, his essays on *Modern Ethics and the Law* and *Judicial Ethics* in *the Legal Conscience*, Selected Papers of Felix S. Cohen, edited by Lucy K. Cohen (1960). *See also*, Fuller, *The Morality of Law.*

24. 91 Harv. L. Rev. 302 (1977).

25. *See* 11 Georgia L. Rev. 969 (1977) in which there are a number of articles devoted to an analysis of Dworkin's work and Dworkin defends himself against a number of criticism. *See also* Mackie, *The Third Theory of Law, Philosophy and Public Affairs*, M. Cohen, New York Review of Books, May 20, 1977; *Dworkin as Quixote*, N. B. Reynolds, 123 U. Penn. L. Rev. 574; G. Marshall, *Positivism, Adjudication and Democracy*; Ch. 7 of *Law, Mortality and Society*, essays in honour of H. L. A. Hart, ed. P. M. S. Hocker and J. Raz.

26. *Supra*, n. 3 at 105-123.

27. I cannot take any credit for the following comments in the text. This point is made more fully and cogently in an unpublished paper of Professor R. Shiner of the Philosophy Department at the University of Alberta. My rather crude statement derives from that paper.

is no right answer but only answers. He defends his theory against this criticism in chapter 13 and at greater length in a recent tribute to H. L. A. Hart.[28]

There is one further aspect of the theory which will require clarification. What are the features that allow us to distinguish a hard case and hence permit us to bring all of Hercules' apparatus to bear on a problem? After all, if we give a liberal interpretation as to what constitutes a hard case, are we not inviting judicial activism (licence?)?[29]

## *IV.*

Twenty-five years ago a distinguished legal philosopher wrote: "The systematic philosophy of law, *Rechtsphilosophie* or *filosofia del diritto*, has not flourished in the English-speaking world. Few of our lawyers have been philosophers and few of our philosophers have been lawyers." He then lamented the fact that "our ethical and political philosophers have reflected deeply on the nature of moral obligation and on the position and duties of man in society, but they have seldom attempted, and never with conspicuous success, to examine in detail the specific problems of the nature, ends, methods and limitations of law."[30]

Much has changed. In 1961 came *The Concept of Law* by H. L. A. Hart. Now we have *Taking Rights Seriously*, a complex, erudite and elegant work. Both of these works deal with the relationship of law to morality. Dworkin, however, makes a strong claim for a conceptual connection between law and morality. This claim remains to be evaluated. Both, however, have answered the complaints of twenty-five years ago and have acted as catalysts for the enormous growth of interest in legal philosophy.[31]

*Taking Rights Seriously* is, in addition, important to the practical lawyer or judge. It paints a model of adjudication which all lawyers and judges know exists and ought to exist. Judges have a responsibility to attempt to come to the one right answer in hard cases. In doing so thay have a responsibility to develop a coherent set of principles for what they are doing and have been doing; it is not enough to come to an acceptable policy solution.[32]

The fact that all judges are not Hercules and that Dworkin's model may be an ideal model does not count against the theory. It simply suggests that "a judge may be wrong in his political judgments, and he should therefore decide hard cases with humility."[33]

—I. RAMSAY*

28. *Law, Morality and Society*, Essays in Honour of H. L. A. Hart, ed. P. M. S. Hacker and J. Raz, chapter 7.

29. For an expansion of this view *see* Mackie, *supra*, n. 25.

30. A. H. Campbell in the Introduction of the English Edition of *Justice* by Giorgio del Vecchio (1952).

31. And legal philosophers who are both lawyers and philosophers.

32. This point is brought out in an article criticizing the recent abortion decision of a U.S. Supreme Court. *See* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920. The writer comments at 947: "It is, nevertheless, a very bad decision. Not because it will perceptibly weaken the court—it won't; and not because it conflicts with either my idea of progress or what the evidence suggests is society's—it doesn't. It is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be . . ."

33. *Supra*, at 130.

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