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Principles, Positivism, and Legal Theory

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Taking Rights Seriously. By Ronald Dworkin. *Cambridge: Harvard University Press,* 1977. Pp. xv, 293. $12.00.

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A complete theory of law, writes Ronald Dworkin, tells us what law *is* and what it *ought* to be. The current "ruling" theory of law combines legal positivism with utilitarianism: it holds, first, that law is a set of explicitly adopted rules and, second, that law ought to maximize the general welfare.[1] Dworkin rejects both branches of that theory. He argues that law contains "principles" as well as rules and that these principles cannot be traced to any explicit adoption or enactment. Dworkin argues further that the ruling theory neglects moral rights, which must be respected, he claims, even if they do not promote the general welfare.[2] Dworkin then offers an alternative theory of law, founded on the right to be treated as an equal.

Taking Rights Seriously presents these views by collecting many of Dworkin's provocative and valuable essays.[3] It is a rare treat—important, original philosophy that is also a pleasure to read. Dworkin argues vigorously, imaginatively, and elegantly.[4] His book encompasses a wide range of topics, as well as some shifts in doctrine, but still it hangs together well. The more topical essays (on the Nixon Court, civil disobedience, and reverse discrimination) employ and develop philosophical ideas found in the more abstract theoretical papers.

But the heart of Dworkin's book is his abstract legal theory, and I shall concentrate on that here. His critique of legal positivism (the

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1. R. DWORKIN, TAKING RIGHTS SERIOUSLY vii (1977) [hereinafter cited by page number only].

2. P. xi.

3. Dworkin's other published work in this area includes *Seven Critics,* 11 GA. L. REV. 1201 (1977); *No Right Answer?,* in LAW, MORALITY, AND SOCIETY 58 (P. Hacker & J. Raz eds. 1977); *Philosophy and the Critique of Law,* in THE RULE OF LAW 147 (R. Wolff ed. 1971); and *Judicial Discretion.* 60 J. PHILOSOPHY 624 (1963).

4. Dworkin uses philosophical machinery very efficiently. His essay *Constitutional Cases,* at pp. 131-49, is a particularly good example.

"descriptive" aspect of the ruling theory of law) is a substantial part of the book. It is well known and widely accepted and is apparently the motivating basis for developing an alternative theory of law; so it will receive most of my attention. I will then consider briefly Dworkin's own theory. But first we should review the doctrines of two outstanding legal philosophers, John Austin and H.L.A. Hart—Hart because Dworkin treats his theory as the high point of positivism and Austin because Hart's ideas emerge primarily from a critique of Austin's classical version of legal positivism.

I. Classical and Contemporary Positivism

Austin's theory of law is set within a theory about the various norms that govern human conduct.[5] Some rules are set for humans by God: this is "divine law." Others are made by humans for each other: these include "positive law" (what we ordinarily call "law") and "positive morality" (all other human standards, ranging from etiquette and custom to conventional morality).

Austin conceives of positive law as general commands, enforced by the threat of punishment for disobedience, that are traceable to a "sovereign"—some person or set of persons whom the bulk of the community habitually obeys and who does not habitually obey any other human. Most of positive morality, by contrast, is not consciously set by particular persons or backed by threats of formal sanctions, but consists rather of norms that prevail informally within the community and that are supported by social pressures. Law is thus different from, though it can overlap in content with, positive morality.

Divine law is Austin's notion of principles that are not merely accepted, but are morally valid and binding. It corresponds to Hart's notion of "critical morality," or "the general moral principles used in the criticism of actual social institutions including positive morality."[6] We have little evidence of God's commands, but Austin reasons that, since God is benevolent, "general utility" is a guide to them.[7] Austin thus emerges as a utilitarian and appears to embrace the full ruling theory of law described by Dworkin.

Hart, who is not a utilitarian, defends positivism,[8] but nevertheless

5. *See generally* J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 9-33, 118-361 (H.L.A. Hart ed. 1955).

6. H.L.A. HART, LAW, LIBERTY AND MORALITY 20 (1966).

7. J. AUSTIN, *supra* note 5, at 34-38, 127-29.

8. *See* Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

rejects Austin's conception of law.[9] The idea that laws are a sovereign's orders backed by threats misrepresents even what Hart calls "primary" rules of law, those rules that impose obligations and that are the basis for Austin's analysis. More important, Austin's conception obscures "secondary" rules, which do not purport to lay down obligations but are designed to confer on individuals the power to make their own legally enforceable arrangements, such as contracts and wills. Further, laws cannot be validated by tracing them back to issuance by a sovereign. We must refer instead, in Hart's view, to those secondary rules that define public offices and confer legal powers on their occupants, if we are to distinguish the official from the private acts of those individuals. Such secondary rules are an essential element of legal systems and are ignored by Austin's analysis.

A legal rule exists, Hart says, when it satisfies the criteria of legal validity used in a legal system, criteria that could be stated in a "rule of recognition." These are the criteria that are actually accepted and employed by officials of the system. Legal rules, unlike other social rules, need not be generally accepted in order to be valid, but in a real legal system they are generally obeyed.[10]

Why should we group Austin and Hart together as "legal positivists"? Hart answers this question, in effect, by listing three doctrines of the classical positivists and noting his corresponding views. First, "laws are commands of human beings"; second, "there is no necessary connexion between law and morals, or law as it is and law as it ought to be"; and third, "the analysis or study of meanings of legal concepts is an important study to be distinguished from (though in no way hostile to) historical inquiries, sociological inquiries, and the critical appraisal of law in terms of morals, social aims, functions, &c."[11] Hart rejects the first of these doctrines but accepts the second and the third. The second is especially relevant here, and it needs some elaboration.

Positivists maintain that law is distinguishable from other social standards, including etiquette and conventional morality. The laws and mores of a community overlap and influence each other, but they are not the same thing. (That they influence each other entails that they are not one and the same.) Positivists also accept the truism that law can be good or bad, wise or foolish, just or unjust. It is not necessary, in particular, that any moral condition be satisfied in order

9. *See* H.L.A. HART, THE CONCEPT OF LAW 18-76 (1961).
10. *Id.* at 77-120.
11. *Id.* at 253.

that something qualify as valid law. It is therefore initially an open question whether one should obey a particular law, that is, whether an act that is legally required or prohibited should actually be done or omitted. Given further information, one might answer that question, perhaps quite readily. But the question is not an empty one, because the validity of a law is logically independent of its morality. The criteria of validity of a legal system may, but need not, incorporate a moral test. The morality involved here is not positive or conventional morality, but critical morality, that is, moral judgments that are binding by virtue of their supposed correctness.

II. Dworkin's Critique of Legal Positivism

Dworkin's own definition of positivism sets the stage for his critique. It goes far beyond the points listed by Hart and may be summarized as follows. First, the law of a community consists of standards that "can be identified and distinguished by specific criteria, by tests having to do not with their content but with their *pedigree* or the manner in which they were adopted or developed." Second, legal standards are "rules" (thus Dworkin's tag "the model of rules"). Third, because of vagueness or ambiguity in rules and gaps or conflicts between them, there are some cases in which the law has no determinate application. These cases can therefore be decided only if judges make new law (by exercising "judicial discretion"). Fourth, legal rights and duties are laid down by legal rules, so that when rules have no determinate application, there are no preexisting rights or duties to be enforced.[12]

Dworkin's critique of positivism rests on a distinction between legal "rules" and legal "principles." "Rules," Dworkin writes, "are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision."[13] Rules thus conclusively dispose of cases to which they apply. A conflict between two rules is a logical anomaly that must be rectified by modifying or invalidating at least one of the rules. Principles, by contrast, do not conclusively dispose of cases to which they apply. They function rather as reasons for deciding cases one way or another—reasons that can be overridden in a particular case by other reasons without impairing their validity. Unlike rules,

12. P. 17.
13. P. 24.

which either dispose of a case conclusively or are irrelevant to its disposition, principles have the property of "weight." Thus conflicts between principles are not logical anomalies, but are occasions for weighing the relevant principles against each other.

Dworkin illustrates the distinction between rules and principles with examples drawn from a few famous cases. One is the case of *Riggs v. Palmer*,[14] in which a boy murdered his grandfather in order to inherit immediately under the latter's will. The statute of wills, literally construed, would have allowed the murderer to inherit, as the court recognized. But the court denied him the inheritance, reasoning that

> all laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.[15]

Riggs was thus decided by the principle that no one may profit from his own wrong.

The principle that was decisive in *Riggs* was said to be drawn from the common law. But principles need not have been so recognized in order to play a role in judicial decisions. In *Henningsen v. Bloomfield Motors, Inc.*,[16] for example, the court declined to enforce a contract limiting the liability of an automobile manufacturer for defective products. The following was included among the court's considerations:

> In a society such as ours, where the automobile is a common and necessary adjunct of daily life, and where its use is so fraught with danger to the driver, passengers and the public, the manufacturer is under a special obligation in connection with the construction, promotion and sale of his cars. Consequently, the courts must examine purchase agreements closely to see if consumer and public interests are treated fairly.[17]

No such specific obligation had traditionally been recognized at common law. Yet the principle underlying it was influential in the court's decision.

The decisive considerations in *Riggs* and *Henningsen* were principles, not rules. In *Riggs*, the principle that no man may profit from

14. 115 N.Y. 506, 22 N.E. 188 (1889).
15. *Id.* at 511, 22 N.E. at 190.
16. 32 N.J. 358, 161 A.2d 69 (1960).
17. *Id.* at 387, 161 A.2d at 85.

his own wrong was weighed against considerations favoring the literal interpretation of statutes and was deemed to weigh more. In *Henningsen,* the principle that automobile manufacturers have a special obligation was likewise weighed against considerations favoring the literal interpretation of contracts. But the decisions in *Riggs* and *Henningsen* did not discredit or require modifications in the principles that statutes and contracts should be literally construed. In other cases, these principles may prevail over contrary considerations, without requiring that the weaker principles be qualified or invalidated.

Dworkin uses this distinction between rules and principles to launch a two-pronged attack on positivism. By concentrating on rules to the exclusion of principles, Dworkin claims, positivism ignores the impact of principles on the decision even of cases in which the relevant rules are clear and, further, exaggerates the role of judicial discretion in cases in which the relevant rules are not clear.

Dworkin may be understood to establish his first point as follows. Judicial reasoning of the sort used in *Riggs* and *Henningsen,* in which established legal rules are qualified by invoking considerations of morality and justice, is regarded as appropriate by judges and lawyers. There may be disagreement about when courts should depart from clear rules in the light of such principles, but the reasons advanced for doing so are not dismissed as legally irrelevant. Indeed, failure to take such factors into account, especially when they are brought forward by counsel, would often be regarded as judicial oversight or error. Such principles may not determine a particular decision, but they can be expected to have some influence, and they may not be ignored. In this sense, we can say that principles are binding on judicial decisions.

Furthermore, judges and lawyers in the normal course of their practice think of judicial reasoning like this as a process of discovering what the law has to say about particular cases, not as a way of making new law. Of course, theorists may describe what happens as the making, rather than the finding, of law. But before we set out to construct theories about the law, we regard these cases in the opposite way. So long as such a pretheoretical notion is coherent and tenable, we need no justification for retaining it. We need justification rather for discounting a pretheoretical notion in favor of a theory. Until we find difficulties with the notion that law is being found rather than made in such cases as *Riggs* and *Henningsen,* we should proceed on that assumption and seek to understand what then goes on. The burden of proof lies on one who would deny it.

But Dworkin does not fault positivism so simply. He also claims

that there is a connection between positivism's neglect of principles and its doctrine of judicial discretion. Dworkin may be understood to reason as follows. If the law contained rules but not principles, as Dworkin understands positivism to hold, then judicial discretion would be exercised in deciding cases in which the relevant rules did not yield a determinate result. But principles supplement rules; they provide guidance for judicial decision; and they are available to eliminate indeterminacies. A theory that ignores principles will accordingly imagine that the law is indeterminate when it is not and that judges have occasion to make law when they do not. Positivists can thus be expected to exaggerate the extent of judicial discretion.

Indeed, Dworkin claims not only that principles eliminate some indeterminacies in the law. He claims, in effect, that principles eliminate all indeterminacies, for he rejects entirely the idea of judicial discretion. He assumes that anyone who accepts that idea does so either because he refuses to acknowledge the existence of legal principles at all or because he mistakenly believes that principles cannot eliminate indeterminacies because they must be weighed against each other.

But Dworkin's assumption is false, and his conclusion that principles eliminate all indeterminacies cannot validly be drawn. In order to eliminate all indeterminacies in the law, principles must cover all cases that might arise; they must have determinable weights; and the balancing process, in which principles are weighed against each other, must never yield an equal weight of principle on either side of a legal question. But we cannot assume that these conditions are satisfied.[18] And so we cannot follow Dworkin in supposing that, by acknowledging the role of principles, one is committed to deny that there is judicial discretion.

So Dworkin's attack on the doctrine of judicial discretion fails. Ironically, this failure has no effect on his critique of positivism: the issue is a red herring. To be sure, Dworkin defines positivism to include the doctrine of judicial discretion, and positivists such as Austin and Hart have in fact embraced that doctrine.[19] But judicial discretion is of interest to us here only if it is theoretically linked to fundamental features of legal positivism and not just historically associated with that type of theory. Now Dworkin seems to assume that there is some such link, but he never explains what it is. He may assume that there is a theoretical connection between the doctrine of judicial discretion and the doctrine that all legal standards are rules. But that

18. Dworkin concedes this general point in *No Right Answer?*, *supra* note 3, at 82-83.
19. *See* J. AUSTIN, *supra* note 5, at 191; H.L.A. HART, *supra* note 9, at 121-32.

assumption would be mistaken: one can reject the model of rules, yet accept the doctrine of judicial discretion; conversely, one can accept the model of rules, yet reject the doctrine of judicial discretion. We have already observed that one can acknowledge the existence of legal principles without believing that such principles eliminate all indeterminacies in the law and with them any occasion for the exercise of judicial discretion. Conversely, systems of hard and fast rules can be complete and internally consistent, yielding determinate answers to all questions that arise under them.

The doctrine of judicial discretion aside, Dworkin's persisting point against positivism appears to be that it refuses to acknowledge a class of legal standards, which he calls principles. Our question, then, is why it should be thought that positivism excludes principles—why, in other words, positivism is committed to the model of rules. To be sure, Dworkin defines positivism to embrace the model of rules. But Dworkin does not explain the connection; he simply takes it for granted. There is, moreover, no clear evidence in the positivist literature that legal standards are conceived of as rules in Dworkin's special sense of that term.

The asserted commitment of positivism to the model of rules might be founded on the first point in Dworkin's definition of positivism, which holds that legal standards "can be identified and distinguished by specific criteria, by tests having to do not with their content but with their *pedigree* or the manner in which they were adopted or developed."[20] Unfortunately, Dworkin never clarifies these metaphoric terms. One might suppose, however, that they are intended to convey the idea that nothing is law unless it has been laid down by legislation, judicial decision, administrative ruling, executive order, or the like. But there is no reason to think that the adoption of legal standards by such means results only in rules (standards that apply in an all-or-nothing fashion) and never in principles (standards that guide, without determining, legal decisions). Lawmakers are capable of instructing other officials to take certain considerations into account, without requiring that those considerations conclusively determine decisions.

Dworkin actually gives two accounts of principles. One is the logical account mentioned above: principles are standards that guide, but may not determine, legal decisions. Another is a normative account: principles (in the sense used in Dworkin's critique of positivism) include both statements of social goals and requirements "of justice

20. P. 17.

or fairness or some other dimension of morality."[21] Unfortunately, Dworkin's two accounts of principles do not mesh. Standards with the logical properties of principles need not be normative standards; conversely, normative standards need not have the logical properties of principles. Dworkin in effect concedes the latter point when he recognizes rights that are "absolute" and overriding.[22]

Be that as it may, we should ask whether there is any reason to suppose that adoption or enactment of legal standards cannot yield principles in the normative sense, as well as rules. But this suggestion is implausible, for legal standards are often adopted precisely because they reflect social goals or moral convictions.

We must therefore seek some other explanation for Dworkin's attribution of the model of rules to positivism. He might be understood to argue that principles, as he defines them, become part of the law in ways that positivists cannot acknowledge. For Dworkin's own idea is that judges regard as embedded in the law those principles that justify past judicial decisions, statutes, and constitutional arrangements. Such principles need not be laid down as law by any sort of adoption or enactment. They become law by virtue of their role in justifying past decisions.

One problem with a critique of positivism based on such a claim is that it turns crucially on Dworkin's own controversial contention that judges regard as embedded in the law those principles that perform a justificatory function independent of any explicit adoption or enactment. But Dworkin's critique faces a much more serious obstacle: it turns upon a fundamental misconception of legal positivism, namely, that the positivists' use of "pedigree" as a test for legal standards excludes tests of "content." This misconception emerges clearly in Dworkin's discussion of Hart.

Hart claims that we can think of every legal system as having a "rule of recognition," which, if it were formulated, would state the ultimate criteria that officials actually use in validating legal standards. Such criteria can vary from one system to another, as well as over time, and Hart envisages a wide range of possible tests, from an "authoritative list or text" to "some general characteristic" that laws might be required to have; from enactment "by a specific body," to "long customary practice," to some "relation to judicial decisions."[23] Hart seems to place no limits on the sort of test that might be em-

21. P. 22.
22. P. 92.
23. H.L.A. HART, *supra* note 9, at 92.

ployed by officials, and the reason is simple: unlike other legal rules, the rule of recognition may be said to exist only by virtue of the actual practice of officials. Nothing else determines the content of this rule. The tests for law in a system are whatever officials make them —and Hart suggests no limits on the possibilities.

In Hart's view, then, the identification of law turns upon certain social facts, namely, facts about the practice of officials. Since there are no limits on the sort of test that might be used by officials, there are no moral conditions that legal standards must meet in order to be valid. Hart's first point corresponds to the tenet of positivist theory generally that law is distinguishable from other social standards: unless a standard passes the tests accepted by officials, it is not law—not even if it is deeply rooted in the customs or moral convictions of the community and has been used to justify existing law. Hart's second point corresponds to the positivist idea that law is independent of critical morality: standards so validated by officials need not satisfy, or include, any particular moral principles. Hart's theory of law is thus in keeping with traditional doctrines of positivism. It is a suitable subject for Dworkin's appraisal.

Dworkin reads Hart's theory more narrowly. He believes that a rule of recognition is expected to specify features of legal rules by which such rules can be conclusively validated.[24] This requirement of conclusiveness would exclude the sort of reasoning that Dworkin claims one uses to find principles embedded in the law. "We argue [that some principle is a principle of law]," Dworkin writes, "by grappling with a whole set of shifting, developing and interacting standards (themselves principles rather than rules) about institutional responsibility, statutory interpretation, the persuasive force of various sorts of precedent, the relation of all these to contemporary moral practices, and hosts of other such standards."[25] These arguments are logically respectable, but they are not conclusive.

I believe that Dworkin misreads Hart. The passage he relies on deals specifically with the imaginary transformation of a "prelegal" community into one with law. At first there is no authoritative test for rules, so they can exist only by general acceptance, and the system suffers from the defect of uncertainty. The introduction of a public test for identifying rules eliminates uncertainty about them. Hart's language emphasizes the elimination of uncertainty; elsewhere he does not suggest that the tests employed by officials must be logically conclusive.

24. Pp. 40-41.
25. P. 40.

But suppose I am wrong about Hart's meaning and that Dworkin is more nearly right. Suppose that Hart really wishes to restrict the tests that could be incorporated into a rule of recognition and, specifically, to exclude tests based on judicial reasoning of the sort that Dworkin describes. This restriction would have no bearing on positivism as a type of legal theory. Such restrictions on the rule of recognition would not be a natural outgrowth of, but rather an arbitrary limitation upon, the underlying positivist idea that law is determined by social facts, such as the facts of official practice. I shall therefore continue to interpret Hart in accordance with this tenet of positivism.

Dworkin's error can be understood as follows. He sees correctly that positivists regard social facts, such as the facts of official practice, as the ultimate determinants of law. He then assumes that positivists would restrict officials, in deciding upon the authoritative tests for law, to criteria that themselves incorporate such social facts about accepted practices. (This assumption is clearly suggested by Dworkin's notion that positivists are preoccupied with the "pedigree" of legal standards and consequently are blind to tests based on "content.") That may be true of Austin, but it is not true of Hart, nor is it essential to the tradition. In Hart's theory, the social facts that ultimately determine law are facts about official practice, but the tests for law are whatever officials make them.

Consider this possibility. In a particular system, officials determine the validity of putative rules by considering their compatibility with the provisions of a certain document. This document requires interpretation, and some of its parts are understood in moral terms, such as fairness or equality. It is standard practice for officials to engage in moral reasoning when interpreting these parts of the document and thus when determining what is to count as law. This reasoning involves the sensitive identification and weighing of diverse considerations. The resulting arguments are not logically conclusive, for that is not their nature; but they can be logically respectable.

The possibility just described is perfectly compatible with Hart's theory of law. It is also one of the features that Dworkin sees in our own legal system. He says that the due process and equal protection clauses of our Constitution are understood to incorporate moral concepts of fairness and equality, which require interpretation in the form of more specific substantive principles. Judges cannot defend their interpretations of these clauses without engaging in moral reasoning.[26]

26. Pp. 133-36.

Dworkin's definition of positivism, then, is misleading. Positivists do not hold that law must be identified by tests of "pedigree" and not by tests of "content." They hold, rather, that it is not necessarily the case that a rule must satisfy particular moral standards in order to count as law. But the fact that qualification by virtue of "content" *need* not occur in legal systems does not imply that it *can* not occur.

If Dworkin is to refute positivism, he must show either that an actual or possible system of law has features that are incompatible with the picture presented by that theory, or that any system of law has features that positivism neglects. Although Dworkin sometimes seems to be trying to show one of these two things, it is clear at the end that his criticisms fail to show either one. His description of our legal system has no implications for legal systems in general, and, as we have seen, it is compatible with the positivist account.

Sometimes, however, Dworkin suggests a milder criticism of legal positivism—not that its picture is false, but that it is incomplete. Positivists fail to explain certain facts about our system, including the supposed fact that "hard" cases are decided on the basis of preexisting law. Further, they fail to formulate and endorse an approach to deciding hard cases. The latter observation may well be true, even if it may not reasonably be taken as a criticism of positivism, since that may not be what positivism tries to do. Dworkin's own theory of law, at any rate, is meant to fill this gap—to provide a systematic and illuminating account of the way in which "hard" cases are and ought to be decided. Let us turn to that theory now.

III. The Rights Thesis and Its Ramifications

Like the ruling theory of law, Dworkin's theory has both a descriptive aspect, which concerns what law is, and a normative aspect, which concerns what the law ought to be. This is true of his Rights Thesis, which speaks only of judicial decisions in civil cases; it is also true of the broader theory that he sketches when he develops and defends that thesis.

It should be emphasized that Dworkin's theory is not, like positivism, a general theory about the nature of law. It is quite limited in scope. The political framework of law that Dworkin describes and endorses is based on features of our own system and cannot apply to systems with different features. And, as we shall see, the scope of Dworkin's theory is also limited by certain moral assumptions.

The Rights Thesis says "that judicial decisions in civil cases, even in hard cases . . . characteristically are and should be generated by

principle not policy."[27] The term "principle" is used here in a narrow, normative sense, one that Dworkin mentioned but did not use in his critique of positivism:

> Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole. The argument in favor of a subsidy for aircraft manufacturers, that the subsidy will protect national defense, is an argument of policy. Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right. The argument in favor of anti-discrimination statutes, that a minority has a right to equal respect and concern, is an argument of principle.[28]

Principles and policies are "the major grounds of political justification."[29]

Dworkin does not explain what he means by "hard cases." These might be cases in which the law appears indeterminate, because of vagueness, conflicting rules, and the like; but Dworkin might also wish to include cases like *Riggs,* in which apparently determinate law is not followed by the courts. Both would be included by saying that hard cases are those in which the decision goes beyond the holdings of past cases and beyond the literal import of established legal rules.

Dworkin does not believe, of course, that in deciding such cases judges need reach beyond the law. His general idea about hard cases, as we have seen, is that they can be decided on the basis of existing law, so long as the law is understood to include more than past holdings and rules explicitly adopted by means such as legislation. This view of law accords, he believes, with our ordinary notions about law, free of theoretical speculation. More specifically, Dworkin's idea is that judicial practice reveals that the law extends beyond past decisions to include the considerations that are needed to justify those decisions, whether or not those considerations have been adequately recorded. These considerations are seen as implicit in existing law; they are treated as already established legal standards. The class of such considerations would include preeminently principles and policies. Dworkin develops this idea systematically and in great detail; I will touch on some of its larger features here.

When judges reason in this way, they are not content to find only

27. P. 84.
28. P. 82; see also p. 22.
29. P. 83.

those principles or policies that are needed to justify the limited class of decisions directly relevant to the case at bar. They seek systematic consistency in their decisions, and so they seek that organized set of principles and policies that provides the best possible justification of the maximum number of past decisions plus any other decisions that they would be prepared to make. Furthermore, these principles and policies are expected to justify political decisions generally, including those reflected in constitutional arrangements, legislation, executive orders, and the like. The principles and policies included in this set are supposed to express not only the personal convictions of the judges, but also the convictions of the community as a whole. When judges decide cases by appealing to such a system of principles and policies, they invoke what Dworkin calls a "political theory." The elements of such a theory are accorded the status of law. They are taken by judges to be embedded in the system and to be preestablished doctrine, enforceable like ordinary rules.

A political theory of this sort must be complex because our system is complex. Constitutional rules, statutes, case law, and so on, are organized in a hierarchical structure. Just as legislation must remain within constitutional limits, so the justification of legislation is limited by the justification of the constitutional structure. And principles and policies bear on decisions at every level of this hierarchy. Further, principles and policies can be ordered in priority with respect to each other and can also be derived from one another.

Determining the political theory that can be said to underlie our system in this sense is not a simple matter. One must engage in moral reasoning and weigh conflicting considerations. Reasonable people can disagree—though the possibility of disagreement does not show that there is no single best, and therefore correct, theory.

This view of our system of law assumes that the vast majority of past political decisions is justified.[30] Indeed, Dworkin assumes, more specifically, that "[t]he constitution sets out a general political scheme

30. The term "justified" is sometimes used in a relatively weak sense, which defines justification to mean consistency with more basic norms of a system of values. In this sense one might speak of "justifying" political decisions that discriminate against blacks, for example, by showing that they serve a racist ideology that is held, on independent grounds, to be embedded in a political system. Dworkin appears to use the term "justified" in a stronger sense, which requires that the principles and policies found embedded in the law themselves be morally defensible. Dworkin's usage is indicated in several ways. For example, his concern to justify the use of coercion and the imposition of burdens or deprivation of benefits seems to presuppose the stronger sense of justification, as does the fact that the justificatory role of principles and policies is, in Dworkin's view, the basis for finding them embedded in the law (rather than the other way around). For confirmation of this interpretation, see Dworkin, *Seven Critics*, 11 GA. L. REV. 1201, 1258 (1977).

that is sufficiently just to be taken as settled for reasons of fairness."[31] It follows that Dworkin's theory of law, which seeks both to describe our system and to prescribe for it, does not apply to systems of which these assumptions cannot be made. I confess that I am less ready than Dworkin to assume that they are true of our own system.

Dworkin's assumption of the justice of our political structure has some bearing, I think, on his strategy of argument. He believes that we must initially accept judges' and lawyers' perceptions of the law, so long as they are not speculating about it. This approach seems philosophically impeccable—until we realize that those perceptions can be distorted by moral interests. Take hard cases, for example. We are told that judges and lawyers, when they are not burdened by theories about judicial discretion, think of law as being found, not made. But it is generally accepted that judicial legislation works injustice by creating rights and duties ex post facto. Those who are professionally engaged in the practice and administration of law may naturally be disinclined to perceive judicial legislation in hard cases, for they could then be regarded as instruments of injustice. Further, judges and lawyers can be assumed, in general, to be ideologically as well as professionally committed to the system under consideration. Thus we must take their morally shaded perceptions with a grain of salt, especially if we have some reason to suspect injustice in the system.

Dworkin's theory explains how precedents can be understood to have legal implications that go beyond the strict limits of their holdings. It does so by according the status of law to the considerations that are held to justify judicial precedents, which considerations are then available in deciding new cases. The Rights Thesis in effect answers the further question: are these considerations principles or policies? Dworkin's answer is that those considerations are solely principles, and his strategy is to argue that we cannot account for the extended legal implications of judicial precedents unless we suppose that they are based only on principles.

Dworkin's argument may be summarized in the following way. Fairness (and fairness alone) requires that like cases be treated alike —that new cases be decided like past cases. When hard cases are decided, this similarity of treatment can be achieved only by applying to the new case the considerations that justify the decisions in past cases. We might think that these considerations could be either principles or policies. But fairness does not require the continued appli-

31. P. 106.

cation of policies, only the continued application of principles. Thus the use of one case as precedent for others can only be explained if we suppose that cases are decided by principle, not policy, since it is only in the application of principle that fairness requires us to be consistent. Further, since fairness requires that we treat like cases alike, and deciding cases by appeal to principles rather than policies is the only way to do so, judges should do just that.

Dworkin's thesis obviously turns on his argument that fairness cannot require the continued application of policies. Let us consider that argument.

When Dworkin considers the possibility that judicial decisions might be based on policies, or social goals, he assumes that such decisions would be much like legislation based on the same considerations. His argument accordingly makes no particular reference to the fairness of judicial decisions based on policies. After considering some examples of legislation based on policies, he concludes:

> There is, perhaps, some limit to the arbitrariness of the distinctions the legislature may make in its pursuit of collective goals. Even if it is efficient to build all shipyards in southern California, it might be thought unfair, as well as politically unwise, to do so. But these weak requirements, which prohibit grossly unfair distributions, are plainly compatible with providing sizeable incremental benefits to one group that are withheld from others.[32]

(Dworkin makes a controversial assumption here, namely, that distributive justice is relatively indulgent.[33] Without that assumption, his argument collapses.) As Dworkin continues, however, he shifts from speaking of the legislature to speaking of government in general (which, of course, includes the courts):

> There can be, therefore, no general argument of fairness that a government which serves a collective goal in one way on one occasion must serve it that way, or even serve the same goal, whenever a parallel opportunity arises. . . . I mean that a responsible government may serve different goals in a piecemeal and occasional fashion, so that even though it does not regret, but continues to enforce, one rule designed to serve a particular goal, it may reject other rules that would serve that same goal just as well.[34]

32. P. 114.

33. Taken literally, Dworkin's passage implies that only *gross* unfairness on the part of the legislature is morally unacceptable on grounds of fairness. It is not clear that such a contention is coherent, and so I have interpreted the passage more loosely.

34. P. 114.

If Dworkin's argument is to succeed, he must establish that, in deciding cases on the basis of policies, judges must have the broad discretion that he describes here. The question is not whether policies can bind judges at all, for Dworkin's general description of our system implies that they can, and he cannot assume the contrary here. Rather, the question is whether judges who decide cases on the basis of policies have the same discretion in their decisions that legislators have in deciding which policies to embody in legislation. Within Dworkin's own theory of adjudication, it seems to me to be untenable to hold that judges are so free to decide which legal standards they shall apply. Since policies can become binding legal standards (as we must assume), judges are bound to apply them when they are relevant and not outweighed by conflicting considerations. It seems, therefore, that Dworkin cannot, in this respect, assimilate adjudication to legislation.

Dworkin might also be understood to argue that hard cases should be decided in terms of principle rather than policy because rights are at issue in those cases. A party to a civil case claims a right based on existing law, and the right of one party is understood to be vindicated, not created, by the judicial decision. These descriptions are taken for granted in hard as well as in easy cases. Since principles are defined in terms of rights, while policies are not, it might seem that the considerations that can account for the adjudication of rights in civil cases must be principles. But that would be mistaken.

As Dworkin allows, both principles and policies can argue for rights. Principles lay down rights directly; policies do not. Policies set out goals, but these, Dworkin assumes, do not entail any rights. Yet policies can be used to argue for rights, and legislation based on policies often creates rights. To use Dworkin's example, if legislation to subsidize aircraft manufacturers is enacted, the manufacturers acquire certain rights. Policies thus provide arguments for political decisions that create rights. In this respect, their operation is no different from the operation of principles in hard cases. For hard cases are those in which the rights to be enforced are not identical with those enforced in past cases. One must distinguish, in dealing with hard cases, between the general considerations used to justify judicial decisions and the specific results of applying those considerations in particular cases. When principles are applied, the rights that they assert are more abstract than the concrete rights that are actually enforced in the case at hand. Those principles therefore operate, like policies, by providing *reasons* for enforcing certain rights in a hard case.

So the fact that judicial decisions adjudicate rights does not show that principles alone, and not policies, can account for them. A possible source of confusion here is the fact that fairness itself can be thought to involve the right to be treated as well as others have been treated in the past. But this right should not be confused with an abstract right that the court may have recognized by invoking it to decide the earlier case. That an argument of fairness is relevant in succeeding cases does not at all tend to show that the considerations on which the initial decision was based themselves concern rights rather than social goals.

We can also see that this requirement of fairness can be met if policies, rather than only principles, are applied. This idea of fairness, that like cases are to be treated alike, requires interpretation. It will not help to interpret it in terms of enforcing the same rights that were enforced in past cases, because, as we have seen, the rights enforced in hard cases are not the same as those enforced in the relevant precedents. All we can assume is that the same justifying considerations are applied. But since policies can serve as justifying considerations as well as principles can, we cannot infer that only principles may be applied.

I conclude that the Rights Thesis requires further argument. Whether it can survive more direct appraisal remains to be seen.[35]

I would like to turn now to the broader reaches of Dworkin's moral theory. These emerge partly from his discussion of the specific political theory that may be said to underlie our political system and partly from his more abstract philosophical discussions.

Dworkin believes that rights are dominant in the political theory that can be most strongly defended for our political system in general, and not just for our civil law. He therefore rejects the notion that our system is predicated on the goal of maximizing total welfare. Generally speaking, if we take rights seriously, we will not allow them to be infringed in order to promote social goals most efficiently. Rights thus "trump" ordinary policy arguments. Some rights, such as that of free speech, are entrenched in our Constitution and confine legislation at the highest level. But Dworkin does not infer from this entrenchment of certain rights that the political theory underlying our system is a mere amalgam of certain specially protected rights and the broad social goal of maximizing general utility. He believes, rather,

35. Serious doubts are raised in R. Summers, Two Kinds of Reasons of Substance in Common Law Cases (unpublished paper read to World Congress on Philosophy of Law and Social Philosophy, Sydney-Canberra, August 14-21, 1977).

that both strands of our political morality rest on more fundamental rights.

Dworkin assumes that the general welfare is served when the existing preferences of current members of the community are satisfied to the maximum feasible degree. He assumes, further, that a government based on popular election of legislators and interest group pressures is the political system best calculated to satisfy existing preferences and therefore to serve the general welfare. Such a system is committed to taking everyone's interests into account and, in this sense, to giving everyone equal consideration. However, our system is influenced not just by preferences that people have concerning themselves, but also by preferences that people have concerning the way in which others are to be treated. Racist attitudes are an example: one might oppose a certain measure more for the benefits it confers on a certain group than for any burden it imposes on oneself. If these preferences influence political decisions, then the interests of some persons will, in effect, be discounted and those of other persons exaggerated. That bias violates the right to treatment as an equal (the right to equal consideration or to equal concern and respect). To protect that right best, a system designed to serve the general welfare must be restricted in certain ways. That is the sort of system that we have—with constitutional limits calculated to protect the right to equal consideration. This right is then seen to underlie both adherence to the goal of general utility, up to a certain point, and respect for particular rights that "trump" the pursuit of general utility.

Dworkin does not merely find this political morality underlying our system of law—he endorses it. In so doing, Dworkin attacks utilitarianism, which takes as the ultimate standard for all choices the welfare and happiness of people (or, more broadly, all sentient creatures) at large, and which is the normative part of what Dworkin regards as the ruling theory of law. He may well be right both in rejecting utilitarianism and in finding a different theory embedded in our system. The questions that he raises about utilitarianism, concerning rights and equal consideration, are challenging and important. But his actual reasoning appears inadequate as it stands.

Consider first Dworkin's general conception of utilitarianism. He defines the general welfare in terms of the existing preferences of current members of the community. But utilitarians take into account the interests of all humans (and some would include other animals), regardless of political boundaries. And, just as they are concerned about the distant consequences of human behavior, as well as its im-

mediate effects, utilitarians do not neglect the interests of those who are as yet unborn. Thus Dworkin's analysis of utilitarianism is far too narrow.

Secondly, in catering to existing preferences, Dworkin's conception sacrifices fidelity to the tradition of utilitarianism for the sake of fashion in welfare economics. In the individual case, welfare cannot be fully understood in terms of the satisfaction of existing preferences, for one would often be better off if one's attitudes and interests, and consequently one's preferences, were changed. Such change is always possible, to some degree, and its costs may be outweighed by the benefits to be gotten. What is true of the individual seems no less true of humanity at large. It is plausible to suppose that we would all be better off if, for example, we were less competitive, less consumption oriented, and free of racist attitudes. It is not unreasonable to believe that the general welfare would be served by working to change our preferences rather than by catering to them.

Finally, though Dworkin recognizes that rights can be derived from certain social goals, he does not consider the possibility seriously in connection with the goal of promoting welfare. But it is not implausible to suppose, as John Stuart Mill did, that government reflecting popular attitudes would best serve the general welfare only if it were restricted by a system of basic rights.[36] The plausibility of this suggestion increases as we dissociate welfare from existing preferences.

Dworkin's discussion of justification provides a further contrast between his theory and the utilitarian tradition. In the first stage of that discussion, we find Dworkin suggesting the idea that a moral judgment is justified if, and only if, it is supported by those general considerations that best express the deep, shared convictions within one's community.[37] This does not mean that popular attitudes are self-justifying, for they may not always square with more deeply held moral convictions. But this idea is nonetheless conventionalistic, since the fundamental values that can be ascribed to a community as a whole are not necessarily shared by each member. This theory entails that one cannot have a justified moral belief that is at variance with the deeply held morality of the community. Given Dworkin's idea that the values embedded in law are drawn from the morality of the community, we are left with the view that the values underlying a

36. For a sketch of Mill's theory, see Lyons, *Human Rights and the General Welfare*, 6 PHILOSOPHY & PUB. AFFAIRS 113 (1977).

37. P. 155. *See also* Rawls, *Outline of a Decision Procedure for Ethics*, 60 PHILOSOPHICAL REV. 177 (1951).

system of law cannot justifiably be disapproved by a member of the community in question. If its system of law were based on the goal of promoting total welfare, for example, one would be obliged to accept that goal, since any other judgment would be unjustified.

In the second stage of Dworkin's discussion, however, he claims that the very idea of moral justification assumes the right to treatment as an equal. We cannot even conceive of justification without committing ourselves to that right, which is then guaranteed a decisive role in any system of values that may be regarded as justified. This view is less conventionalistic than the first, because it insists upon the right to treatment as an equal, whether or not that right is among the deeply held moral tenets of the community. No system that is not predicated on that right, or at least no system that clashes with it, can be regarded as justified.

Even this second view of moral justification nevertheless seems significantly conventionalistic, since any values that do not clash with the right to be treated as an equal can be imposed upon dissenters in the community by virtue of their being generally accepted at a deep level. In this respect, Dworkin's ideas about justification again diverge from the utilitarian tradition. Utilitarians try to take a detached moral point of view. Right and wrong are not subordinate in any systematic way to the moral beliefs that people happen to have. Moral principles are supposed, within this tradition, to apply universally. The only principle for which this may be true in Dworkin's theory is the right to treatment as an equal.